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LIABILITY FOR CONTAMINATED FORMER LOCAL AUTHORITY SITES

Environmental Protection Act 1990

Part 2A of the Environmental Protection Act 1990 imposes a duty on enforcing authorities to require those responsible to remediate contaminated land, i.e. land designated as such which due to substances in it is causing or threatening significant harm or significant water pollution. Whether the 'significant' threshold has been reached falls to be determined in accordance with the Statutory Guidance issued under Part 2A (http://www.legislation.gov.uk/ukpga/1990/43/part/IIA).

The persons primarily responsible for remediating contaminated land under Part 2A are 'Class A' persons, i.e. those who caused or knowingly permitted the relevant substances to be present. If no Class A persons remain in existence, liability falls on 'Class B' persons, i.e. those who are owners or occupiers at the time when the land is determined to be contaminated for the purposes of Part 2A. If there is more than one Class A or Class B person, the Statutory Guidance sets out a number of tests designed to exclude from liability those considered less responsible. If more than one liable person remains after the application of those tests, liability is apportioned in accordance with the Statutory Guidance.

A question has arisen in relation to the liability of a Class A entity which is dissolved by statute and replaced by another statutory body. Does the successor take on the liability of its predecessor? There are two issues.

- First, should the successor be considered as a causer or knowing permitter simply because it has taken over the functions or business of its predecessor?

- Secondly, does the predecessor have liability under Part 2A which passes to its successor under legislation abolishing the former and creating the latter?

The first question was answered with a resounding negative by the House of Lords (now replaced by the Supreme Court) in *R (National Grid Gas plc) v Environment Agency* [2007] (https://publications.parliament.uk/pa/ld200607/ldjudgmt/jd070627/grid-1.htm). National Grid Gas, the privatised successor company, did not cause or knowingly permit the presence of the contaminants. The land had been sold by its predecessors before the company was formed at the time of privatisation of the gas industry in 1986. There was nothing in Part 2A which extended the categories of causers and knowing permitters to their successors.

Powys County Council v Price and Hardwick [2017] EWCA Civ 1113

The same issue arose in *Powys County Council v Price and Hardwick* [2017]. (http://www.bailii.org/ew/cases/EWCA/Civ/2017/1133.html)

A Welsh local authority had operated a landfill over a culverted watercourse which eventually resulted in river pollution. The land had been sold after landfilling stopped and was subsequently designated as contaminated land under Part 2A. Following statutory reorganisation of the Welsh

local authorities, it was widely assumed that the new authorities would simply step into the shoes of their predecessors and assume their liability as causers of the contamination. The Court of Appeal followed the *National Grid* decision and held that was not the case. The emphasis in Part 2A is on the actual polluter: the person who caused or knowingly permitted the pollution.

The second question was whether Part 2A liability passed from the predecessor to the successor body under the provisions of the relevant institutional restructuring legislation. Under the Gas Act 1986 and earlier Gas Acts considered in the *National Grid* case, liabilities to which the predecessor was subject "immediately before" the statutory transfer date passed to the successor. The statutory transfer date was 24 August 1986, whereas Part 2A was inserted into the Environmental Protection Act 1990 by the Environment Act 1995 (https://www.legislation.gov.uk/ukpga/1995/25/contents) and only came into force on 1 April 2000 in England and 15 September 2001 in Wales.

In *National Grid* the House of Lords held that liabilities created by statute in 1995 did not exist immediately before the transfer date in 1986 and therefore could not have been transferred to National Grid Gas as the successor body.

Distinguishing *Powys* from *National Grid*:

The position in the *Powys* case was different in two respects. First, Article 4 of the Local Government Re-organisation (Wales) (Property etc) Order 1996 (http://www.legislation.gov.uk/cy/uksi/1996/532/body/made/data.xht?wrap=true) simply stated that the 'liabilities of the old authority shall …. vest in [the] successor authority'. However, the Court of Appeal considered that the omission of words such as 'immediately before' made no difference. Following the reasoning of the House of Lords in *National Grid,* Lord Justice Lloyd Jones held that 'liabilities' refers to those to which the predecessor was subject prior to the transfer. The words 'immediately before' merely emphasise that conclusion. If Parliament intended to transfer liabilities arising subsequently, clear words would be required to achieve that result. For example, under transfer of liability schemes made under the Water Act 1989 (https://www.legislation.gov.uk/ukpga/1989/15/contents) a body to which liabilities are transferred is to be treated as the same person in law as the authority from which they are transferred. That wording has the effect of transferring to the successor liabilities not yet in existence at the time of the transfer.

Secondly, the statutory transfer date under the Welsh local government reorganisation legislation fell after the insertion of Part 2A into the Environmental Protection Act in 1995 but before it came into force in Wales in 2001. The distinction was unimportant to the decision in *National Grid* and so, perhaps unsurprisingly, the House of Lords focused on the earlier date. However, in *Powys* it was held that the date when the Part 2A legislation came into force was the relevant time. The Court of Appeal stated that if Part 2A had been in force on the statutory transfer date, the predecessor authority would have been subject to a contingent liability which passed to the successor authority on that date. As Part 2A was not then in force, there was no liability under that legislation, contingent or otherwise, which was capable of being passed to the successor.

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Points to Note

- Since there was no Class A person in existence (the predecessor local authority having been dissolved under the local government re-organisation legislation) liability fell on Class B persons, the current owners and occupiers of the land, Mr Price and Mrs Hardwick. From the perspective of owners of contaminated former local authority land the effect of such legislation may be to eliminate the only other party who may be solely or partly liable for the costs of remediation. If, unlike Mr Price and Mrs Hardwick, the current owner is a Class A knowing permitter (e.g. due to failure to remediate when it should have been clear that remediation was necessary) that owner could be made to shoulder the full liability, whereas Part 2A liability may have been shared with the predecessor local authority (if it were still in existence) under the apportionment provisions of the Statutory Guidance unless that predecessor authority had been excluded from liability under the exclusion tests.

- Although not mentioned by the Court of Appeal in *Powys,* the Part 2A Statutory Guidance enables the enforcing authorities to waive or reduce the liability of both Class A and Class B persons in certain circumstances such as hardship or unfairness to the liable party. That discretion is exercised in suitable cases.

- In cases of statutory reorganisation the precise statutory wording is critical in determining whether Part 2A liability has passed to the successor. If liabilities are merely expressed to be passed to the successor, Part 2A liability only passes if Part2A came into force before the statutory transfer date. On the other hand, if the liability transfer legislation states that the successor body is to be treated as the same person as the predecessor, the successor would assume the predecessor's Part2A liability even if Part 2A came into force after the statutory transfer date.

- The Court of Appeal noted that contingent liabilities of the predecessor under existing law (e.g. breaches of a duty of care which had not yet resulted in damage) would have passed to the successor at the statutory transfer date. It follows that in the *Powys* case if neighbouring landowners claimed compensation because pollution from the former landfill had migrated to their land, the predecessor local authority's contingent liability would pass to the successor. The latter would therefore be liable when the neighbours suffered damage even if that occurred many years after the landfill operation had ceased.

- Owners of contaminated former local authority sites are well advised to check their potential liabilities and whether they have been affected by local government reorganisation legislation. The provisions of the sale contract should also be considered as these may be worded to trigger a transfer of Part 2A liability to the buyer under the exclusion tests in the Statutory Guidance, thereby excluding the seller authority from liability. The issues involved in transferring Part 2A liability and other contaminated land liabilities are complex and require detailed advice.

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