Paying for the past...

A question of liability: Martin Edwards reviews a recent decision on contaminated land that has caused concern among conveyancers and may appear harsh, but is ultimately difficult to fault

A recent Court of Appeal decision regarding contaminated land liability in Wales under Part IIA of the Environmental Protection Act 1990 has caused much concern, particularly among conveyancers. While the decision in *Powys County Council v Price and another* [2017] EWCA Civ 1133; [2017] PLSCS 168 may appear to produce a harsh outcome, it is hard to fault. The facts are by no means unique. I came across a similar case, albeit in a different part of Wales, 10 years ago and, reluctantly, came to the same conclusion as the Court of Appeal in this case.

A contaminated land liability case considers 'appropriate persons'

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Delving back in time

Between the 1960s and 1993 the predecessor authorities of Powys County Council operated a landfill site on part of a farm now owned by the respondents. Following re-organisation, in 1974 one of those predecessor authorities, Brecknock Borough Council, became responsible for the site and held various waste disposal licences for it.

Tipping ceased in 1992 and the site became part of a farm. On 31 March 1996 Brecknock was abolished and Powys came into existence. At the time, Powys assumed that it had taken over all liability for the site. It also informed the respondents that it had responsibility for all local authority environmental functions and so began monitoring the site for potential leachate contamination.

However, in 2013, Powys reconsidered its assumption regarding its liability for the landfill and concluded that liability under Part IIA had not been transferred to it so that it could not be considered to be the original polluter (and thereby the class A appropriate person).

The result of this was that the respondents stood to be identified as class B appropriate persons (as the current owners and occupiers). They therefore sought a declaration from the High Court that liability had transferred to Powys, including contingent liability, and thus that it remained liable under class A. The judge made the declaration but also granted permission to Powys to appeal to the Court of Appeal because the point of law was novel.

Court of Appeal

The Court of Appeal allowed the appeal. The key to the point of law involved a detailed analysis of the relevant statutory provisions applicable to local government re-organisation in Wales and the judgment of the House of Lords in *R (National Gas Grid (formerly Transco plc)) v Environment Agency* [2017] UKHL 30; [2007] 3 EGLR 5.

Of particular relevance was the interaction between sections 53 and 54 of the Local Government (Wales) Act 1994 (which created Powys), Article 4 of the Local Government Reorganisation (Wales) (Property etc) Order 1996 and the detailed provisions of Part IIA.

Two principal questions fell to be considered. First, did the definition of "an appropriate person" in section 78F of Part IIA cover a successor body to the original polluter? This is a more general point. The second question was whether the specific succession provisions in the 1994 Act and the 1996 Order had the effect of imposing liability on Powys as the successor body.

The court was clear on the first issue. Following Transco section 78(2) of Part IIA cannot be construed as including Powys as successor of Brecknock. The emphasis on section 78F(2) and (3) is on the actual polluter and Powys did not fall into that category.

The second issue was whether Powys could be "an appropriate person" by virtue of the operation of the succession provisions in the 1994 Act and the 1996 Order. Powys accepted that, had Brecknock been in existence in 2001 when Part IIA came into force in Wales, it would have been an appropriate person because of its previous conduct in relation to the site.

However, it argued successfully that Part IIA does not operate retrospectively so as to deem a predecessor body to have been under a liability that only arose under legislation which came into force after the predecessor body had ceased to exist.

The wording of Article 4 of the 1996 Order was nowhere near as extensive as the respondents had argued. Despite valiant efforts on the part of the respondents' counsel to argue that Powys should be held to have succeeded to a contingent liability, this approach was rejected by the court.

Similarly, reliance on the "polluter pays" principle did not assist because, as Lloyd Jones LJ held, this principle is dependent on determining who is the polluter.

He also acknowledged that, as Transco itself showed, the means selected by Parliament to give effect to this new regulatory regime, when combined with the statutory provisions governing succession, gave rise to gaps in the scheme of responsibility. He also held that the question of whether or not the "polluter pays" principle should be extended was a matter for Parliament, not the court.

Difficult to fault

This decision may seem harsh to many readers as it leaves the landowner respondents with potential liability as class B appropriate persons, as no class A appropriate persons can now be found. It is, however, extremely difficult to fault. More importantly, it does underline the need to analyse contaminated land liability under Part IIA with extreme caution, paying particular attention to the specific case (especially when dealing with successor bodies, be they local authorities, former statutory undertakers or companies) and to all the relevant statutory provisions.

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