

In this edition of real estate newsknight issues surrounding contaminated land, forfeiture of leases and planning law and practice all feature. I do not presume to give a view on where we are on the cycle of economic recovery as, whilst we are optimistic, signs are certainly mixed. We remain as one of the region's largest property teams, well placed to work with you on all matters large and small. Contact us at any time should you have points to raise on the articles featured here or indeed on any point of property law.

We look forward to continuing to work with you.  
Best wishes

IAN WHITE  
head of real estate department



## It's your mess - You clear it up?

**If historic contamination comes to light during the term of a lease, could the landlord require the tenant to remedy the site under the terms of the lease?**

Ideally, from the landlord's perspective, any costs that are incurred in remedying contamination on the site being let should be passed onto the tenant as the current occupier of the property. If the current tenant is the person who has caused the contamination then this should not be a problem (in which case, it is unlikely to be 'historic contamination' anyway); the real problem arises when the tenant did not create the contamination, particularly when the lease in question was entered into before the contaminated land regime detailed in Part IIA of the Environmental Protection Act 1990 ("the Act") came into being (on the 1st April 2000).

The main aim of the Act is to provide a means of finding and dealing with contaminated land. It achieves this by establishing rules for who should pay to clean up contaminated land, based largely on the principle of "polluter pays". The case - R (on the application of National Grid Gas Plc, formerly Transco Plc) v.

Environment Agency [2007] UKHL 30 confirmed the idea that the primary responsibility for the remediation of contaminated land should rest with the original polluter.

Due to the complex regime, however, innocent owners and occupiers could find themselves liable. Landowners and developers can, for that reason, face bills of thousands of pounds to clear up contaminated land, a cost that they would clearly prefer to pass on to tenants through the terms of their lease.

It is suggested that cleaning up land contaminated by historic pollution would not usually fall within the ambit of a standard covenant to repair, the general argument being that 'repair' cannot be applied to the land itself. Conversely, the phrase 'to keep in good condition' could apply to the remediation of contaminated land. The cases suggest that liability has to be decided on the facts of each case.

Looking at other standard provisions in the usual forms of commercial lease, it is common to see a clause whereby the tenant must

comply with all statute law. The question arises as to whether this includes the Act, particularly if it was not in force at the time the lease was drafted, given that it can place such onerous obligations upon a party.

The case law is presently fairly sparse and such as there is leaves it still uncertain whether a landlord can require the tenant to remedy the site for historic contamination under the terms of the lease (in the absence of an express requirement to do so). Looking at case law it would seem that the courts are likely to read the terms of the lease taking into account when it was drafted and what could have been contemplated by the parties at the time. Tenants will need to be wary of a widely drafted lease as it gives more scope for the landlord to pass on remediation costs. In practice, of course, most contamination from the past continues to be dealt with upon re-development (by virtue of planning requirements).

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# Planning Law update

This article summarises recent planning issues that are relevant to property law.

## Nationally Significant Infrastructure Projects

The Infrastructure Planning Commission (“the IPC”) is an independent body that was introduced by the Planning Act 2008 to determine applications for development consent for nationally significant infrastructure projects (“NSIPs”) including power stations, airports and large wind farms.

Decisions will be based primarily on National Policy Statements (“NPSs”) which will set out the policy framework.

The IPC opened for business on 1 October 2009. It currently offers advice to potential applicants, and will accept applications from the Energy and Transport sectors from 1 March 2010.

## Procedures to Allow Changes to Existing Planning Permissions

The Town & Country (General Development Procedure) (Amendment No.3) (England) Order 2009 (“the Order”) came into force (in England only) on 1 October 2009.

The Order also followed the dramatic downturn in the economic climate which led to a reduction in the implementation rate of major schemes that already had planning permission.

The Order introduces a new procedure (an Article 10B application) for replacing a planning permission in existence on 1 October 2009 and which has not been implemented, effectively extending the life of the planning permission. It also enables S73 of the Town & Country Planning Act 1990 (“TCPA”) to be used to make minor material amendments to existing planning permissions, and introduces a new procedure under S96A of the TCPA under which Local Planning Authorities (“LPAs”) may make non-material amendments to existing planning permissions.

The fees regulations will be amended in late November/early December 2009 to take account of the proposed fees for applications under the new procedures.

## Community Infrastructure Levy

The Community Infrastructure Levy (“the CIL”) is a new charge that was introduced by

the Planning Act 2008 and which replaces Planning Gain Supplement, which was never enacted. The CIL is intended to ensure that costs incurred in providing infrastructure to support the development of an area can be funded wholly or in part by owners or developers.

The CIL Regulations have been delayed until 2010. Taking into account the time needed for LPAs to produce Development Plan Documents that will introduce the CIL in their area, the CIL is unlikely to become payable by developers and owners until 2012. Until then, LPAs will continue to rely on planning obligations under Section 106 of the Town and Country Planning Act 1990.

## Case law relating to judicial review periods

The Court of Appeal recently emphasised the need for prompt action in commencing Judicial Review proceedings to challenge planning decisions.

In R (on the application of Finn-Kelcey) v Milton Keynes Borough Council [2008] EWCA Civ 1067, the Court of Appeal rejected a claim for judicial review (“JR”) that was not filed promptly, even though the claim was filed within the three month period specified by the Civil Procedure Rules (“CPR”).

CPR 54.5(1), which governs JR claims, provides that a claim form must be filed (1) promptly and (2) in any event, not later than three months after the grounds to make the claim first arose.

The Court said that the two requirements of CPR 54.5(1) are separate and independent, and that filing within three months does not necessarily amount to filing promptly. The Court noted that the need to act promptly arises in part from the fact that a decision by a local planning authority normally affects the rights of parties other than the claimant and the decision-maker.

The Court’s decision emphasises that claimants cannot rely on being allowed the full three month period in every case, especially where a third party (in this case, the developer) is likely to be prejudiced by delay.

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# The human rights convention vs possession orders

In what may be considered a landmark judgement by the European Court of Human Rights, conveyancers and residential landlords alike have been left to ponder the ramifications of the decision made in the recent case of *Paulic v Croatia*.

Mr Paulic (the applicant) had been in occupation of a flat, the right to which was granted through his employment by the Yugoslavia People’s Army (YPA) in June 1991. In 1997 he applied to exercise his right to buy under Croatian law, which was refused. The state of Croatia proceeded to bring a civil action seeking his eviction on the basis that (1) they were the legal owners of the property and (2) relying on a prohibition which came into force in July 1991 (2 months before Mr Paulic moved in), which restricted all land transactions involving property owned by the YPA. In October 2000, the state was granted possession of the flat as the applicant did not have a protected tenancy and occupied the flat in violation of the prohibition.

Subsequent appeals failed under similar judicial reasoning, until the case arrived at the European Court of Human Rights. Mr Paulic alleged that the national court’s judgment in ordering his eviction violated his rights under Article 8 of the Convention, which provides the right to respect for an individual’s private and family life, their home and correspondence.

The fact that the flat had been, since 1991, the home of the applicant was undisputed, and it was also clear that the proposed eviction would constitute an interference with his right to respect for his home. Such interference was, undoubtedly, deemed legitimate, protecting the rights of the state as owner. The decision emphasised that the ruling of the domestic courts previously, was by virtue of their reliance upon the legal provisions protecting the proprietary interest.

However, to seek compatibility with Article 8, such interference must also pass the proportionality test. The autonomous concept

of “home” can exist even where occupation lacks a legal basis, and the applicant had sufficient and continuing links with the flat for it to be considered their home. His 17 years in occupation further confirmed this. It was also deemed that the obligation for the applicant to leave the flat amounted to an interference with his rights even though the judgment had not been executed. It was held there had been a violation of his rights and domestic courts had not given sufficient consideration to the proportionality principle.

It is this ruling which may have wider implications in the future for the ability of obtaining possession orders in the UK, and may be of significant importance to the residential landlord most specifically, in years to come. Obtaining such orders may prove trickier, as UK courts begin to favour the European approach, with the far reaching criteria of “home” fairly easy to satisfy. Residential landlords may, in years to come, find they have no way of gaining the orders they require, as the individuals in occupancy, even if unlawful, would still find themselves with rights to their “home”.

A local authority’s right to obtain an order for possession against an occupier of a site that it owns is an issue with which the UK courts have historically faced considerable difficulties, and with this decision, further problems may be just around the corner. No doubt, this issue will be one for future consideration by the Supreme Court and is one to watch in the coming months.

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# FORFEITURE - a weapon of last resort?

If a tenant is in breach of covenant a landlord will often look to the forfeiture provisions in the lease (often coming under a heading of “Right of Re-entry”). Forfeiture is a remedy available to a landlord to get the premises back from a tenant who is in breach of its obligations under their lease. However, an understanding of forfeiture and the other remedies available is required and it is strongly recommended that legal advice should be obtained at an early stage before any action is taken.

The majority of leases contain a right of re-entry in favour of a landlord in the event that: (i) the rent is outstanding for 14, 21 or 28 days after becoming due, whether formally demanded or not; or (ii) the tenant is in breach of any covenants of the lease. Leases often contain a right to forfeit in the event of a tenant’s insolvency but this is not going to be covered in this article.

Where a tenant is in breach of its obligations and a landlord really does want to forfeit the lease, the landlord must serve a section 146 notice pursuant to the Law of Property Act 1925 upon the tenant unless the only breach upon which the landlord is going to rely is non-payment of the rent, in which case such a notice is not necessary.

Where a section 146 notice is necessary, this must be completed properly and set out all the details required including the details of the breach, whether the breach is capable of remedy and a request that the tenant both remedies the breach and compensates the landlord for the breach. If the tenant fails to remedy the breach within a reasonable time and fails to compensate the landlord, the landlord can choose to forfeit the lease either by peaceable re-entry (provided the property does not include any residential accommodation in which event this method is not available) or by court proceedings.

However, when faced with forfeiture, a tenant may apply to the court for relief and the courts are increasingly likely to grant relief, particularly if the breach is remedied before the application for relief is heard and the landlord’s costs are paid. In deciding whether to grant relief, the court will take into account the nature of the breach, the conduct of the tenant and the court will assess whether the likely loss to the tenant will outweigh the potential loss to the landlord.

Once a landlord has knowledge of a tenant’s breach, accepting or demanding rent will almost certainly act as a waiver of the breach (for example, if rent is paid by standing order or credit transfer and the landlord fails to instruct his bank to reject the transfer). Even if rent is demanded “without prejudice” to the breach it does not prevent the waiver and it has been held that acceptance of rent in error by a managing agent’s clerk constituted a waiver. [Central Estates Belgravia Ltd v Woolgar (No.2) (1972)].

Forfeiture is not by any means the only option open to a landlord where the tenant is in breach and, in the current market conditions, may not be the landlord’s best bet.

An errant tenant may not be that easy to replace and amendments to empty rates legislation mean that, in some circumstances, 100% business rates are payable within 3 months of a property becoming vacant and, in these tough economic times, a landlord will not wish to forfeit a lease without having a replacement tenant in place.

“Re-gearing” and exploring alternative solutions through compromise with a tenant that is in difficulty is still an approach worth considering, even though we do keep being told that things in commercial real estate are on the up again. Therefore, forfeiture should remain a last resort and a measure only adopted after taking professional advice both as to whether you should forfeit (and if you should, whether you are still able to or have waived your right to do so) and how to go about it.

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**Christmas drinks**

Knights would be delighted to have the opportunity to celebrate Christmas with you at one of its offices:

**Monday 14 December, 5:00 - 7:00pm**  
The Brampton, Newcastle-under-Lyme

**Monday 21 December, 3:00 - 6:30pm**  
28A, London Road, Alderley Edge

Please feel free to join us for a glass of mulled wine and a Christmas buffet. We look forward to your company.

# Redland appeal against contaminated land remediation notice

The Secretary of State for the Environment, Food and Rural Affairs has dismissed appeals by Redland Minerals Limited (former site owner) and Crest Nicholson Residential plc (developer) against remediation notices served by the Environment Agency (EA).

## Facts

Between 1955 and 1980 various organic and inorganic bromine-based substances were manufactured on the land. The land was later sold by Redland Minerals Ltd to Crest Nicholson Residential with information about the contamination of bromide in the land. Crest took steps to remediate the bromide contamination but it later transpired that these were not enough. Bromide had seeped into underground water and forced the closure of several underground abstraction wells and threatened the water supply for hundreds of people – it was a typical case of contaminated land as identified by Part IIA of the Environmental Protection Act 1990 (EPA).

## Awareness

The importance of selling with information is that Redland may have excluded themselves from liability if Crest were aware of the presence of contaminants when it bought the land (Test 3 of DEFRA Circular 01/2006). What this case did bring to light is that not only must the buyer be aware of contaminants, but they must have information that would have reasonably allowed them to be aware of the broad measure of the presence of contaminants when they purchased the site.

## Apportionment

The Secretary of State for Environment (“SoS”) in his report stated in circumstances such as these it is not possible to prescribe detailed rules for the apportionment of liability between members which would be fair and appropriate in all cases. The SoS felt that the general principle is that liability should be apportioned to reflect the relative responsibility of each member.

When Crest bought the site they were aware of the bromide contamination but were not aware of further contamination caused by bromate. It was therefore agreed that the division of liability for bromate should be Crest 15% and Redland 85% based on the period the two parties were in control of the site.

The overall purpose of the “sold with information” test is to exclude those who have disposed of contaminated land in circumstances where it is reasonable that another member of the liability group, who has acquired the land from them should bear



liability for the remediation of the land. It is also felt that the costs for remediation should be borne by those who have the potential for making profit from the land, rather than the water companies and their customers.

## ‘Causing’ contamination

An interesting discussion also came up as to the interpretation of the words “to cause or knowingly permit” as required by the EPA. If a party is found to cause or knowingly permit contamination it becomes a ‘Class A’ polluter (the first party the authorities will serve a remediation notice on). It was decided that a party does not need to have introduced a contaminant to the land in order to ‘cause’ it. A party can be found to have caused contamination through both action and inaction. The developers Crest, as a result of action and inaction caused contaminants to be flushed deeper and faster into the ground. The fact they did not introduce these contaminants to the land did not affect their liability.

## Extent

It was also decided that the “suitable for use” approach adopted by DEFRA to identify contaminated land should extend to water polluted by contamination, as well as the land itself. The objective of serving the

notice was to allow the aquifer to be used once more as a supply of safe drinking water.

## Conclusion

The Environment Agency will try to apportion liability to reflect the relative responsibility of each party, and failing that, try to obtain a result that is fair and appropriate. It is reluctant however to allow the costs to be borne by the public services (and in turn the public), even if this is at the apparent injustice of an agreement that was made between the seller and the buyer.

Developers and former site owners therefore need to be careful about the terms on which they sell contaminated land. The ‘sold with information’ exclusion test will not always come to the aid of former site owners should it be judged that the depth of information passed onto the buyer was not enough. It is not always in the site owner’s power to make full information available, as contamination may be more serious than first thought or there may be other sources of contamination that the parties are not aware of.

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