

Who pays for the cost of cleaning up contaminated land?

By Robert Sutherland, Advocate

The decision of the House of Lords in *R (National Grid Gas plc) v Environment Agency*, [2007] UKHL 30, (27 June 2007) will have significant implications in determining liability for clean up cost for historic environmental contamination. In a case which leap-frogged the Court of Appeal (see *R v Environment Agency ex p. National Grid Gas plc*, [2006] 1 WLR 3041) the House of Lords has reversed the original decision and issued a judgement which potentially means that hard pressed public authorities may face the bill for expensive remediation works if no other appropriate person can be found. The decision also has implications when considering the re-development of brown field sites.

The facts of the case illustrate the nature of the problem. Residue from the production of coal gas created a residue which was buried on land that was later re-developed as residential properties and gardens. Section 78E of the Environmental Protection Act 1990 sets out provisions concerning the remediation of contaminated land by an appropriate person. Section 78F sets out provisions for determining the appropriate person to bear responsibility for the remediation. The appropriate person in the first instance shall be "any person or persons who caused or knowingly permitted" the land to become contaminated land. If no such person can be found after reasonable enquiry then the owner or occupier for the time being is an appropriate person. Where there is an "appropriate person" then that person can be served with a notice requiring them to carry out remediation works. Alternatively the enforcing authority (which in Scotland may either be the local authority or SEPA, depending on how serious the pollution may be) can carry out the remediation works and recover its costs from the appropriate person. The enforcing authority has discretion not to recover the whole or any part of the costs of remediation from the appropriate person where this may cause hardship.

In this instance, via a chain of private gas company amalgamations, followed by nationalisation in 1948, privatisation in 1986 and corporate re-organisation in the 1990's, the National Grid Gas plc (formerly known as Transco) were the statutory successors to the private gas companies which had originally used the site for the dumping of the unwanted by-product of gas production. Neither the original gas companies, nor their amalgamated successor, nor the house building companies remained in existence and so it was not possible for the Environment Agency to pursue any of these businesses. The Agency decided that it would not seek to recover its costs in carrying out remediation

works against the owners of the houses built on the affected land. Instead it chose to recover these costs from Transco.

The Agency had been successful before Forbes J. However the case leap-frogged the Court of Appeal and the House of Lords has reversed that decision. The reasons for doing so are that the definition of "person .. who caused or knowingly permitted" the contamination in Section 78F(2) could not be construed so as to include every person who became by statute the successors to the liabilities of the actual gas companies responsible for creating the pollution and could not be said to have actually caused or knowingly permitted the contamination. Nor could the transfer of liabilities arising from nationalisation and subsequently privatisation of the gas industry encompass a liability that did not exist at the time and only arose when the 1990 Act was amended by the Environment Act 1995.

The factual circumstances behind this decision are unlikely to be unique. The practical consequences of the decision are that where it is not possible to identify any person or body as being actually responsible for causing or knowingly permitting the pollution then the owner or occupier of the premises may be liable. However there will be many cases where the owner or occupier is a private person or body and they do not have the financial resources to meet the clean up costs involved. In these circumstances the local authority or SEPA might find itself having to bear the financial burden. Another distinct possibility is that the local authority might have inherited ownership of the contaminated land, and as a result it could be liable for the costs in any event.

The House of Lords decision also has potential consequences when considering the re-development of contaminated brown field sites. Where the costs of remediation works are significant these costs might put off developers unless they can expect to get planning permission which is likely to be sufficiently beneficial as to cover these costs. PAN 33, *Development of Contaminated Land*, discusses the implications of the contaminated land regime in Part IIA of the 1990 for the planning system and for development, but it does not absolve the statutory bodies or any other relevant person of their obligations under that regime. The preferred route of Scottish Executive policy has been that the legacy of contaminated land within Scotland is dealt with through the planning and redevelopment process. The House of Lords decision can be expected to make it harder to identify a person with sufficient financial resources to pay for expensive clean up operations. Developers might be reluctant to come forward unless someone else cleans up the land first, or they can be sure that they will receive an adequate return on their up-front outlays. Where these issues come to the fore then financially pressed local authorities

might face yet another call on their already stretched financial reserves. In these circumstances the Scottish Executives policy preference not only makes common sense, it might be the only hope for ridding our townscapes and countryside of a legacy of pollution from past generations.

Robert Sutherland

