

## Environmental Webinar 08.07.21

Speaker	Dialogue
Sam Levy	<p>Hello everyone and welcome to this afternoon's second instalment of our BCLP Environmental Bulletin Series. Today's session will focus in on asbestos. I'm Sam Levy from the BCLP Environmental team and I'll be asking the questions today, with answers coming from my colleagues Aiden Thomson and Isabelle Laborde. Unfortunately, Steven Sike [SP] was unable to join us today, which is why I'm stepping in.</p> <p>If anyone have any questions throughout the session then please do ask them in writing, using the questions function, which you should all see on your screen. And we'll reply to these in writing after the session. Alright, without further ado, let's launch into the conversation.</p> <p>So, asbestos. Isabelle, why does the word lead to so many negative thoughts?</p>
Isabelle Laborde	<p>Well Sam, you've got to remember that asbestos was the one <i>[inaudible]</i> substance in the middle of the 20<sup>th</sup> Century. A trusted fire retardant used in millions of buildings, ships, and trains around the world. But then in the 1960's it was found to have unwanted effects. A bit like cigarettes, lead in petrol, CFC and betel. Effectively, it causes a serious lung disease which can take decades to appear after exposure and which is often fatal.</p>
Sam Levy	<p>Right, so that would have led to a huge number of claims right?</p>
Isabelle Laborde	<p>Yeah, people sued their employers or anyone else who might have exposed them to asbestos. Companies around the world should have been looking after their employees, visitors but also contractors better than they actually did. And as a result, companies went <i>[inaudible]</i> and their insurers took a serious hit.</p>
Sam Levy	<p>OK, so Aidan these cases can't have been easy to bring or to defend with the illness arising so long after exposure the evidence presumably gets lost and memories fade.</p>
Aidan Thomson	<p>Well that's right Sam, but you know the UK at least, a very claimant friendly approach was taken by the law and by the courts to make it easier to claim particularly for an asbestos-related condition called Mesothelioma.</p>
Sam Levy	<p>So what about the insurers?</p>
Aidan Thomson	<p>Well insurers of course, had a bad time of it. You know the effect of these asbestos-related claims way down the line was never really considered when a lot of policies were entered into. You know the asbestos claims just weren't priced in.</p>
Sam Levy	<p>OK, so where do we stand now with asbestos?</p>
Aidan Thomson	<p>Well, people who are exposed many years ago are still getting ill and they're still making claims against their employers from the 1970's, the 80's, the 90's and also against others. Some asbestos related diseases, particularly Mesothelioma have a very long latency period indeed. And there are currently about 5,000 asbestos-related cases in the UK per year.</p> <p>It's also important to remember that illness and claims are receding and now and that's because its use, so it's new use was effectively banned about 30 years ago. So no new asbestos has been coming onto the markets to cause trouble for many years now.</p>
Sam Levy	<p>Alright, so Isabelle it sounds like there's nothing to worry about anymore?</p>
Isabelle Laborde	<p>Oh not quite Sam. There is still a huge amount of asbestos in old buildings, ships, and trains. And it's not easy to remove and it poses an ongoing risk. Particularly, if it's damaged or disturbed and loose fibers become airborne.</p>

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Sam Levy	OK, so people could still get ill after being exposed to that old asbestos I suppose?
Isabelle Laborde	Yes, even many years after exposures. And those persons will try to sue whoever might be responsible for exposing them to asbestos.
Sam Levy	OK, so Aiden, what if someone using or maintaining a building gets exposed to asbestos and then gets ill? Who ends up liable?
Aidan Thomson	Well, when he or she does get ill and that'll be many years after the exposure, there is potential liability for the employer of the maintenance worker for the building owner under either health and safety law or under tort. And to avoid liability, the employer or the building owner will need to know or need to show that they satisfied their various duties to minimize risk and take care, whether under health and safety law or otherwise.
Sam Levy	Right, that does sound good. So the claim could come in 20 year or so later, when an owner or an employer is least expecting it and presumably when it has no records to speak of?
Aidan Thomson	Yes, yes, and that does happen, and is a nasty surprise when it does.
Sam Levy	OK, well what about defences, would it be a defence say that you could only have been responsible for a very, very small exposure of asbestos compared to others?
Aidan Thomson	Well don't count on it. To cut a long story short, even very small exposures can lead to liability.
Sam Levy	Right, but won't there be insurance to cover claims if they do come in?
Aidan Thomson	Possibly yes, but there's been a huge amount of litigation over asbestos insurance coverage. You know, which public liability and which employer's liability policies get triggered. It's very complicated indeed. And some more recent policies expressly exclude asbestos cover.
Sam Levy	OK so how could you prepare yourself for these sorts of claims in the future?
Aidan Thomson	Well, you need to know where the asbestos is when you own a building and you need to be monitoring it and you need to be looking after it. If you're sending your staff to work there, you need to take steps to make sure that they're not exposed to it. It's really important to make sure that everything that you do to identify, to monitor risk assess is recorded so that there's a chance that if a claim does come in down the line, you can dig the information out and use it to defend yourself.
Sam Levy	Making and keeping records like that could be tricky couldn't it?
Aidan Thomson	Well it could normally, but actually in this case, no, because law has been put in place. It's currently the control of asbestos regulations to make sure that the information is created, it's kept up-to-date and the findings are followed. So creating this information is a no-brainer really. It's a legal requirement, it generates knowledge that helps companies minimize exposures to asbestos and it will always be there to assist if you hang on to it, in the defence of any future claim.
Sam Levy	OK, OK, so Isabelle who does those requirements fall on?
Isabelle Laborde	Well, those in control of buildings that contain or could contain asbestos. It also falls on employers whose work might involve asbestos.
Sam Levy	OK well sticking with building owners for the moment, so the law actually encourages the production of information that can save building owners from a claim down the line?
Isabelle Laborde	That's correct. In addition to avoiding a fine, compliance with the control of asbestos regulation should accord duty holder's useful information to

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	defend future claims. However, if these records are not available then the duty holder risks a hefty fine and might not be able to defend a claim.
Sam Levy	OK well there could be lots of people in any particular building, there can be landlords, tenants, licensees, and in these sorts of multi-party situations, who is the person with the responsibility for getting that information together?
Isabelle Laborde	So the person responsible is called the "duty holder" and that is any person responsible for the maintenance or repair of the building.
Sam Levy	OK well, what do you have to do with that information?
Isabelle Laborde	Well first, you have to keep it up-to-date, then you have to have a management plan to ensure you manage the asbestos properly. And then you have to provide all this information to any contractors that come to work on your building.
Sam Levy	So Aiden, what if someone like a contractor did not access this information from the building duty holder before letting it's employees work in that building?
Aidan Thomson	Well I mean it's pretty simple, as well as potentially exposing employees and leaving yourself open to the possibility of a civil claim in the future. Acting in this way really is a straight breach of health and safety law by the contractor. It's a clear case really of not identifying and managing risk.
Sam Levy	OK well, moving on to transactions. If I buy a building and I want to make sure that I'm adopting the right behaviours right from the start, how do I get an asbestos report or management plan for that building?
Aidan Thomson	Well, it's pretty straightforward, the outgoing owner who is being subject to these requirements, him or herself, should provide you with one that has been used by him or her. You know it should be pretty easy to adopt that and to follow it.
Sam Levy	Well, what if it showed that the asbestos is in a dangerous condition though?
Aidan Thomson	If it does, then the new owner is going to need to get it made safe immediately.
Sam Levy	And what if the current owner can't get his hands on the report at all?
Aidan Thomson	Well if that happens, I think alarm bells should be ringing at that point. And at the very least you can go through with the transaction, but you'll need to get an asbestos survey carried out and some sort of management plan developed as soon as possible after the purchase.
Sam Levy	OK and then when you get it, that could presumably reveal that work still needs to be done?
Aidan Thomson	Yes, I mean it certainly could and if it does, you'll need to get that work done as soon as possible.
Sam Levy	And is there anything else that happens if you're buying a building and it's clear that the outgoing owner has not been doing what they should be doing under the control of asbestos work?
Aidan Thomson	Well, I mean apart from the new purchaser having as I just said, you know, to take all the necessary steps to ensure that its compliant immediately and immediately following the acquisition, you know there may be a delay to the transaction because in a breach of the control of asbestos regulations is a criminal offense. And that might require some sort of filing of a suspicious activity report and that could, you know, delay the transaction and of course raise the attention of the regulator. So there are these implications.

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Sam Levy	OK so Isabelle, what about the case in corporate transactions? If I buy a company, should I be worried about asbestos in that case?
Isabelle Laborde	Of course you should Sam. The usual position when you buy a property is that you're only responsible for what happens in the future. But when you buy a company, you acquire all its liabilities whether past, present or future. So any past exposure to asbestos becomes your problem.
Sam Levy	So that presumably means that an assessment needs to be made of the possibility of asbestos exposure claims in the past?
Isabelle Laborde	This is absolutely correct.
Sam Levy	Right, OK so how would you go about doing that?
Isabelle Laborde	Well, it can be tricky, but with property due diligence it's possible to affect the risk of a future claim. If the purchaser is not happy with the level of risk, then the purchaser can seek an indemnity from the seller, or can require a change in the transaction structure to ensure that potential asbestos liabilities stay with the seller.
Sam Levy	OK, wait a second, Aiden asbestos isn't just found in the fabric of buildings. My understanding is it also often picked up as a contaminant in the ground. Is that correct?
Aidan Thomson	Well, you're right Sam asbestos isn't just found in the fabric of buildings, you know, you quite often find that it's been buried illegally in the ground. You often find it in made ground because it's a remnant from an old construction that was crushed down to form the base of a new building.
Sam Levy	So is that asbestos that's in the ground treated differently to asbestos in buildings that we've been talking about so far?
Aidan Thomson	Yes it is, so what we've said so far about creating asbestos reports and making sure that the asbestos is maintained, that really applies to buildings. It doesn't really apply, or it doesn't apply to asbestos in the ground. But that's not to say that you can just not worry about it and forget about it.
Sam Levy	So why is that? What if there is a contaminant in the ground on my side?
Aidan Thomson	Well, if it's causing a risk to anyone, it could be contaminated land under the Part 2A Contaminated Land Regime and need remediation. And it could be a breach of general sort of health and safety duties if its presenting a risk to employees or visitors that's not controlled. That could mean a liability down the line in tort, if someone gets exposed. And that leads to you know, an illness down the line.  It could also, depending on the terms of your lease give rise to liability for remediation under the lease terms, whether or not the sort of asbestos in the ground is posing a risk or not. And it might be that asbestos in the ground is a risk post-development, you know, if it's there in the ground and it's going to affect people post-development. Then you are going to have to deal with it during the development process. And dealing with asbestos you know, has its complications, final point. Dealing with asbestos does have its complications. You know, quite apart from anything else, any asbestos waste is going to be have to dealt with very carefully and expensively.
Sam Levy	Very interesting. Alright, well I think that's all we have time for in today's session. So the only thing that's left for me to say is thank you very much Aidan and Isabelle for answering those questions. And I hope everyone listening today, found that useful and informative. And as I said at the beginning, we'll come back to any questions in writing after today's session. Our next session is on the 22 <sup>nd</sup> of July and that will cover environmental permits. So please do join us in that session as well if you're available. And

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<b>Speaker</b>	<b>Dialogue</b>
	I hope you will have a good rest of the afternoon and thank you very much for attending today.
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