

Contaminated Land

Many homes are now being built on brownfield sites and contamination may be an issue. If it is found that the land is contaminated, this can have serious consequences, which can result in the property being less valuable, or possibly unsaleable. Costs to clean up contamination can be huge.

The usual principle of “buyer beware” applies and the responsibility is on the buyer to find out if a site is contaminated.

How contamination can arise?

Contamination is often the result of some past industrial or commercial use. Examples include gas works or munitions factories (poisonous wastes), timber yards (preservatives leaching into the subsoil), petrol filling stations (petrol leaking into the subsoil) and landfill sites (methane gas from buried domestic household waste). However, contamination can result from naturally occurring substances (e.g. radon gas in Kent or Cornwall; lead in parts of Yorkshire). Furthermore, contamination can spread from land that may be some distance away from the main source, (e.g. through underground courses).

Liability for Contamination

Local authorities are creating registers of contaminated land and can serve “clean up” notices requiring that action is taken to remedy contamination. The responsibility to clear contamination rests primarily with the person who caused it. What if that person or company is no longer in existence or cannot be found? In that event the property owner or occupier becomes liable. Liability is both civil and criminal. However, the fact that a property is not on a contamination register does not mean there is no problem. It may simply mean the local authority has not yet inspected the site. Local authorities are also now required to consider the possibility of contamination before granting planning permission, and may refuse permission if contamination is present.

Environmental Searches

Environmental searches are provided by companies who keep detailed records of past and present land use and can identify potential hazards.

Lawyers are required to consider in every transaction whether an environmental search is appropriate. This may be obvious where, for example, the property is built on a well-known brownfield site. However, this may require knowledge of the property the lawyer does not have.

Our practice is to recommend that an environmental search is carried out every time, regardless of the age and location of the property.

Please feel free to discuss with us the property you are buying and the proposed use, so that we can advise you what searches are available, and you can consider the options. In addition to information about the previous use of the site, we can arrange a search which is customised to your requirements, including, for example, enquires of local authority planning and environmental health departments, petroleum licensing authorities or water service providers regarding trade effluent consents.

If you are buying a property for development, we recommend that in addition to an environmental search you also have a site inspection and soil survey, as environmental searches can only inform you of the risk of contamination. They do not report on actual contamination. We can assist you in arranging a survey with a reputable company, or a commercial screening report prepared by an environmental auditor.

Please note that lawyers are not professionally qualified to advise you on the content of environmental searches. Should the search reveal there is a risk of contamination, we can refer you to a specialist environmental adviser to assist further. Except where you are obtaining a mortgage, where the lender will require that a search is carried out, the decision as to whether to obtain a contaminated land search is yours.

Should contamination problems arise:

- Try to ascertain the reason and cause of the contamination and whether the person who caused the contamination can be identified.
- Buyers should consider in depth survey and site investigation.
- We can advise on specialist clauses, indemnities or exclusions to be included in the contract documentation. The contract will need to reflect carefully the responsibilities or indemnities on either the seller or the buyer.
- Consider indemnity insurance (see below).

Insurance against the risks

Some insurance companies offer policies that provide cover against contamination risks. As a rule we are not keen on them. No one yet has sufficient experience to say how serious the risks might be (there could be a deluge of claims in future years which sink the insurance companies) and they only cover clean up costs and not, for example, loss of value through a property becoming blighted where a neighbouring property is contaminated.

Flooding and Searches

Environmental searches include information on the risk of flooding.

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