

GROUND INVESTIGATION GUIDELINES

6.1 - CONTAMINATED LAND IN HONG KONG - SOME LEGAL ASPECTS

by Mark Badger, Solicitor, Minter Ellison

▶ Background

Given its past and rapid development, it seems likely that Hong Kong contains many areas of land contaminated from industrial and other commercial activities. A reduced demand for industrial use land, restrictions on harbour reclamation and the general scarcity of available land indicates that many sites will be subject to future redevelopment. Relevant to this is the issue of legal liability for the remediation of the contamination.

▶ Common Law

The common law (judge made, non-statutory law) provides remedies for some classes of person harmed by land contamination mainly based on the law of nuisance and (to a lesser extent) the law relating to trespass and to negligence.



In overall terms, the common law can be a blunt device with which to address environmental protection. The common law relating to contaminated land was designed in the main to protect rights enjoyed by one landowner against another owner of land and not to control a landowner from contaminating his own land. It is not designed to protect the "rights" of the environment. Some degree of fault on the part of the polluter must often be proved in order to secure a remedy. A common law claim is not decided by reference to specific, measurable standards of emissions or ground quality set by a central monitoring authority; instead, the courts are concerned with the extent to which the legal rights of the claimant have been affected.

Governments in common law countries have recognised these limitations and so seen fit to enact precisely formulated statutory controls, such as stipulating the concentrations of particular chemicals permitted or prohibited in water, for the good of the environment generally. Environmental legislation of this sort usually has two important characteristics: (a) the prevention of further contamination; and (b) the clean up of existing contamination.

▶ Summary of Environmental Legislation

In Hong Kong there are detailed statutory laws regarding prevention of further contamination which penalise certain types of pollution by the creation of "environmental" criminal offences, eg

- Air Pollution Control Ordinance (Cap.311)
- Noise Control Ordinance (Cap.400)
- Waste Disposal Ordinance (Cap.354)
- Water Pollution Control Ordinance (Cap.358)
- Air Pollution Control Ordinance (Cap.311)
- Ozone Layer Protection Ordinance (Cap.403)
- Dumping at Sea Ordinance (Cap.466)
- Environmental Impact Assessment Ordinance (Cap.499)

▶ Polluter Pays?

For clean up of existing contamination Hong Kong has a detailed statutory regime that is mainly founded on the Environmental Impact Assessment Ordinance.

On the question of the clean up of existing contamination the Hong Kong statutory regime differs fundamentally from other common law jurisdictions. In many other common law jurisdictions, the primary responsibility for cleaning up contaminated land falls on the person who caused or permitted the contamination: the "polluter pays" principle. This is not the case under the Environmental Impact Assessment Ordinance. Rather, the effect of that legislation is to make the person who wants to develop a contaminated site responsible for any necessary clean up. Often this party will not be the person who has caused or permitted the contamination.

A peculiar feature of Hong Kong, and one that has no doubt shaped the legislation enacted (or not enacted) to deal with contaminated land, is the fact that land in Hong Kong is held under Government leases or sub-leases. Thus the "polluter pays" principle may apply, not through legislation, but through the law of contract if the lease in respect of contaminated land obliges the lessee to clean up his contamination or pay for the costs of clean up.

▶ Government Leases

Government leases may contain clauses that make the leaseholder liable for his contamination of the leased land. Where there are no such provisions in the lease concerned, the law of contract does not allow the Government to impose new conditions on the leaseholder.

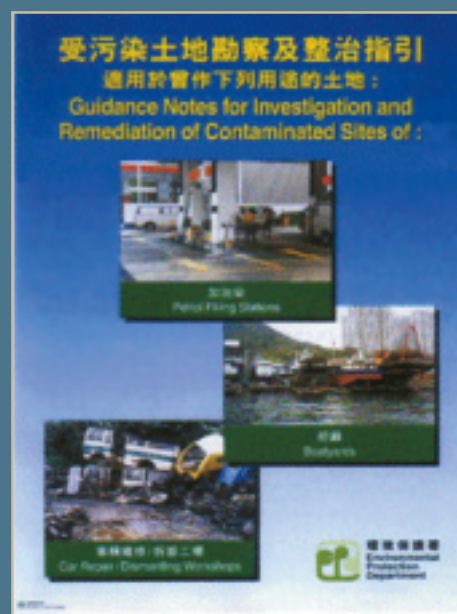
Sometimes Government and the leaseholder may want to agree on the early termination (or "surrender") of the lease: for example, where Government wants to get the land back, but for some reason is unable or unwilling to invoke its statutory powers of "resumption" (compulsory acquisition in return for statutory compensation).

Surrenders of leases are made through a separately agreed contract and these contracts sometimes contain obligations on the leaseholder to indemnify the Government for the costs of cleaning up any pre-existing contamination found on the site after the surrender.

▶ Pre and Post - 1998

It would seem that before 1988, there was no practice of including a standard environmental clause in Government leases.

In 1988 the Lands Department began including in draft leases a standard environmental protection clause. This was not comprehensive: it prohibited doing certain things that might result in pollution and specifically the discard of waste matter on the leased land; but for example there were no provisions for things such as requiring inspections of the land to test for contamination.



▶ Contamination Assessments

Apparently, the practice of using the standard environmental protection clause ceased altogether around 1997. But by 2002, it would seem that more comprehensive environmental clauses began to be incorporated in leases for industrial sites, and from 2003, in leases for petrol station sites. These require the lessee to avoid contaminating the soil and groundwater at the site, to carry out soil and groundwater assessment to the satisfaction of the Director of Environmental Protection, and to clean up any contamination. If he fails to clean up, Government may carry out the work at the lessee's expense.



▶ Clean Up

The biggest problem with using lease control mechanisms for contaminated land is that the conditions in Government leases vary greatly; it seems likely that the vast majority of pre-1988 leases contained no or insufficient contractual mechanisms dealing with the problem of contamination of the leased land. Even for leases made after 1988, problems might arise in relying on contractual remedies; for example:

- Practical difficulties in forcing lessees to clean up, even where they are obliged to do so.
- Political controversy - in recent cases involving contaminated shipyards the substantial clean up costs that are being incurred have been borne by Government, not the shipyard operators.
- Contaminated substances will often require specialist handling to avoid injury to the public and further environmental harm.

Even if there is an obligation to clean up, the use of this can be severely impaired if Government does not also have a right to go in and conduct environmental assessments of the level of contamination (or require the lessee to do so). If Government wants the land back quickly, it might be asked in negotiations to take the land back in the condition it is in, with no redress for any contamination that may be there in large quantities.



▶ Statutory Limitation Period

There is a statutory limitation period for bringing claims for breach of contract. For deeds, this is 12 years and for contracts not made by deed (e.g. tenancy agreements) 6 years from the date of breach of contract. Unless the breach is a "continuing" breach the relevant date of breach is likely to be when the contamination takes place. This might have been more than 6 or 12 years ago. Where a site has been contaminated continuously over a long period of time, it may well be difficult to prove which part of the contamination occurred within the limitation period for bringing claims.

Recent cases suggest that Government will seek to rely on another common law remedy to penalise those leaseholders who contaminate leased land. That is, by relying on the doctrine of "waste": an ancient legal remedy that applies to leased land.

"Waste" in this context refers to any act or omission by the lessee (tenant) which causes a lasting alteration to the nature of the land or property in question to the prejudice of the lessor (landlord).

A leaseholder owes an obligation to his landlord not to commit "waste". The possible scope for examples of "waste" are therefore wide; clearly it could include the contamination of leased land by the leaseholder.



Authority

There are very few reported Hong Kong case decisions on the doctrine of waste. However, in relying on the doctrine, the lessor (e.g. Government) may well face similar problems with the limitation period for bringing actions as described above.

There is recent English case authority to the effect that where there are provisions in the lease/tenancy agreement dealing with the act of "waste" complained of, the law of waste does not apply - the court will only look at whether the lease/tenancy agreement was breached. To give an example, a "fair wear and tear" clause in a lease might be relevant in this regard.

There is recent New Zealand case authority to the effect that where the law of waste is used in contaminated land cases, the law of waste does not apply to contamination that arises from reasonable use of the land concerned. In deciding what use is "reasonable", the court held that it was important not to set unrealistic and unachievable standards; the standard set should relate to the purpose for which the land is leased; moreover, what is reasonable may change with time as both technology and our knowledge develops.

EIAO

Therefore, it seems that the common law will continue to have a limited role to play in determining liability for the remediation of contaminated land in Hong Kong. Primarily, that liability will continue to fall on developers of contaminated sites - this under the Environmental Impact Assessment Ordinance or, to projects which are not subject to that Ordinance, under conditions attached to planning permissions or through provisions in new leases that are granted for sites with potential contamination.

This is a general information note and does not constitute legal advice in any form. All users of this information do so at their own risk. Appropriate legal advice is recommended before using the information in this note for particular circumstances.