

A review of contractual considerations for remediation contractors and property owners, purchasers and developers

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Overview

- Summary of the of the Chatham Docks case
- Importance of communicating the extent of the scope of works and its implications post completion
- Examination of importance of accurately documenting site investigation, risk assessment, remediation strategy and verification work
- Clients' requirements and expectations and the requirements and expectations of others obtaining third party reliance

Urban Regeneration Agency and English Partnerships (Medway) Limited v Mott Macdonald

Facts

- High Court Case 1996 NJ 736
- MM were to investigate the extent of contamination at a 155-acre former Royal Docklands site, Chatham, with potential for 1,500 houses. MM were to advise on decontamination and carry out letting of contracts
- EP's approach was that redevelopment would only take place if the cost of the decontamination was not greater than the value of the site when restored, estimated at £23m. Unexpected contamination was encountered, leading to MM having to remove three times more contaminated soil than they originally advised there would be. Costs escalated as the job was far more intensive than first imagined. EP made a claim for £65m+



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Urban Regeneration Agency and English Partnerships (Medway) Limited v Mott Macdonald (2)

Issues

- The parties had different perceptions of what was meant by “contamination”
 - EP believed this included chemicals unacceptable to EP, potential purchasers or financial lenders, because they were harmful, or perceived to be. EP was conscious of the marketplace and public perception and had a policy of removing all contaminants above threshold trigger levels
 - MM believed contamination was to an “engineering standard”, where only materials which were actual or potential hazards based on risk assessment approach were removed. They were only removing contaminants breaching action trigger levels and where contamination was between TTL and ATL, it was a matter of judgment
- MM argued the "squeaky clean" approach was far too high a standard and they only needed to remove contaminated soil considered to pose danger to public health or environment
- EP claimed MM had given incorrect advice and failed to provide interim warnings to abort, when costs began escalating



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Urban Regeneration Agency and English Partnerships (Medway) Limited v Mott Macdonald (3)

Held

- EP didn't have contaminated land experience and so were reliant on MM
- The contract required MM to provide services for removal and treatment of materials "to a standard sufficient to permit residential and/or commercial development". The contract did not refer solely to engineering standards but also to "any standard necessary for reasons of engineering, economics, planning or public perception". EP's view found to be reasonable
- No standard of care defined but the judge concluded MM required to exercise reasonable skill, care and diligence

Urban Regeneration Agency and English Partnerships (Medway) Limited v Mott Macdonald (4)

- Judgement ran to over 500 pages
- Trial lasted 77 days
- Damages of £18.5m awarded. This was 50% of overall remediation costs, as couldn't recover all losses from subsequent redevelopment, plus lost opportunity of abandoning project

Lessons to be learned from case?

- Clear communication between parties
- Consider the implication for clients after completion
- Consider whether the works are in line with client expectations
- Proper expertise and duty of care

Clear communication

- Judge emphasised need for consultancies to communicate carefully with clients:
“A consultant must provide clear and comprehensive advice in a way that enables the client to appreciate all the factors influencing any proposed remediation. This includes the results of any site investigations, and the reasons for any professional judgment exercised and for each recommendation made.”
- This is of particular importance, given:
 - the dependence of remediation schemes on professional judgement
 - costs involved in undertaking remediation
 - potential for different requirements (public perception, attitude to residual risks, requirements of future tenants, funders etc)

Are the works in line with client expectations?

- MM was required to provide services "to a standard sufficient to permit residential and/or commercial development," a phrase open to different interpretations
- MM should have ensured that this phrase had a common understanding
- MM failed to consider the purpose of the project. Had they considered that the project was preparing the land for housing, they would have realised that EP would be considering contamination to a different level than the engineering standard
- EP was acutely conscious of the marketplace and public perception, and consistently had a policy of removing all contaminants above threshold trigger levels from the site
- Judge noted how public perceptions of risk can differ from those of experts. MM could not just dismiss public opinion



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Contracts for site investigations works

- Purpose of site investigation works:
 - assessing presence of contamination for:
 - development requirements
 - compliance with planning conditions
 - Part 2A regime / groundwater protection
 - baseline condition report for environmental permit
 - liability allocation between parties (indemnity baseline)
- What does the contract say?
- Reliance on reports:
 - contractors, future owners, tenants, funders, others

Contracts for remediation works

What is the contractor agreeing to deliver?

- Does specification match with employer's requirements?
- Target driven?
- Works required by remediation scheme to be agreed with planning authority?
- Consider planning conditions, responsibility for planning sign off, responsibility for Environment Agency sign off, environmental permitting compliance
- Unlikely to be delivering a clean site but suitable for use. Longer term contamination considerations. Change in law. Future redevelopment. Off site impacts
- What does compliance with law mean in the context of delivering the remediation works?

Contracts for remediation works (2)

- Potential for gaps in contractual cover if different contractors for site investigations, remediation strategy and design and remediation works
- Future owners/occupiers will want reliance from all contractors/consultants
- For significantly contaminated sites – could be additional contractual considerations. Need to understand liabilities/requirements of future owners/occupiers in advance before agreeing contracting approach
- Where do residual risks lie? Who is taking unknown ground condition risk?
- Environmental permitting responsibility - responsibly for obtaining the permit(s), who is required to hold the permit, requirement to transfer or surrender, permit application often twin tracked with planning application but not always

Post completion contamination risks

Liability if remediation works do not address all the contamination risks:

- may not be a breach of contract by contractor – depends on contractual terms and scope of work
- Sign off by local authority under planning conditions does not guarantee no future liability or requirement for additional assessment or remediation works if further development at the property
- Sign off by local authority does not necessarily mean sign off by the Environment Agency

Proper Expertise/Duty of care

- Judgement determined that MM had failed to exercise reasonable skill, care and diligence to EP under the Chatham Docks contract
- Lessons:
 - What is the standard set out in the Contract?
 - Ensure teams have adequate training and supervision
 - Consider asking legal to provide a summary of contractual obligations
 - Some projects have unusual reporting, certification or confidentiality requirements and may benefit from project protocols to ensure requirements followed (particularly for projects with a long duration)
 - Produce clear non technical guidelines for clients on ground condition standards to be applied



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Any Questions?