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Contaminated Land, Statutory Nuisances and Dual Liability

Jon Dunkley

The contaminated land provisions under Part IIA Environmental Protection Act 1990 and the accompanying guidance to its interpretation (currently in draft form) provide a very restrictive definition of contaminated land and reduce the ability of persons aggrieved by land contamination to take action. However, the statutory nuisance provisions, on which the contaminated land provisions are based, are capable of providing both persons aggrieved by contaminated land and local authorities with useful remedies in addition to their causes of action under the civil law. It is concluded that the interaction between the contaminated land and statutory nuisance provisions may, in certain circumstances, impose a dual liability on owners of contaminated land.

The tort of nuisance has traditionally protected landowners from the unreasonable actions and omissions of others which interfere with the use and enjoyment of the land. This civil action is now complemented by the administratively simpler and less expensive criminal proceedings under ss79-82 of the Environmental Protection Act 1990 (EPA). S79 defines several states of affairs including the emission of dust, gases, smoke and noise which can constitute statutory nuisances, most of which must emanate from premises.¹ In order for them to be actionable there is a proviso that the state of affairs is "...prejudicial to health or a nuisance."² When a statutory nuisance is suspected, aggrieved individuals can alert their local authority who have a duty to investigate the complaint³ and if the local authority is satisfied that a statutory nuisance exists, they are under a statutory duty to abate the nuisance in accordance with the procedure laid down in s80.

In addition to the powers of the local authority, there is a procedure under s82 that allows persons aggrieved by the existence of a statutory nuisance to apply to the magistrates court for an order which, assuming the

¹ Defined in s79(7) to include land and any vessel not powered by steam reciprocating machinery.

² Nuisance is to be given its common law meaning: *National Coal Board v Thorne* [1976] 1 WLR 543.

³ s79(1).

nuisance is found to exist, requires the defendant to either abate the nuisance⁴ or to prohibit the recurrence of the nuisance.⁵ This procedure is particularly useful to persons aggrieved where the local authority refuses to recognise the nuisance⁶ and more specifically, where the local authority is the cause of the nuisance.⁷

The extent to which s79 applies to 'contaminated land' in its broadest sense is now uncertain with the imminent introduction of the dedicated contaminated land provisions in the form of Part IIA EPA.⁸ Contaminated land is therein defined as :

"...any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that -

- a) significant harm is being caused or there is a significant possibility of such harm being caused; or
- b) pollution of controlled waters is being, or is likely to be, caused..."⁹

The meaning of 'significant harm', originally drafted in terms of "harm only"¹⁰ looks set to be determined more restrictively than is apparent

⁴ s82(2)a.

⁵ s82(2)b.

⁶ There is no requirement that the local authority be informed before s82 proceedings are instigated although it is obviously desirable for the person aggrieved by the nuisance to have the costs of the proceedings paid by the local authority in the first instance.

⁷ Department of the Environment, *The Use of Section 82 of the Environmental Protection Act 1990 Against Local Authorities and Housing Associations*, HMSO, August 1996.

⁸ Inserted by s57 Environment Act 1995.

⁹ s78(A)2

¹⁰ The qualification was introduced at the Report stage in the House of Lords by Viscount Ullswater who believed the addition would clarify the scope of the

from a reading of the statute if the draft guidance¹¹ recently issued by the Department of the Environment is approved. Firstly, for contaminated land to be so designated, there must exist a 'significant pollutant linkage'¹² consisting of :

- a 'contaminant'¹³ situated in, on or under the land;
- a 'receptor'¹⁴ or specifically defined target which is capable of being harmed by the contaminant (see Appendix 1); and
- a 'pathway',¹⁵ or pathways which link the contaminant with the receptor thereby causing harm.¹⁶

Thus, a local authority cannot designate land as 'contaminated' unless this 'significant pollutant linkage' exists regardless of the quantity and toxicity of contaminants on, in or under the land.¹⁷ Moreover, under the contaminated land provisions, it is acceptable for remediation to substantially take the form of containment of the contaminant by removal of the pathways leading to the receptor, allowing the land to remain in a seriously contaminated state.

Furthermore, ss79(1)A EPA¹⁸ states that :

"No matter shall constitute a statutory nuisance to the extent that it consists

provisions; *Hansard*, HL, 7 March 1995, cols 137-8.

¹¹ At the date of writing the draft guidance entitled '*Consultation on Draft Statutory Guidance on Contaminated Land*' dated September 1996 has just been released to statutory consultees.

¹² Draft Chapter II, Part A, para 8.

¹³ *Ibid*, para 8(a). A pollutant or potential pollutant capable of causing harm or pollution of controlled waters.

¹⁴ *Ibid*, para 8(b).

¹⁵ *Ibid*, para 8(c).

¹⁶ Harm is defined in relation to the receptor; See Appendix 1.

¹⁷ *Ibid*, para 8.

¹⁸ Inserted by Environment Act 1995, Sch 22, para 89.

of, or is caused by, any land being in a contaminated state."

One consequence of this exclusion is to deny local authorities and persons aggrieved by a statutory nuisance a cause of action under ss80 and 82 EPA respectively as soon as land is designated as contaminated. It is not specifically stated in either Part IIA EPA or in the draft guidance whether 'contaminated land' has its designation removed when remedial action has been taken.¹⁹ However, s79(1)B EPA²⁰ states :

"Land is in a 'contaminated state' for the purposes of subsection (1A) above if, *and only if*, it is in such a condition, by reason of substances in, on or under the land, that-

- (a) harm is being caused or there is a possibility of harm being caused; or
- (b) pollution of controlled waters is being, or is likely to be, caused..." (*emphasis added*).

The first point of note is that land can be in a contaminated state for the purposes of nullifying the statutory nuisance provisions where a mere possibility of harm exists and yet cannot be designated as contaminated land under Part IIA until there is a 'significant possibility' of 'significant harm' being caused by the land in question. There is therefore, in theory, a regulatory lacuna.²¹

In practice, it is submitted that any remediation would remove the 'harm' in addition to the 'significant' harm and the statutory nuisance provisions are thereby resurrected as causes of action as soon as the

¹⁹ Both Part IIA EPA and the draft guidance are silent on this point which is significant in the light of the adverse comments obtained from the consultation exercise on the old registers of contaminated land under s143 EPA (which were never brought into force and have now been repealed by Sch 24 Environment Act 1995) on this very point. Also 'special sites' (s78A(3)) are capable of having their 'special' designation removed (78Q(4)).

²⁰ *Ibid.*

²¹ *Encyclopaedia of Environmental Law*, Sweet & Maxwell, London, November 1995.

contaminated land is remediated to the extent that it would no longer warrant designation as 'contaminated' under s79(1)A. This therefore poses a number of difficulties in the application of the contaminated land and statutory nuisance provisions.

Problems might arise where the local authority designates a site as 'contaminated' and the process of remediation involves the containment of the contamination by the removal of pathways rather than the actual cleansing of the site. Whilst removing the problem which led to the designation of the land as 'contaminated land', the remediation process may disturb contaminants which have remained relatively inert for many years. The local authority will attempt to recover the costs of the remediation in the first instance from the polluter²² and if the polluter cannot be traced after reasonable inquiry, the owner or occupier²³ of the contaminated land. If, after the remediation, the disturbed contaminants cause a nuisance or are prejudicial to health (but not constitute 'harm' under s79(1)A), the local authority under s80 EPA has a statutory duty to serve an abatement notice²⁴, the non-compliance of which is a criminal offence punishable with a fine.²⁵ Alternatively, a person aggrieved under s82 EPA, can instigate proceedings to compel the plaintiff to abate the nuisance or to prevent its recurrence with similar penalties for non-compliance.

This could therefore lead to the inequitable situation where the owner of the land, unaware of the contamination at the time he purchased the land, could firstly be liable to indemnify the local authority for the costs of the containment of the contamination and then incur a secondary liability abating the statutory nuisance or being fined when unable to abate the nuisance within the requisite time.

There are two 'defences', in addition to the general defences, on which

²² s78F(2) & (3). The term 'polluter' is not used in the section.

²³ s78F(4).

²⁴ The obligation to serve an abatement notice under s80 EPA is a statutory duty and not a mere power even if there is an overlap of responsibility between statutory authorities; *R v Carrick District Council ex parte Shelley*, High Court, 3 April 1996. [1996] 3 Env LR D25, (1996) 255 ENDS Report 48.

²⁵ s80(5) & (6).

owners of contaminated land could rely in this situation. Paradoxically, they could argue that the statutory nuisance emanating from the land was so serious that it actually or potentially resulted in 'harm' thereby nullifying the statutory nuisance action as a cause of action by virtue of s79(1)A and B.

Secondly, liability for a statutory nuisance is not absolute and there is a defence that the plaintiff used the best practicable means to prevent or counteract the effects of the nuisance which is available in limited situations.²⁶ However, a recent report²⁷ on the working of s82 EPA suggested that the 21-day period of notice that the person aggrieved must, in most cases²⁸, give to the person responsible for the nuisance before action is taken is unrealistically short even to utilise the 'best practicable means' defence. The report concludes that local authorities have been wholly unsuccessful in attempting to abate nuisances in such a time scale and it is anticipated that compliance with this time limit by an individual with limited resources will be even more onerous.

Mitigating circumstances on the part of the plaintiff which prevent the abatement of the nuisance do not, subject to the limited defence of best practicable means, provide a statutory defence and can only be taken into account by the court in awarding costs, damages etc. This is in contrast with s78P(2)²⁹ which obliges the local authority to take into account the hardship that would be caused by the designation of a site as contaminated.

The discrepancies highlighted are certainly exacerbated by the extremely restrictive definition of 'contaminated land' interpreted in accordance with the draft guidance on its operation, and their interaction with the strict obligations imposed by the statutory nuisance provisions. It is expected that the interaction between the two regimes will prove to be a fruitful source of litigation when the contaminated land provisions are

²⁶ s80(7) & (8) EPA.

²⁷ Department of the Environment, *The Use of Section 82 of the Environmental Protection Act 1990 Against Local Authorities and Housing Associations*, HMSO, August 1996.

²⁸ s82(7).

²⁹ See also Chapter 4 of the draft guidance on the meaning of 'hardship'.

brought into force due to the substantial costs in remediating contaminated land and the potentially enormous losses in the value of land that has been subject to contamination. The restricted definition of contaminated land might also provide the impetus for local authorities to remediate contamination on land using their powers under s80 EPA in appropriate cases when they do not feel able to reasonably designate land as 'contaminated' or if they anticipate that the owner of the land might plead hardship if his land is designated as contaminated.

Jon Dunkley
PhD Candidate
Southampton Institute

Appendix 1

Chapter II, Part A, para 11, Table A of the *Consultation on Draft Statutory Guidance on Contaminated Land*, September 1996.

TYPE OF RECEPTOR	DESCRIPTION OF HARM
Human Beings	Death, serious injury, cancer or other disease, genetic mutation, birth defects, or the impairment of reproductive functions. Disease is to be taken to mean an unhealthy condition of the body or some part thereof.
Any living organism or ecological system within any habitat notified under section 28, declared under section 35 or designated under section 36 of the Wildlife and Countryside Act 1981, ⁹ any European Site within the meaning of regulation 10 of the Conservation (Natural Habitats etc) Regulations 1994 ¹⁰ or any habitat or site afforded policy protection under paragraph 13 of Planning Policy Guidance Note 9 on Nature Conservation or Planning Guidance (Wales): Planning Policy (that is, candidate Special Areas of Conservation, potential Special Protection Areas and listed Ramsar sites).	Harm which results in an irreversible or other substantial adverse change in the functioning of the habitat or site. (In determining what constitutes a substantial adverse change, the local authority should have regard to the advice of English Nature, Scottish Natural Heritage or the Countryside Council for Wales, as the case may be, and to the requirements of the Conservation (Natural Habitats etc) Regulations 1994).
Property in the form of livestock, of other owned animals, of wild animals which are the subject of shooting or fishing rights or of crops	Death, disease or other physical damage such that there is a substantial loss in their value. For this purpose, a substantial loss should be regarded as occurring when a substantial proportion of the animals or crops are no longer fit for the purpose for which they were intended. In many cases, a loss of 10% of the value can be regarded as a benchmark for what constitutes a substantial loss.
Property in the form of buildings, where "building" has the meaning given in section 336(1) of the Town and Country Planning Act 1990, that is, "building means any structure or erection, and any part of a building... but does not include plant or machinery comprised in a building".	Structural failure or substantial damage. For this purpose, substantial damage should be regarded as occurring when any part of the building ceases to be capable of being used for the purpose for which it is or was intended.

⁹ Sections 28, 35 and 36 of the 1981 Act relate to Sites of Special Scientific Interest, National Nature Reserves and Marine Nature Reserves, respectively.

¹⁰ SI 1994/2716. Regulation 10 relates to Special Areas of Conservation and Special Protection Areas.