



LAW ANSWERED

SAMPLE CHAPTER FROM OUR ADVANCED COMMERCIAL PROPERTY ELECTIVE GUIDE

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ENVIRONMENTAL ISSUES AND CONTAMINATED LAND

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Key Terms for this chapter:

CLR	Contaminated Land Regime
DEFRA	Department for the Environment, Food and Rural Affairs
DEFRA Guidance	DEFRA Contaminated Land Statutory Guidance
EPA	Environmental Protection Act 1990

Local authorities are under a duty to identify contaminated land, and then notify the appropriate persons. Contaminated land is identified by area surveys or physical inspections of individual sites – it may also be revealed during an environmental impact assessment pursuant to a proposed development. Local authorities are not under a duty to require the land to be “pristine”, but the land must be safe for the purpose for which it is being used.

STEP 1: Is there contamination?

Contamination: The definition of **contaminated land** is “any land which appears to the local authority... to be in such condition, by reason of substances in, on or under the land, that:

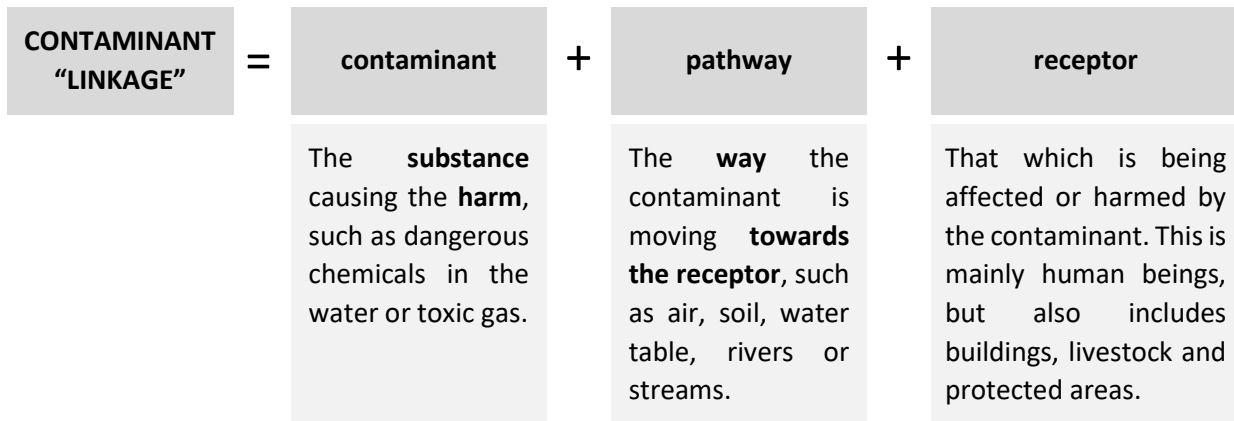
a: **significant harm** is being caused or there is **significant possibility of such harm being caused;**

b: **significant pollution of controlled waters** is being caused or there is a significant possibility of such pollution being caused” (s. 78A(2) EPA).

CONTAMINATION = significant (possibility of) harm or pollution + a contaminant “linkage”

HARM

The definition of harm in the EPA is “harm to the **health of living organisms** or other **interference** with the **ecological systems** of which they form part, and, in the case of man, includes **harm to... property.**”



For example, in *Circular v Sevenoaks*, the **contaminant** was rotting vegetation emitting methane gas, the **pathway** was through soil paths created by excavations undertaken for residential development, and the **receptors** were the housing residents at risk of becoming ill from the methane emissions.

NOTE: there **must** be **contaminant linkage** for the land to be deemed **contaminated**. Think of this like **causation**.

STEP 2: Who are the appropriate persons?

The intention of the CLR is that the "*polluter pays*". However, if the original polluter cannot be located, then the incumbent owner or occupier may be held liable.

Appropriate persons fall into two categories (s. 78F EPA):

- a: **Class A:** a person who **caused** or **knowingly permitted** the substances to be in or under the land; or
- b: **Class B:** the **owner** or **occupier** of the land.

Case law illustrates the scope of Class A:

Circular v Sevenoaks

The new owner was deemed to be "*knowingly permitting*" contamination because an agent knew about previous infilling of organic vegetable matter.

Crest Nicholson v SoS Environment

Both Crest and the former owner fell into Class A as persons "*causing*" the contamination because the former owner originally put the chemicals on the land and Crest also caused the contamination when, during development, they broke up the site and left it exposed for an extended period.

Only go to Class B (owners and/or occupiers) if there are appropriate persons within **no Class A**.

- **Owner** – the person who is entitled to receive rack rent (i.e. rent agreed between the landlord and tenant rather than being fixed by law) whether in their own right or as trustee for another person, or would be entitled to receive rack rent if the land were let (s. 78(9) EPA).

The definition of “*owner*” excludes **mortgagees not in possession**. However, a **mortgagee** who exercises its security by **taking possession of land** may become liable as an **appropriate person under Class B** if no class A person can be found. This has not been tested in court. Lenders can **avoid** becoming **mortgagees in possession** by appointing a LPA receiver – but the receiver may require indemnity for environmental liability from the lender.

- **Occupier** – not defined but taken in the plain English sense of the word.

STEP 3: Do the exclusion tests apply?

The **DEFRA Guidance** exclusion tests for Class A and Class B appropriate persons can only be applied if there is more than one appropriate person in the relevant Class. They must be applied in numerical order and cannot be applied if the result would exclude everyone from that Class. Apply the tests using the **DEFRA Guidance paras 7.38 – 7.61 and 7.76 – 7.79**.

CLASS A EXCLUSION TESTS

TEST 1:	Excluded activities – exclude the person whose supporting or advisory role is so far removed from the land that, even if they could be said to have “knowingly permitted” contamination, they should still be excluded. Examples are activities like lending, insuring, advising, licensing etc.
TEST 2:	Payments made for remediation – exclude the person who paid a sufficient amount for remediation to a responsible party, even though the remediation was ultimately not carried out properly.
TEST 3:	Sold with information – exclude the person who sold the land at arm’s length and provided sufficient information for the buyer to be aware of the risk. NOTE: in transactions with a large commercial entity as a buyer, it will be sufficient for the seller to allow the buyer to investigate the land – the buyer will have constructive knowledge of the risk. A seller can only be excluded under this test if the seller retains no interest in the land.
TEST 4:	Changes to substances – the first person introduced substance A to the land and, later, another person introduced substance B and the substances reacted to create a contaminant linkage. Exclude the first person if the introduction of substance B was not reasonably foreseeable.
TEST 5:	Escaped substances – exclude the person who is liable only because of the escape of a harmful substance from other land, caused or knowingly permitted by another of the liable persons.
TEST 6:	Introduction of pathways or receptors – exclude the person who caused or knowingly permitted the introduction of the contaminant that created the contaminant linkage, but only because another person later introduced a pathway or receptor (<i>Circular v Sevenoaks</i>).

CLASS B EXCLUSION TESTS

There are two possible exclusion tests for **Class B** appropriate persons:

TEST 1:	Exclude a person who occupies the land under a licence or other agreement with no marketable value ; and
TEST 2:	Exclude a person who pays rack rent with no other beneficial interest in the land apart from that tenancy.

STEP 4:	Apportionment of liability:
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If there is **more than one appropriate person** left in a Class, then liability will be **apportioned** between them. The apportionment process is very detailed – see **s. 7(d) & (f) DEFRA Guidance**.

AGREEMENT ON APPORTIONMENT OF LIABILITY

Before proceeding, check whether there are any existing agreements between members of a liability group. Generally, an enforcing authority should give effect to such agreements, except where it would place a party under hardship (**s. 78P(2) EPA**).

APPORTIONMENT FOR CLASS A APPROPRIATE PERSONS

The general principle is that liability should be apportioned “*to reflect the relative responsibility*”. If the enforcing authority cannot determine the relative responsibility, then liability should be apportioned “*in equal shares*” (**par. 7.65 DEFRA Guidance**). Refer to **s. 7(d) DEFRA Guidance** for the detailed rules on apportionment.

In general, the kinds of questions to ask when assessing **relative responsibility** include:

- **How long** was each person in **control** of the land?
- To what **extent** were they in **control**?
- Did they have the **means and opportunity** to deal with the contamination adequately?
- Were different appropriate persons evidently controlling larger parts of the land, or in charge of larger quantities of contaminant?
- Is the **remediation action** required applicable to only one member of the group?

Apportionment is not an exact science. The cases of ***Circular v Sevenoaks*** and ***Crest Nicholson v SoS Environment*** show how complicated the application of the CLR can become when there are multiple appropriate persons.

APPORTIONMENT OF CLASS B APPROPRIATE PERSONS

Broadly speaking, the apportionment among Class B appropriate persons can be dealt with in three ways.

Liability is apportioned:

- 1:** To or between the **specific person or persons** who own or occupy the particular area of land to which the **remediation action** or most of it obviously relates (**par. 7.81 DEFRA Guidance**);
- 2:** According to the capital values of the respective interests in the land of the Class B appropriate persons (**par. 7.83 DEFRA Guidance**); or
- 3:** In equal shares if the capital value of the Class B persons' interests in the land cannot be established (**par. 7.86 DEFRA Guidance**).

STEP 5:**What happens when someone is found liable?**

The local authority can:

- serve a **remediation notice** on the appropriate liable person, instructing that person on what must be done to address the contamination and by when; or
- arrange to have the clean-up works done and then **claim back the cost** of the operation from the liable appropriate person.

Importantly, a remediation notice **cannot** be served where:

- the contamination is being addressed voluntarily and the enforcing authority is satisfied that this will be sufficient;
- the activity causing the contamination is licenced under another regime; or
- if the enforcement authority were to undertake the clean-up works itself, it would not recover the costs from the liable appropriate person on account of hardship.

NOTE: where none of these circumstances apply, the enforcing authority **must** serve a remediation notice on the liable appropriate person(s).

A party can appeal a remediation notice if they have grounds to do so.

If a liable appropriate person fails to comply with a remediation notice, then they could be fined and the court may grant an injunction.

Few remediation notices are served in practice under the **CLR** – instead, most contaminated land is addressed voluntarily or through planning permission. Local authorities typically incorporate obligations to clean up contaminated land within the planning regime.

STEP 6:**How else could someone be held liable?**

Someone could also be found liable in respect of contaminated land under any of the following heads of liability:

PRIVATE NUISANCE

PUBLIC NUISANCE

RYLANDS V FLETCHER

NEGLIGENCE

OCCUPIERS' LIABILITY

TRESPASS

REMEMBER: a tenant may be liable to clean up any contaminated land under their lease if the landlord passes any charges on under the terms of the lease. Depending on how the lease is drafted, the tenant (who may have excluded itself from statutory liability under Class B) may nonetheless be liable to the landlord to pay for clean-up costs, any relevant service charge, specific covenants or covenant to comply with statutory obligations clauses under their lease.

HOW TO PROCEED WITH A TRANSACTION WHERE THERE ARE ENVIRONMENTAL CONCERNS

A buyer who wishes to proceed with the purchase of a site despite its (potential) environmental issues should consider the following alternatives:

1:	<p>A conditional contract:</p> <ul style="list-style-type: none"> • Advantages – the purchase is conditional on the site being clear of contamination. The buyer will not be subject to Class A liability. • Disadvantages – the seller may not agree to a conditional contract and the buyer could therefore lose the site. If the seller does agree, there may be a delay while the clean-up works are carried out. <p>Consider this option where time allows and where there are significant environmental concerns. The contract should be conditional on the remediation works being carried out by the seller and/or upon the environmental survey being satisfactory.</p>
2:	<p>Seller's warranty and indemnity against potential costs:</p> <ul style="list-style-type: none"> • Advantages – it can be done quickly, which helps to ensure that the purchase goes through. • Disadvantages – relies on the seller's covenant strength i.e. on whether the seller will be able to pay for the potential future costs of remediation works. The buyer will inherit Class A liability. <p>Consider this option if the seller's covenant strength is strong (and it is likely to remain so) and where there is time pressure on the purchase.</p>
3:	<p>Decrease the purchase price by potential cost of remediation works:</p> <p>Advantages – it can be done quickly, which helps to ensure that the purchase goes through.</p> <p>Disadvantages – the seller and buyer may not be able to agree on an estimate of future costs. The buyer will inherit Class A liability and will be responsible for paying the future costs, which could leave the buyer worse off if the price of the remediation works exceeds the price reduction that was agreed.</p> <p>Consider this option if an environmental survey has already been done and the buyer is satisfied that the environmental concerns are minimal. Also appropriate where there is time pressure on the purchase.</p>