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CONTAMINATED LAND - WHOSE RESPONSIBILITY?

BY PHILIP HUNTER

There have been developments under the contaminated land regime in respect of who is the 'appropriate person' under the regime for remediating contaminated land.

As the regime currently stands, land is contaminated where there are substances in, on or under the land which are causing significant harm to people, property or ecosystems, or there is a significant risk of such harm.

The 'appropriate person' is the person under the regime who is responsible to remediate the contamination. That person is the one who caused or knowingly permitted contamination to be present.

There have been two cases about the appropriate person.

The most recent case was decided in 2006, and related to National Grid Gas plc which is statutory successor to the National Grid. In this case, the High Court held that National Grid Gas plc was liable for remediation of contaminated land where the contamination was caused or knowingly permitted by its statutory predecessor in title. This was so even though the court recognised that National Grid Gas plc had not actually caused or knowingly permitted the contamination. The potential liability to National Grid Gas plc could be enormous, so it will be no surprise to learn that permission has been granted for an appeal to the House of Lords.

The second case was one I have commented upon in a previous article, and that is Circular Facilities (London) Limited v. Sevenoaks District Council decided in 2005.

In this case a property developer had built houses on the site of a former brickworks (formerly used for landfill). Sevenoaks District Council were concerned about the volume of methane and carbon dioxide that was escaping from the site, and perceived a significant risk of significant harm to both people and property.

The Council served a remediation notice on Circular Facilities ("CFL") stating that they were the appropriate person having knowingly permitted the contamination. This was on the basis that CFL had known of contamination on site because of a ground investigation report obtained by their predecessor in title. Although the report had not been obtained by CFL, CFL had used their predecessor in title to manage the development of the new site for them.

CFL appealed the remediation notice to the Magistrates Court, and this was upheld on the basis that the ground investigation report had been available to CFL and they must have been aware of the contaminating substances.

CFL appealed the decision of the Magistrates Court, and received a better reception to their argument from the higher Court. The Court said that Sevenoaks District Council had to show that CFL had actual knowledge of the contaminating substance, and where the appropriate person was a company, the authority must identify the person with the relevant knowledge, and identify precisely the basis on which that person's knowledge is imputed to the company.

The court directed a retrial of the case, but it has since been settled.

That leaves us with a degree of uncertainty again about the appropriate person. It means that to knowingly permit, you need actual knowledge, and it is not enough to say that the person should have known. That would suggest that as a buyer of potentially contaminated land, you may be better to close your eyes and not carry out any investigations into whether contamination is present, because after this case, it would seem you cannot be said to knowingly permit the presence of something you had no actual knowledge of.

GENERAL ELECTIONS!

BY TESSA HASKEY

Opting to tax

VAT can be a painful subject, but unfortunately an important one. Dealings with commercial property (subject to certain exceptions) are exempt from VAT, unless an election has been made by the seller or landlord to waive the VAT exemption, and so charge VAT on the sale price or rent. The making of an election is also known as "opting to tax".

There are two common misconceptions about the option to tax:

That if a previous owner of the property made the election, the current owner does not need to in order to charge VAT; and

VAT has to be charged when the seller or landlord is VAT registered, even if no option has been made.

The rule of thumb is that the option does not attach to the property; only to the person or company who made it. That person must decide whether to make an option; otherwise the supply will be exempt from VAT.

The method of opting has now been made simpler by HM Revenue and Customs and a form can be downloaded from the following website, in order to opt to tax the property: www.hmrc.gov.uk Follow the links to the VAT section, and the form to download is VAT 1614.

If the property consists of land or a property which is difficult to identify without a plan it is good practice to attach a copy plan to the form, before submitting it to HMRC.

Transfer of a going concern

When selling a business as a going concern, which includes property, there will be no VAT on the sale price. However, the option to tax is still important. If the seller has opted, the buyer will also have to opt. Similarly if the seller has not opted, the buyer need not opt, but to protect its position, the buyer should ensure that there is a clause in the sale contract under which the seller is contractually bound not to opt between exchange and completion of the sale.

Double tax!

If a purchaser pays VAT on the purchase price of commercial property, it will be charged Stamp Duty Land Tax on the aggregate amount of the purchase price and the VAT. This can be particularly irritating when the VAT pushes the aggregate amount over say £250,000, resulting in a SDLT charge at 3%, instead of 1%. Similarly, a tenant taking a new lease on which it will have to pay VAT will pay Stamp Duty Land Tax on the rent and VAT. A double charge to tax!

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