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**The impact of environmental factors
upon procurement and risk exposure in
UK construction projects**

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Purpose of paper

To consider relationship between environmental factors and construction law in the UK context.

‘Environmental factors’ are broadly defined including:

- **Energy efficiency and resources**
- **Waste Management and disposal**
- **Water inundation**
- **Contamination and pollution**
- **Prohibited/deleterious materials**
- **Sound insulation and noise.**

Background

Historically, litigation on environmental issues in construction and development concerned:

- **Planning and development control.**
- **Actions for nuisance in water inundation.**

Planning

Background

R v Poole Borough Council 1991

R v Swale Borough Council 1991

Decisions of planning authorities valid despite failure to access environmental impact of development.

Background

Planning

Ryeford Homes v Sevenoaks District Council 1989

Planning authority not negligent in failing to assess impact of development on water drainage.

However see R (Environment Agency) v Tonbridge and Malling Borough Council 2005: court quashes grant of planning permission for development on flood plain.

Background

Nuisance

Dear v Thames Water 1992

Water authority not negligent, when new development overwhelmed system.

King v London Borough of Harrow 1994.

Background

Nuisance

Marcic v Thames Water Utilities 2004

Water company not liable to building owner under Human Rights Act for failure to develop bigger system for new development.

Hanifa Dobson v Thames Water Utilities 2007.

Waste Management and disposal

Gloucestershire Health Authority v MA Torpy and Partners 1994

Engineers negligent in failing to achieve EU performance standards for emissions from hospital waste incinerator.

Prosecutions brought against road contractors for discharge of construction waste into water courses (early to mid 1990s).

2005 EU Directive on Waste Electrical and Electronic Equipment.

Contamination and Pollution

**Merry Hill Shopping Centre built on British Steel Round Oak Works site.
Inadequate remediation hinders disposal of development.**

Merlin v British Nuclear Fuels 1990

**Increased levels of radioactivity did not ground claim by house-owner –
no physical harm.**

Contamination and Pollution

Blue Circle Industries v Ministry of Defence 1997.

Radioactive contamination from Atomic Weapons Research Establishment basis for £5 million damages.

RG Carter v Ham Grey Associates 1996.

Engineers liable for failure to detect methane gas contamination in retail development site.

Remediation controls strengthened by EU Directive Landfill (England and Wales) Regulations 2002.

Contamination and Pollution

Corby Group Litigation v Corby Borough Council 2008

Claimants, who were born with limb deformities, allowed by the Court of Appeal to proceed with claim in public nuisance against local authority which had acquired a large heavily contaminated site from British Steel. Claimants allege exposure to toxic materials during their mothers' pregnancies, as a result of decontamination work, caused deformities. Court said personal injury claim could be brought in public nuisance.

Sound insulation and noise

***Havant Borough Council v South Coast Shipping 1997.* Code of Practice for Noise Control on Construction Sites and procedures incorporated into contract specification.**

***Baxter v London Borough of Camden (No. 2) 1999.* Materials complied with Building Regulations: building authority not liable – contractor and owner could be.**

Sound insulation and noise

New Islington & Hackney Housing Association v Pollard Thomas & Edwards 2001.

**Designer responsible for design and specification of sound insulation:
claim out of time.**

Stannard v Charles Pitcher Ltd 2002.

**Owner and tenants liable for room re-arrangement causing noise
nuisance.**

Construction materials: deleterious products

Marder v Sautelle & Hicks 1988.

Building surveyor liable for failure to identify mine waste (mundic) in walls of building.

BJ Crabtree (Insulation) Ltd v GPT Communication Systems 1990.

Dispute when cost of contract to remove asbestos from building tripled by local authority's requirements.

Construction materials: deleterious products

Barclays Bank v Fairclough Building 1995

Contract for cleaning asbestos roof £133,000.

Damages for removal of asbestos slurry £3.9million.

Linden Gardens v Lenesta Sludge Disposals Ltd 1993.

Purchaser of property unable to claim against contractor for inadequate removal of asbestos.

Construction materials: deleterious products

Carillion Construction Ltd v Farebrother & Partners 2002.

Public authority's responsibility during asbestos removal limited to monitoring environment of locality.

Briggs & Forrester Electrical v Governors of Southfield School for Girls 2005.

Allegations of asbestos contamination by electrical contractors led to closure of school and enforced re-location of 1000+ pupils.

Construction materials: deleterious products

Control of Asbestos at Work Regulations 2004.

Duty to manage asbestos in non-residential buildings, identifying, monitoring, removing or managing risk.

Construction materials: energy efficiency and conservation

2001 Climate Change Levy: charge on building owners to improve energy efficiency.

Part L Building Regulations – implementing EU Directive on Energy Performance of Buildings.

2007 Energy Performance of Buildings (Certificates and Inspections) Regulations.

Home Information Pack Regulations.

Construction materials: energy efficiency and conservation

Jewson Ltd v Boyhan 2004

Supplier not liable to developer when boilers did not meet Standard Assessment Procedure energy efficiency regulations.

Environmental factors in construction contracts

Incorporation of Code of Practice (Noise control) in *Havant Borough Council v South Coast Shipping 1996*.

Term of meeting Standard Assessment Procedure (energy efficiency) will not be implied into contract: *Jewson v Boyhan 2004*.

Environmental Factors in Construction Contracts

British Property Federation

Standard form of warranty by architect to funder or purchaser.

“The Architect undertakes that he has not and will not specify any of the following for use ...

Item

Item

or any other materials generally known by the architects’ profession at the time of specification to be deleterious.”

Environmental factors as tendering criteria

Concordia Bus Finland v Helsingin Kaupunki 2001.

Contracting authority entitled to take account of environmental factors (nitrogen oxide emissions and noise levels) in awarding transport contract.

***Concordia* case in ECJ led to Article 26 of the Utilities Procurement Directive 2004 allowing awarding authorities to include technical specifications, including environmental factors, in tender documents.**

Environmental factors as tendering criteria

Health and safety already permitted as a tendering criterion in English law: *General Building & Maintenance plc v Greenwich Borough Council* 1993.

Environmental Factors as Tendering Criteria

Difficulties with weightings and refinements of criteria for award

***Lianakis v Dimas Alexandroupolis 2008* ECJ sub-criteria not made fully explicit.**

Lettings International v London Borough of Newham 2008.

Environmental factors in Construction Contracts

EU public authorities are seeking to address difficulties by inserting environmental factors in tender documentation.

Davenport ICLR 2008

60% of contracts under Public Procurement Directive are 'solid green' (more than 3 environmental criteria) in UK, Denmark, Finland, Germany, Austria and the Netherlands.

Conclusions

The interface between environmental factors and construction law in the UK has developed significantly in the last 20 years, from early beginnings in planning and nuisance.

Conclusions

The law has developed reactively through the courts.

Driven principally by EU regulation, a proactive approach has developed.

Conclusions

The contents of contracts and the criteria for award reflect this proactive approach by anticipating the relevance of environmental factors and making them an integral part of the process and the transaction.

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