Part 2A – Where are we and where are we going?

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What I'm going to cover

Background

Case law

- *Circular Facilities (London) Ltd v Sevenoaks District Council* (2005)
- *R (National Grid Gas Plc (formerly Transco Plc)) v Environment Agency* (2007)
- *R (Redland Minerals Ltd) v Secretary of State & R (Crest Nicholson Residential Ltd) v Secretary of State* (2010)
- Stonegate Housing Estate, Willenhall
- *Powys County Council v Price and Hardwicke* (2017)

Analysis

What next?

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Background (1)

Came into force on April 2000 (England), July 2000 (Scotland) and July 2001 (Wales).

Defines contaminated land as “any land which appears to the local authority… to be in such a condition, by reason of substances in, on or under the land, that—

(a)significant harm is being caused or there is a significant possibility of such harm being caused; or

(b)significant pollution of controlled waters is being caused or there is a significant possibility of such pollution being caused.”

Primary responsibility sits with Class A persons – those who caused or knowingly permitted contamination to be present.

If no Class A persons can be found, responsibility sits with Class B persons – owners or occupiers of the land for the time being.

Regulated by local authorities or (for Special Sites) EA, SEPA or NRW.

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Background (2)

Supported by official guidance (most recent edition 2012).

Determination requires significant contaminant linkage (i.e. a contaminant, pathway and receptor relationship which gives rise to an unacceptable risk).

Land should not be determined on the basis of generic assessment criteria (e.g. soil guideline values) – a site-specific risk assessment is required.

Four categories of land:

- Category 1 – Unacceptably high risk (contaminated land).
- Category 4 – Low or no risk (not contaminated land).
- Category 2 – Strong case for considering that risks from the land are of sufficient concern (contaminated land).
- Category 3 – The strong case required under Category 2 does not exist (not contaminated land).

Contaminated Land Capital Grants Programme provided grants to help English local authorities cover the capital cost of implementing Part 2A by funding site investigations and remediation – finally closed 1 April 2017.

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Circular Facilities (London) Ltd v Sevenoaks District Council (2005) (1)

Planning consent was granted to Mr Kinchin-Goldsmith in 1977 to develop housing on a former clay pit.

He sold the site to Mr & Mrs Smith, who transferred it to Circular Facilities in 1979.

The site was developed as housing in 1980.

During planning, Circular Facilities sent a copy of a soil report (obtained by Mr & Mrs Smith) to the planning authority – it disclosed black organic matter, bubbling gas and other contaminants.

In 2002, Sevenoaks determined the land to be contaminated.

Sevenoaks served a remediation notice on Circular Facilities, on the basis that it had knowingly permitted the presence of the contamination.

Circular Facilities appealed against the notice in the Magistrates' Court.

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Circular Facilities (London) Ltd v Sevenoaks District Council (2005) (2)

The Magistrates upheld the notice, so Circular Facilities appealed to the High Court.

The High Court held:

- It had not been shown that Circular Facilities' director (its "controlling mind") was aware of the 1978 report (and, therefore, that Circular Facilities had the requisite knowledge about the presence of the contamination to be a "knowing permitter") until 2002/3.
- (Obiter) A person need only have knowledge of the presence of a substance and need not be aware of the risk of potential harm arising from the substance.

Re-trial ordered, but matter settled.

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R (National Grid Gas Plc (formerly Transco Plc)) v Environment Agency (2007) (1)

1915-1948 – Coal tar residues deposited underground at privately-owned gas works.

Gas works nationalised and transferred to the East Midlands Gas Board under the Gas Act 1948.

Gas production ceased and the site was sold in 1965 – eventually redeveloped for housing.

Gas industry reorganised by Gas Act 1972 and privatised by Gas Act 1986.

Each Gas Act provided that the successor company would take over the liabilities of the predecessor company “immediately before” the transfer date.

Part 2A came into force in England in April 2000.

Former gas works site was subsequently determined under Part 2A.

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R (National Grid Gas Plc (formerly Transco Plc)) v Environment Agency (2007) (2)

EA contended that:

- National Grid should be liable on the basis that liability should sit with the statutory successor to the original polluter.
- Transferred liabilities should include those which would eventually come into force (whether contemplated or not).

House of Lords disagreed:

- Very clear statutory language would be required to impose liability to pay for remediation on an "innocent" company.
- Liabilities existing immediately before the date of transfer could not include liabilities coming into existence years later.

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R (Redland Minerals Ltd) v Secretary of State & R (Crest Nicholson Residential Ltd) v Secretary of State (2010) (1)

Crest purchased former chemicals manufacturing site from Redland in 1983.

The site was contaminated with bromide and bromate.

Crest were aware that bromide was present, but not bromate.

Crest demolished part of the site and left it uncovered for 2 ½ years, exposing the ground to rain which flushed the contaminants into lower ground levels and aquifers.

The EA served remediation notices on Crest and Redland, who both appealed.

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R (Redland Minerals Ltd) v Secretary of State & R (Crest Nicholson Residential Ltd) v Secretary of State (2010) (2)

Planning Inspector:

- Redland caused both Bromide and Bromate to be present.
- Crest knew that Bromide was present and had a reasonable opportunity to prevent or remove its presence, so knowingly permitted it to be present.
- Crest did not know that Bromate was present, so could not knowingly permit it to be present.
- Crest caused both Bromide and Bromate to be present by carrying out demolition works, which mobilised the contaminants – not necessary to *introduce* the contaminants onto land.
- Liability apportionment:
  - Bromate – Redland 85% Crest 15% - broadly reflects the duration of periods when the site was under the parties' control.
  - Bromide – Redland 45% Crest 55% - Redland's liability halved to reflect "sold with information" provisions in sale contract.

Secretary of State agreed with Planning Inspector.

High Court refused permission for parties to judicially review the Planning Inspector's decision.

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Stonegate Housing Estate, Willenhall (2017) (1)

Former gas works site sold to local authority in 1965, who obtained outline residential planning consent.

Site sold to first developer in 1972, who obtained detailed consent and transferred part of site to second developer.

Site was developed by first and second developers between 1972 and 1974.

2012 – Local authority determined the site was contaminated with B(a)P.

2015 – Remediation notices served on first developer – second developer could not be “found” (voluntarily liquidated in 2014).

First developer appeals.

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Stonegate Housing Estate, Willenhall (2017) (2)

Planning Inspector upheld appeal on the basis that the local authority had unreasonably identified the land as contaminated. Whilst B(a)P may be present, the local authority had not demonstrated that conditions amounted to SPOSH.

The local authority had not carried out a scientific and technical assessment of the risks arising from the pollutant linkage according to relevant, appropriate, authoritative and scientifically-based guidance on such risk assessments.

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Powys County Council v Price and Hardwicke (2017) (1)

Since 1960s, farm owners allowed Builth Wells UDC to operate a landfill on their land.

1974 – local government re-organisation – Borough of Brecknock succeeds BWUDC.

Landfill closed in 1992 – Brecknock carried out works to bring the site back into agricultural use.

1996 – another local authority re-organisation – Powys CC succeeds Brecknock.

Powys assumed that it had inherited Part 2A liability for the site so carried out further on-site treatment and monitoring.

2015 – Powys CC ceased work because of *Transco* case – it did not think it would be liable under Part 2A for the acts of its predecessors.

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Powys County Council v Price and Hardwicke (2017) (2)

Site not actually determined under Part 2A – farm owners brought case because of concerns that it would be in future.

High Court held in favour of the farm owners.

Court of Appeal held in favour of Powys – there was nothing in the statutory scheme of transfer which was capable of transferring future liabilities to Powys – Part 2A did not come into force in Wales until 2001.

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Analysis (1)

In all but one example (*Redland* and *Crest Nicholson*), the result has been 'negative' (persons have not been found to be liable or land has not been found to be contaminated).

Reasons:

- Statutory successors and future liabilities.
- "Controlling mind" must have requisite knowledge for company to be "knowing permitter".
- Technical requirements of determination.

After *Circular Facilities*, Sevenoaks were reported as saying that they 'certainly wouldn't serve a remediation notice in future'.

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Analysis (2)

No central register of Part 2A sites.

Most recent data published by CL:AIRE covers 2000-2013.

Year	Remediation notices	
	Contaminated land sites	Special Sites
2000	0	0
2001	2	0
2002	4	0
2003	1	0
2004	111	0
2005	0	1
2006	2	0
2007	0	0
2008	0	0
2009	3	0
2010	1	0
2011	2	0
2012	1	0
2013	1	0
Total	128	1

Since 2000 - of the potential 230,000 contaminated sites brought the regulators attention only 11,000 have been through any detailed inspection (5%).

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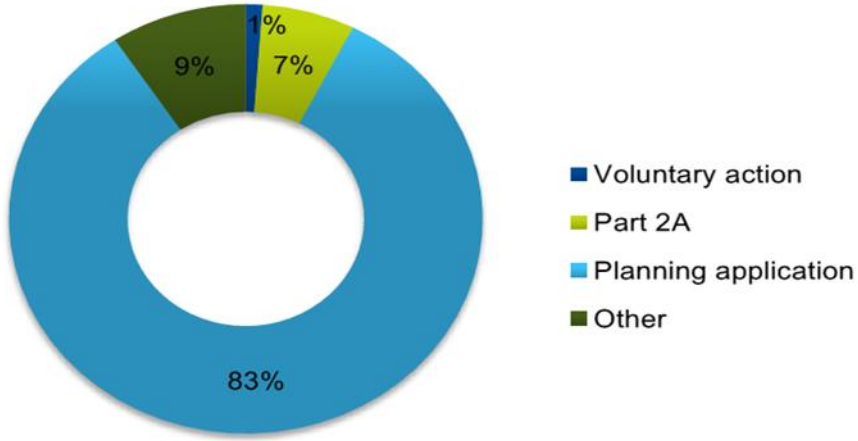
Analysis (3)

Less than 10% of land is dealt with under Part 2A – the majority (92%) is dealt with through planning or other mechanisms.

By start January 2014:

- only 30% of local authorities were on target re. their objectives in their inspection strategy; and
- 66/197 local authorities reported 461 contaminated land (non-special) sites under Part 2A and 50 designated Special Sites. 90% of these sites have been remediated (88% were remediated by the local authority!).



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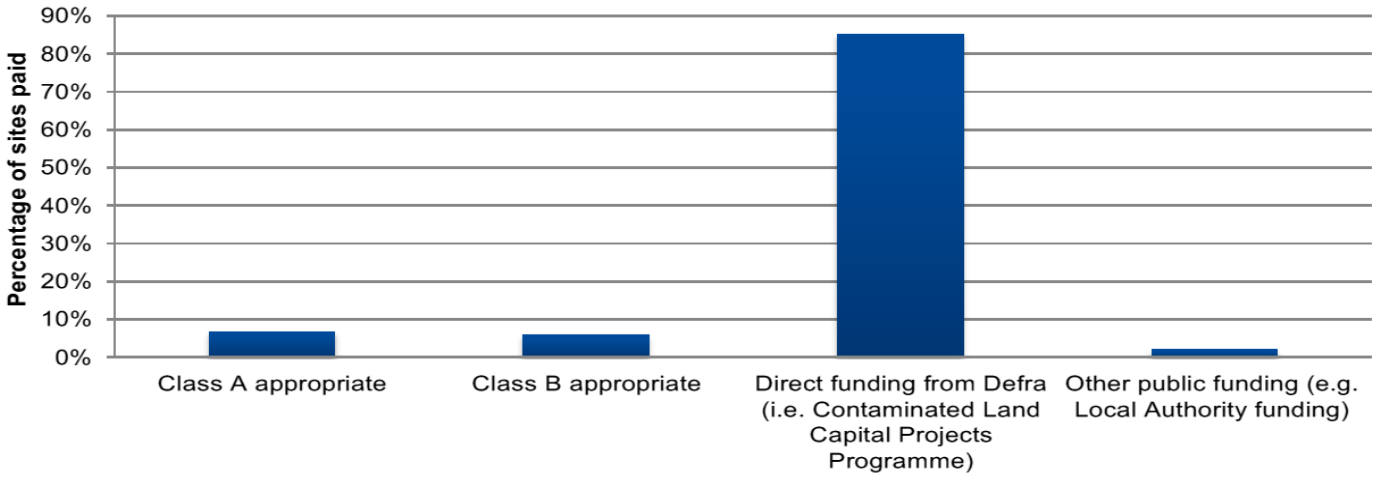
Analysis (4)

Who was actually paying for remediation?

85% of contaminated land remediation has been paid for by the Contaminated Land Capital Grants Programme (which ends in April 2017).

What's the average cost of remediation? – Surprisingly low: £74,000.



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Analysis (5)

One 3rd of local authorities have changed their approach to Part 2A referencing lack of funds, a move towards planning and **fewer determinations** due to using more realistic screening values:

Reason for change of the priorities	Number of times the issue was cited
Lack of funding	12
New risk analysis work was undertaken, either due to new software, errors in previous assessments, or new prioritisation methods	10
Moved towards a greater emphasis on planning	9
There was a change in official priorities (e.g. prioritising human health issues or landfill sites)	6
A need to focus on high risk sites only	4
Change was to reflect new statutory guidance in 2012	4
Changing timetable - Targets in original strategy were not achievable	4
Timetables slipped for the initial strategy or it was found to be unachievable	3
The local authority had decided to become less “proactive”	3
Aim to review a high volume of sites and re-prioritise	3
Flexibility was added into the strategy	2
Changes in boundaries, now district wide	1
Reprioritised all sites as errors had been made previously	1
Total	62

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What next? (1)

The case law and data indicate that Part 2A has not been a success.

Absence of central funding suggests that this will not change.

Scrap it?

Existing alternatives:

- Planning;
- Environmental Permitting;
- Waste;
- Environmental Damage; or
- Common law (private nuisance, public nuisance, negligence, trespass).

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What next? (2)

However:

- “Polluter Pays” principle is laudable.
- Increased awareness of issues.
- Agreements on liabilities.
- Voluntary remediation.
- Insurance solutions.

Part 2A still has *a* role?

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Questions?

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