

RICS CPD Foundation 2018

Environmental Legal Update - updates affecting land use

The Clive, Ludlow

17:15-18:15 - 5th June 2018



UK environmental law is mostly derived from EU legislation and governs many aspects of land use relevant to RICS professionals.

Issues include:

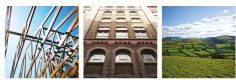
- Invasive species
- Energy, waste and contamination
- Flooding
- Post Brexit outlook



UK environmental law - experience

- Planning and inquiries – bats / newts / contaminated land
- Prosecutions under EPA
- Energy projects
- Due diligence on corporate transactions
- Environmental Permitting

etc etc



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Generally,

- ▶ Purchasers and vendors consider a range of issues when undertaking due diligence during a commercial transaction for acquisition or sale of a business and associated sites and plant.
- ▶ Consideration of environmental issues should be included within any due diligence exercise for the business.
- ▶ Regulatory environmental requirements may have significant capital expenditure implications and environmental risks may alter the overall risk profile for a business.
- ▶ Legal compliance issues may affect business reputation, and enforcement action may affect the long term viability or profitability of a business.

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Generally,

- ▶ Environmental issues can arise from:
 - ▶ historic use(s) of the site (eg previous industrial uses)
 - ▶ historic and/or current use of nearby properties (eg potential leaching of contaminants from other sites)
 - ▶ current or proposed use of the site (eg a potentially contaminating use or a use requiring specific permits/licences)
 - ▶ regulatory requirements
(eg Energy Performance Certificates, Carbon Reduction Commitment (CRC) Energy Efficiency Scheme, Energy Savings Opportunity Scheme (ESOS), building regulations)



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Generally,

- ▶ Due diligence is the process that allows a prospective buyer, tenant or funder and their professional advisers, to
 - ▶ audit the target's affairs and / or investigate the property and
 - ▶ use the information obtained as a bargaining tool in negotiating deal terms.
- ▶ **'Caveat emptor'**, meaning 'let the buyer beware', is a common law principle meaning the seller is under no duty to disclose material facts to a prospective buyer, so the buyer needs to undertake their own enquiries.



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Environmental issues in leases and licences

- ▶ In addition to the environmental issues which may arise in a property transactions the following issues may be of particular significance:
 - ▶ contamination—A landlord could potentially be liable for historic pollution as well as pollution caused by the tenant.
 - ▶ asbestos
 - ▶ the **CRC Scheme** is a mandatory emissions trading scheme in the UK that aims to cut carbon dioxide emissions and improve energy efficiency in large non-energy-intensive public and private sector organisations. Organisations that qualify for the CRC Scheme have to purchase allowances for every tonne of carbon dioxide they emit.
 - ▶ from 1 April 2018 it will not be possible to grant a lease of a non-domestic or domestic premises with an EPC rating of less than E.



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CRC scheme to be scrapped from the end of the 2018-19 compliance year.

- ▶ For a number of years many commentators have been calling for the amalgamation of all of the different carbon and energy related regulations onto a single simplified scheme.
- ▶ The new scheme will be based around the **Energy Saving Opportunities Scheme (ESOS)** which is derived from the Energy Efficiency Directive
- ▶ ESOS is derived from EU law and the UK Government has very little discretion.
- ▶ The **Climate Change Levy (CCL)** will also have a key role to play. Businesses can reduce the amount of the levy by joining with sector associations and entering into **Climate Change Agreements (CCAs)** that commit businesses to energy efficiency targets if they are to benefit from a reduction in the levy.



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Environmental issues

- ▶ Property lawyers are often involved in real estate finance transactions whether acting for lender or borrower.
- ▶ Lenders are increasingly concerned with environmental risk in their day-to-day secured lending businesses.
- ▶ All major UK banks now have to make, to some greater or lesser degree, a formal consideration of environmental risk within their secured lending credit risk assessment process, although more generally this relates to commercial rather than residential property.
- ▶ This process can form part of the solicitor/conveyancer's report on title but increasingly lenders are adopting formal internal procedures that may also involve their panel Chartered Surveyors to address environmental risk as part of the valuation process.



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Environmental issues

- ▶ Some common areas that lenders are actively seeking to manage their (and their clients') liability exposure include:
 - ▶ contaminated land
 - ▶ flood risk
 - ▶ Japanese knotweed
 - ▶ energy performance schemes
 - ▶ asbestos
 - ▶ The CRC Scheme (see above)



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Scoping

- ▶ Provide the context of any proposed transaction to any agents when considering and undertaking 'due diligence' in order for an appropriate assessment of potential liabilities to be undertaken.
- ▶ The following should be considered:
 - ▶ What is the proposed transaction?—sale, asset only purchase, management buyout etc.
 - ▶ The reporting format for vendor due diligence will differ considerably from that for acquisition due diligence



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Transactions

- ▶ What is the value of the transaction?
- ▶ What other advisors are on the team?
- ▶ Confidentiality is also a key issue to consider.
- ▶ The scope of work undertaken will be determined by the type of business being assessed, and the context of the transaction.
- ▶ Alongside environment due diligence undertaken, consideration of the health, safety performance, security, and management change of a business are likely to cross over into the scope of work.
- ▶ Parties must be clear as to who is responsible so that items are not missed through assumption.



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Scope Of Work

- ▶ There is a relatively standard scope of work for environmental issues:
 - ▶ site setting, which includes:
 - ▶ site history;
 - ▶ geology and hydrogeology;
 - ▶ hydrology; and
 - ▶ surrounding land uses and associated permits/authorisations (eg other industrial operations which impact upon the environment);



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Environmental Consultant's Role

- ▶ An environmental consultant considers all aspects of environmental compliance, and look ahead to consider environmental legislation which is due to come into force that would likely affect the operations, and therefore viability of the target site/assets.
- ▶ To a certain extent purchasers need their environmental advisors to be able to 'look around corners' and anticipate what may be coming

(eg recent changes with energy related requirements under the Energy Saving Opportunities (ESOS) Regulations 2014, SI 2014/1643).



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Environmental Consultant's Role

- ▶ Consultant's scope and methodology can be defined by standards.
- ▶ US clients usually commission consultants to work to ASTM 1527-13 Standard Practice for Environmental Site Assessments: **Phase I Environmental Site Assessment**. Broadly this process can be applied in Europe and provides an approach to conducting an inquiry designed to identify 'recognised environmental conditions' (RECs).
- ▶ There is nothing within the ISO standards which mirrors this but **ISO 14015:2001 Environmental management—Environmental assessment of sites and organizations (EASO)** is the closest.
- ▶ It may be beneficial to discuss competencies of the individual / proposed team and experience with the use of such standards to help ascertain whether they have the required skills.



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Environmental Consultant's Role

- ▶ Timing
 - ▶ Often the time for a transaction to proceed and complete can be constrained and a great deal of pressure is applied to all parties involved.
 - ▶ Ensuring that you engage with the appropriate technical teams and consultants early is essential. More often than not, transactions tend to focus on financial issues, with technical due diligence such as environment, playing a secondary (albeit important) part.
 - ▶ Delays in identifying need and engaging and appointing a consultant can lead to inefficiencies within the process, and missed opportunities for accurate assessment.
 - ▶ If intrusive investigations and additional testing is required following instruction, the time required to complete them can delay transactions.



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Advising Purchasers

- ▶ A purchaser needs to understand potential liabilities associated with the business to be acquired in order for them to be factored into negotiations.
- ▶ In a multi site transaction, it may be appropriate to initially undertake a desk based screening exercise to reduce the number of site visits to those with the highest potential for significant liabilities.
- ▶ For example, sites where the land is owned rather than leased, or if leased, where the business has been operating at the location for a long time.
- ▶ Highly regulated sites such as those under the **Environmental Permitting Regime** may also warrant greater time allocated to them.
- ▶ Once site visits have been completed, key issues identified will need to be reported back to the team as soon as possible. It is often appropriate to provide a short email report immediately following the visit to be followed up with a more detailed report later.



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Advising Purchasers

- ▶ The reporting format chosen should allow the purchaser and team to quickly ascertain the areas of potential concern which represent the highest liability risk and the greatest cost.
- ▶ The report may only need to be issues based and therefore only report identified potential liabilities rather than a full description of all that was reviewed by the auditors.
- ▶ The methodology will set out all the items covered during the due diligence exercise to provide comfort that all areas required have been properly considered.
- ▶ The nature of acquisition due diligence means it is not always possible to accurately quantify all the potential liabilities identified.
- ▶ Consultants can provide a 'worst case scenario' or a cost range with respect to remedial actions for factoring into negotiations.



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Advising Purchasers

- ▶ Further investigations, such as **Phase II Intrusive Ground Investigation**, may be recommended but it is likely that the cost and potential outcomes need to be managed / considered.

- ▶ This might be done by:
 - ▶ putting funds aside for further investigations

 - ▶ providing indemnities against the regulator requiring remediation of contaminated land



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Advising Vendors

- ▶ Environmental due diligence on behalf of a vendor is often not subject to the time pressures of acquisition due diligence, as it is commissioned when a business is being prepared for sale.
- ▶ The aim of the due diligence is usually to provide a factual report on the environmental compliance of a business, which can be presented to potential purchasers as part of the disclosure exercise.
- ▶ The reporting structure chosen for vendor reports is generally quite descriptive setting out the operations and environmental compliance of each aspect of the business.



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Advising Vendors

- ▶ Where potential liabilities are identified the auditor will seek to quantify them to the extent possible to avoid uncertainty.
- ▶ Further work such as **Intrusive Ground Investigation (Phase II)** or asbestos surveys may be commissioned to achieve this.
- ▶ The environmental consultant may prepare a schedule of costs to support the findings of the due diligence, but generally it is recommended that this is reported separately and is not disclosed to potential purchasers.
- ▶ Vendor due diligence reports may be assigned to the purchaser as well; however, vendors will wish to keep estimated costs separate to support negotiations as identified remedial costs are often deducted from the purchase price.
- ▶ Even when vendor due diligence reports are assigned to both parties, because of the 'buyer beware' principle, purchasers will often commission their own independent work or seek an independent review of the vendor reports.



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Environmental Assessment (EA) & the UK planning system

- ▶ EU Council Directive 85/337 became operative in July 1988 and amended by Council Directive 97/11 in relation to certain public and private developments and by article 3 of Directive 2003/35 in relation to public participation and information.
- ▶ 2012 Changes to 'streamline' the rules on environmental impact assessments to reduce administrative burdens and ensure that only projects with significant environmental impacts are subject to environmental assessment.
- ▶ EA may be broadly defined as a technique which allows a systematic and structured assessment of the potential effects of certain development projects on the environment, which can then be taken into account in the decision making process of whether to grant planning permission subject to appropriate conditions and legal obligations.



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Environmental Assessment (EA) & the UK planning system

- ▶ Developers produce an Environmental Statement, describing the project, its likely significant effects and the proposed mitigating measures.
- ▶ Clear procedures are to be followed for EA, including publicity and consultation with expert bodies and the general public.
- ▶ The onus rests with prospective developers or in appropriate cases central or local governments, to provide an EA related to the projects concerned.
- ▶ The purpose is clearly to prevent pollution or environmental harm at source to plan mitigation measures as part of the authorisation procedure.
- ▶ Failure to properly comply with the EIA process is an error of law which can result in the quashing of planning permission - see *Wye Valley Action Association Ltd v Herefordshire CC (2009)* - the High Court ruled that the LPA had failed to carry out the EIA process prior to granting consent for 54 Ha of polytunnels at a Herefordshire farm.



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Brexit!

- ▶ There are opportunities from **Brexit** as well as threats. No one would suggest European environmental law has been perfect. Having more localised solutions to environmental issues might be a benefit for the UK. We may find better ways to achieve the same—or better—environmental standards. Our priorities could be better focused on UK issues.
- ▶ But, the task now facing the government is enormous. Untangling 40 plus years of EU law and new policy developments as well as driving forward environmental protection
- ▶ The key challenge is uncertainty and the extent to which the landscape of environmental legislation in the UK will change post-Brexit may not be apparent for some time.



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