

Speaker	Dialogue
Aidan Thomson	<p>Good afternoon everyone. And welcome to today's bulletin on Unlocking disagreements over future contaminated land liability. Welcome from me Aidan Thomson and also my colleague here at the BCLP the environment's team Isabelle Laborde. Also welcome from our guest speaker today Duncan Spencer.</p> <p>Duncan is a director of EDIA Limited which is a broker specializing in the placement of insurance to management of environmental risk. Duncan has over 30 years' experience in the contaminated land sector. And working first in the engineer then as an underwriter and now a broker. And I think I am right and saying Duncan; that I have known you for a long time wearing, you know, each of those hats. It has been a long time.</p>
Duncan Spencer	And I would like to think that neither of us look that old, so...
Aidan Thomson	<p>Oh well, indeed, indeed. Now, just a appoint for everybody to note, there is a facility fuel to ask questions please do so. We are probably won't get to the questions right at the end because this is a short session. But we will do whatever we can to try and answer those questions afterwards.</p> <p>So, let us get straight on with it; and just by way of introduction, and with all being involved in property transactions where things get completely locked, usually at a very late stage, because the parties can't see eye to eye in relation to environmental liability. The seller, of course, wants nothing to do with the site post sell, and wants the buyer to be responsible for environmental liability in the future. But, the buyer is very nervous about taking this on. Just a question for Isabelle, why do you think these entrenched positions happen?</p>
Isabelle Laborde	Well, [<i>inaudible</i>], in that sometimes sellers, and their predecessors have or might have contamination of the site. But, due to a lack of signs or site access, or more generally information, the buyers must [<i>inaudible</i>] to its satisfaction thus making the buyer nervous. Or, the buyer hasn't bothered to properly diligent the site, and expects to leave the liability with the seller, thus making the seller angry.
Aidan Thomson	I see. And does this sort of situation or this conflict happen often?
Isabelle Laborde	Not that often, but more often than you think.
Aidan Thomson	OK. Well, let us take a look at that in a little bit more detail. Does this sort of impasse happen with sites that are bought for development?
Isabelle Laborde	These sites tend to be less problematic. Developers are usually happy to take the liability of this to some extent because they have often has carried out their investigation and in any event, they plan to remediate the site as part of redevelopment. The liability that they are taking on is rather theoretical.
Aidan Thomson	OK. And what about people who buy the property, just to use it exactly the same way as it's always been used, like as in an office block, or a storage, or a manufacturing facility?
Isabelle Laborde	I think people are usually, but not always, pretty happy to take on the liability, as long as you simply continue to carry on the activity that went on before without too much change, and as long as the site has not come to the radar of the regulatory of authority, or having all this unquantified issue, it's just a case of not rocking the boat.
Aidan Thomson	I see. So, I get that lots of sites won't really present liability problems and, you know, that can be solved. But, can you give me some examples of some tricky situations?

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Isabelle Laborde	Oh, there are plenty. Sometimes a party simply want budge from a house position on liability. They want it clear, but someone else will take that liability, because, that is what they always do, but the other party doesn't agree. Sometimes, a Seller accepted from a very onerous liability terms when they bought a site, and now, they're wanting to pass these on to the buyer, but the buyer is not accepting it because it's not market. And, sometimes, you have a nasty ground field development site, and the party fears that something could be missed in the remediation process, and that something could come back to harm them many years later in a big way. And, finally, I will give an example of sometimes you have a lender, and the lender will need to see layers of protection, and the lenders just not happy with what they offer.
Aidan Thomson	OK. So, how do things normally arrive at the crunch point as the parties negotiate?
Isabelle Laborde	Well, as you know, you usually explore all usual reasonable drastic alternatives, but, the parties are unable to find satisfactory compromise, and sometimes, the dread is this is a deal breaker may have been answered. And, both parties, clearly wants the transaction to proceed, but neither is willing to compromise. Now, as environmental lawyers, it is really not a fun position to be in, and of course, it always happens at the eleventh hour.
Aidan Thomson	Yes, well I can, I can agree with that, and it has, it's not pleasant when it happens. So, how do we get around these difficult situations?
Isabelle Laborde	Well, if nobody's going to back down, then that's the time when you will have to start speaking about environmental insurance as a solution; and it's a way to lay off the risk that nobody wants to take on to an insurer for a premium.
Aidan Thomson	Ah, well, this is a good time then to bring in, Duncan, with the mention of the word insurance. And Duncan, what are the typical sort of situations do you find when you get called in by the transaction teams?
Duncan Spencer	Well, we get caught up in all sorts of situations. The ones that Isabelle has run through there, really the driver for them is some of the parties are nervous about the liabilities around the transaction and for whatever reason, neither party is willing to give the comfort that the other party is looking for.
Aidan Thomson	OK. So, give us some examples of the typical sort of scenarios you get involved with.
Duncan Spencer	Yeah, well most of our business comes from development projects actually. The site is going to be sold to a developer who is going to change its use. We know that its contamination presence and the seller is nervous that the developer won't do a proper remediation job. And the concern is that it comes back to harm them at some point down the line. The policy here that we would create would be designed to pick up the bits to get through the net. That could be a remediation notice that served by the regulator, or it could be a third party claim, a neighbour or an occupant if the property is going to be tenanted. We also get involved in projects where a site is not going to be developed, so it is continuing use. Maybe it is one investor whose is selling a tenanted property to another investor. And, normally the driver there is because actually we know that there was a historical issue in the past, or actually, there is a lack of information, we don't have the time to gather that information and the risk just can't be squared between the

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	<p>parties. Again, our policies would be triggered by that combination of a remediation notice or a third party claim.</p> <p>In both of those situations, we also cover business interruption cost or maybe loss of rental income. So where a facility has to close to allow remediation to go ahead, the first party cost associated with that would also be insured.</p>
Aidan Thomson	OK. So that is a situation, is it? What are the typical contractual limitations and on claiming against polices like these?
Duncan Spencer	<p>Well, the most obvious one is the fact that the policy doesn't guarantee that the site is clean. So, if you are looking to buy a petrol station and you want to build some houses on it for example, we can't insure, we can' buy a policy that says the site is clean. The cost of changing the use, in other words, the remediation of the known contamination can't be insured. The other side of the coin is actually, we are trying to prevent an insured purposely triggering the policy. So it is the same concept, the policy isn't saying that the site is clean, so, if you stop voluntarily looking for contamination when no one else is asking you to look for contamination, you find something, you deal with it yourself. You can't look to the policy to deal with that.</p> <p>Around the development works, we normally phase our cover. So to begin with, we provide covering in case the liabilities affected a third party so there the pollution has affected a neighbour, it is gone offsite, or if the development works, makes something worse. And then on the end of development, will then add on onsite covers. So what happens if the regulator comes back in later, and says, "actually, we don't think you did a proper job," the policy can be extended to include that kind of risk too.</p>
Aidan Thomson	OK. That is interesting. But first, before we say, you know, that environmental insurance is the equivalent of the, physio's magic sponge, just give us a sense of what environmental insurance won't do.
Duncan Spencer	Yeah, well, fines and penalties aren't insurable by law. So, taking on a risk where that is a particular prospect, then we have to remember that we can't insure that. Whoever is taking that criminal liability has to keep with it. Other exclusions that we have is asbestos within the fabric of the building. That's normally considered an employee's liability type exposure, and yet we think of it as pollution, just to be clear. Asbestos in the soil and ground water, so if you had buried asbestos for example, that, that we can cover, it is just when it is in the building. And, the last key one, just to be aware of is underground storage tanks. We know that there are a large number of underground storage tanks leak already, and so when an insurer looks at a site with an underground storage tank before we will insure it, we need to make sure that the tank isn't leaking. And so there, we normally review which doc management results, or maybe if it is an integrity test, or any other kind of data that we have to make sure that we are getting positive cover for that underground storage tank.
Aidan Thomson	OK. Well thanks, yeah. Just a slight change of tact here, because there is lots of parties involved in these sorts of transactions when the environmentalist use goes sour. Can you insure multiple parties so purchasers, sellers, future lenders, group companies, tenants, are all together under the same policy?

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Duncan Spencer	Yes, we can. So, the strategy is normally that we insure more people than less. So we would insure buyer and seller, lenders, tenants; and like you say, group companies that may or may not be brought into a claim at some point down the line. It doesn't cost anymore to include everybody under an umbrella policy, so it's usual that we go, we set it all out and we insure as many of the interested parties as we possibly can.
Aidan Thomson	OK. And if there are several insured parties as you just described, you know, they may not speak to each other until after the transaction, who knows what they are up to; and, could one party invalidate the policy for the others in the future?
Duncan Spencer	Well, we make sure that our policies have a non-invalidation course, condition within the policy. It prevents this issue from happening, the actions of one insured cant affect the cover of another insured, and so we manage that in the drafting of the policy.
Aidan Thomson	All right. Just tell us a little bit about the, you know, the mechanics of getting a policy. What sort of information do you need to get together and supply?
Duncan Spencer	We usually take whatever information is available. So, if it is a development project, there is normally some idea of the ground conditions because if you are going to change your factory into residential development, for example, you normally understood what the ground conditions are going to be. So we take whatever information is around, whether that is a ground investigation or just a phase one. And the other things we like to look at is, again, if it is a development project, what you are going to do with the site? So, whether that is a master plan or a detailed remediation scheme if you have gone that far, and then also, copies of the contracts really help us get an understanding of what the contractual process is going to be and how we can work in with that.
Aidan Thomson	OK. What about, are there any declarations, dreaded declarations that you need to make? What happens if you don't have the information that, you know, the insurers are probably going to want?
Duncan Spencer	Well, the declaration process is normally straightforward. It's either a statement from the insured saying that we're not aware of any claims or conditions that might lead to a claim other than what we've already disclosed to you; or some insurers might want the form filling in, and we normally help the insurer and the insured complete the form. And, if there are situations where there are gaps in information, some true gaps, and it's-, take the situation where we are trying to buy a land field, and while we know there must be some data somewhere, because it is a land field. What we normally then do is help the parties understand what information we're going to require and we set a specification out that maybe we then can arrange for consultants who, to obtain.
Aidan Thomson	OK. And, how quickly does this process take from, you know, getting the broker involved to going to insurers to getting an offer from the insurance market? How quick can that be?
Duncan Spencer	It should just take a couple of days, really. There are complex situations that will take longer or particular in busy periods. So Christmas is a very busy period for example, on the run up to the 1 st of April and all the run up to the summer holidays also seems to get very busy because everyone wants to get something done at the same time. There we try and stretch out our timetable to a week or maybe slightly longer. And, but always remembering, if the transaction is working to pace, you know if it's truly is

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	the 11 th hour, then we'll work to the transactions timetable really, but sometimes it's better if we have a bit longer sometimes.
Aidan Thomson	And all right, and so a few days go by whatever it is, two days, perhaps a bit longer, and what can you expect to get back from the insurers?
Duncan Spencer	An initial response from an insurer is usually very limited except a premium outline of conditions and exclusions saying and a specimen policy wording; because we're dealing with these all the time, we accept that and we then produce a report that's underlines the risk code, so we extend our demands and needs statement ready. We set out what the risk is and then we identify who our preferred insurer is and we analyse what their insurance policy is going to look like against those risks that we have identified. Each insurer is slightly different, and so we then start to talk about where we are going to get to with this insurer if the specimen isn't quite doing it for us. When we have a preferred insurer, we then request a draft policy which then we will get over to your team and we then are able to go through the policy in detail once we understand the risk.
Aidan Thomson	OK. And how long can you get that cover for in the context of these transactions?
Duncan Spencer	Normal policy periods up to ten years. We can extend up to 15 years where we start looking at extended reporting periods. So there is some techniques that we can extend beyond those 10 years.
Aidan Thomson	Although the sort of time periods, I think that you could normally get people quite comfortable. Just out of curiosity, how much cover do you get?
Duncan Spencer	Well our market is driven around the policy that provides somewhere between a three million limit and a 20 million limit. Less than three million, you're not saving much money on your premium if you bought a one million limit or a three million, so we tend to buy a three million. And then when you go over 20 million, its only certain projects to say whether is a drinking water well that's in close proximity that you'd start to think is 20 million adequate? But the reality is the policies that we bind, so we've gone through the analysis, the premium, and the risks allowed for it, the policies that we bind normally sit between a five and 10 million pound mark.
Aidan Thomson	OK. So it is just worth bringing Isabelle in here. Isabelle I mean, how would you choose or decide what level of cover you want in a transaction? Is it based on the value of the transaction or something else?
Isabelle Laborde	No, it's really a question of what the environmental problem that you are trying to insure against might be. And sometimes you have what may seem like a small problem but it could have very big consequences and vice versa.
Aidan Thomson	Yeah, yeah, understood. And Duncan again, what are the premiums like generally? Probably a very difficult question to answer, but generally speaking, what are they like?
Duncan Spencer	Well, it depends on the risk that we are looking at. It depends on the limit, the term, and the quality of information that we have got. So there is quite a lot of variables that go around it. But normally for a development project we are looking at £50,000 but that can be anything from £35,000 up to £150,000 depending on that risk profile, but 50,000 is normally the average price. When we look at policies that are for more modest risks. So an office block built on Brownfield Land is not going to be redeveloped and we start to look at some of the indemnity policies. So there is a trench of policies that are very particular to environmental law, maybe we're are looking as less than £5,000. So there is a huge variation around it.

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Aidan Thomson	All right. So those numbers, it depends on the transaction of course but you know, that is sort of a realistic bull park for transactions isn't it? There is a general rule and you know go to insurers early and try and get them as much information as you can.
Duncan Spencer	Yes, that is right. I have tried to sound out the market before we can get to the 11 th hour, it always helps.
Aidan Thomson	Alright. OK. And Isabelle quick one from you. Do you think there is much chance of that happening?
Isabelle Laborde	Well, there is no harm trying.
Aidan Thomson	Excellent. Yeah. Now and this final thing, I have noticed that some of the policies that you can buy are very cheap, you know, costing about £1000. And some policies are very expensive, so that is the big range.
Duncan Spencer	Yes, yes. Well it depends on their application. Some of the very cheap policies have a very narrow scope of cover and actually, when you start to analyse the risk, you realize that it might be very difficult to actually trigger the policy in the first place. So, where are some of the more expensive policies obviously are tailored to what our risk is and so we are more confident to the response.
Aidan Thomson	So are the cheap policies good value for the money?
Duncan Spencer	Sometimes they are. So there are good solution when we have got a particular issue that we are trying to resolve and we are trying to get a transaction over the line. Most the time, they are just too generic and they don't actually deal with the heart of the issue we are trying to resolve. So we use them, but only under warning. Only under the advice, you would look at it.
Aidan Thomson	All right, wise words indeed. Well, I think that just about brings us up to time on today's session on unlocking these environmental liability problems and transactions. Just a few more seconds really to say a few things. First of all, thanks very much Isabelle. Thanks very much Duncan. To everybody remember that if you got any questions, unfortunately we don't have time today, but if you got any questions please use the facility to ask them and we'll get back to you. Our next session in this bulletin series is on the 8 of July, which is all about avoiding the asbestos liability web. I believe there is a button on everybody's screen that they can press and a link that will take them through to the registration page for that session. If you could see you all there as well and that brings us to the end. So finally, thank you all for logging on today and I hope you have a very good rest of your afternoon. Thank you.
Duncan Spencer	Thank you.
Isabelle Laborde	Thank you
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