
# Contaminated Land Issues

## *A practical guide by Environmental Law Specialist, Lee McBride*

A key issue when buying contaminated land is to ensure that your client pays the right price for it, taking into account possible clean-up liability.

Ideally, the allocation of the environmental risks and other issues associated with contamination should be part of the Heads of Terms. Unfortunately, more often than not they are omitted (or not dealt with properly). This can cause delays to completion of transactions or, worse, can cause problems further down the line.

The last thing your client wants following the purchase of a brownfield redevelopment site is:

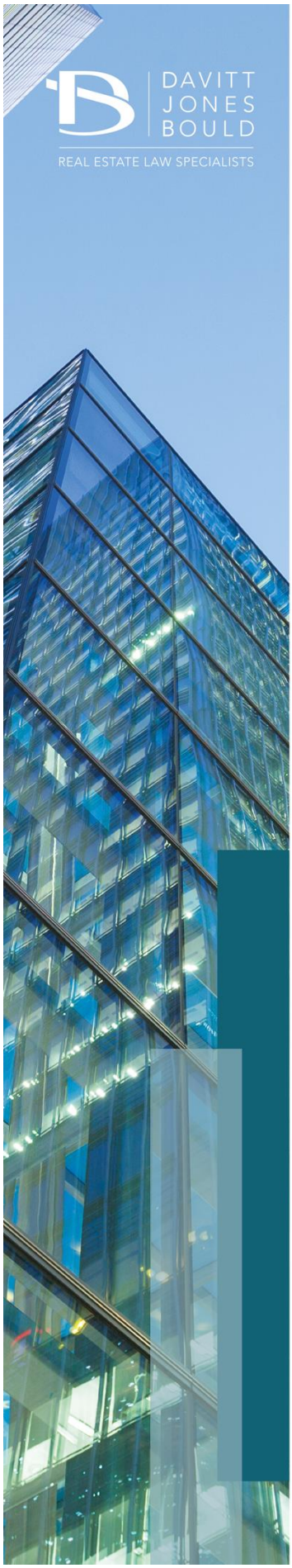
(i) a call from a regulator telling them that their site has contaminated an adjacent watercourse; and/or
(ii) the requirement to pay for "unbudgeted" remediation costs in order to comply with the conditions of the relevant planning permission for the redevelopment.

So how can such a scenario be prevented?

***Issues to Consider at the outset***

The following should always be considered:

- What are you buying? Is it greenfield or brownfield land?
- Is the property a former petrol station/chemical factory etc? Is contamination likely to be issue?
- Will you be developing the site and therefore need planning permission?
- What will the planners require in relation to clean-up?
- What is the history of the site? What was it historically used for before its current use?
- What is near the site? e.g. Is there a school, watercourse or other sensitivities nearby?
- Geological pathways: is the underlying rock porous (e.g. chalk aquifer) or clay (impermeable)?
- Are there any existing environmental permits (e.g. allowing prescribed processes to be carried out on site) which can't be surrendered back to the relevant authority without carrying out a clean-up?
- Do any relevant environmental permits need to transferred to you?
- What existing paperwork/reports are immediately available?
- What is the bargaining power of the parties?
- How much time have you got to complete the transaction?
- Are any sellers' environmental reports fit for purpose?
- Lender's requirements – the lender's solicitors may require further or more detailed due diligence/protection.




***Liability for Clean-Up***

There are a variety of ways in which an unsophisticated buyer may find itself liable for remediation of contamination (whether under statute or common law) including pursuant to Part 2A of the Environmental Protection Act 1990 ("EPA")

Briefly, liability for clean-up of contaminated land (where significant harm is being caused) under the EPA rests with the 'Appropriate Person'. This is the person who 'caused or knowingly permitted' the contaminants to be present ('Class A' persons).

'Knowingly permitting' means knowledge of a state of affairs but allowing that state of affairs to continue when in a position to do something about it. There is no need to have introduced a contaminant to a site to have 'knowingly permitted' the relevant contamination to be present.

If Class A persons cannot be found, the regulator may require remediation of contamination by the current owner or occupier of the land (Class B persons). Rack rent Tenants with short term leases will be excluded from Class B unless they are knowing permitters (and therefore Class A polluters).

The important point is that the buyer can unwittingly take on responsibility for contamination after completing an acquisition as a knowing permitter, despite not causing the presence of the contamination in question by a deliberate act.

***Dealing with the contamination risk in sale contracts***

In order to allocate environmental risk correctly (or avoid it!) the parties to a contract of sale could provide for some or all of the following to be adopted:

- an agreement on allocation of environmental liability between the seller and buyer. Buyers should take care to exclude liability for contamination that may have historically migrated from the property (as this could be an unknown) as well as liability arising out of pre-completion exposure of humans to contaminants;
- an indemnity from the buyer/seller in relation to any contamination on site;
- confirmation that the buyer was given a price reduction to reflect the cost of remediating identified contaminants;
- confirmation that (i) the buyer received certain environmental reports or other information and (ii) has had a right to carry out environmental investigations on the property (and therefore was aware of the nature and extent of contamination onsite);
- agreed clean up (this can be done before or after completion, but either way it should be ideally carried out by the buyer. This way the buyer can be sure that it has been done properly and can have the benefit of the warranties given by contractors); and
- is the requirement for an insurance policy to be obtained? EIL policies are bespoke policies that often require an environmental lawyer as well as an insurance lawyer to negotiate the wording with the underwriter. Insurance policies can be a good way of bridging the gap between what the seller wants to sell the property for and the environmental risk that the buyer is prepared to take at that price.


***Asbestos***

Asbestos was used as a building product in the development of commercial property predominantly between 1950 and 1980, before its use was banned at the end of 1999. Following an increase in a number of asbestos related illnesses, the government introduced the first asbestos regulations in 2004.

Regulation 4 requires the "duty holder" (which may include owners or tenants with a repairing responsibility) to carry out an asbestos management survey in order to ascertain the presence of any asbestos containing materials, identify them on a plan and deal with them (cover, remove, monitor etc).

It is quite common for these surveys not to have been carried out, or for the ongoing monitoring of asbestos to have been ignored. Failure to obtain a survey is a criminal offence, which may be reportable in terms of the money laundering and proceeds of crime legislation, and can put you in a difficult position if completion of the transaction has to be held up as part of that process.

If you are buying a commercial property and there is no asbestos management survey available, then ideally one should be commissioned before completion or an indemnity should be obtained from the seller for the cost of obtaining the survey after completion and the carrying out of any recommended works.

***Consultants Reports***

What if the seller has had an environmental report carried out themselves? Is that sufficient?

Buyers should consider whether such reports are "fit for purpose". For example:

(i) Was the scope of consultant's appointment adequate for the buyer's purpose?
(ii) Can the report be used as part of a planning application?
(iii) How old is the report? Is it out of date?
(iv) What are the caps on liability (re time and money)?
(v) Do you need your own consultant to check that the right kind of investigations have been carried out and to review the technical date revealed?

**Conclusion**

There are number of important matters to be aware of when buying land. The key message is to deal with contamination issues at the outset. Ignore them at your peril!


# KEY CONTACT

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