

Avoiding the pitfalls of the waste management and liability regime

Transcript

Speaker	Dialogue
Sam Levy	Hello everyone and welcome to this afternoon's next 20-minute instalment of our BCLP Environmental Bulletin Series. I'm Sam Levy from the BCLP Environmental Team and I'll be asking the questions today with answers coming from my colleagues, Aidan Thomson and Isabelle Laborde. If anyone has any questions throughout the session, then please do ask them in writing using the questions function which you should all see on your screens. We will reply to these in writing after the session. Right. So let's get started. So we're here today to talk about waste in property and property transaction context. Aidan, let's start with the fundamental question. What is waste?
Aidan Thomson	Well Sam, you might think that it's a common sense question, really, but the legal definition of waste is any substance or object that the holder discards, intends to discard or is required to discard. You only have to look at the case law on the definition of waste to understand that the question has become anything but straightforward or common sense.
Sam Levy	OK. So where do the difficulties lie?
Aidan Thomson	Well, I guess, I suppose in most cases it's gonna be clear that a substance or object is waste. It's completely defunct, it's unwanted and you need to get rid of it. Things like asbestos-containing material, used office supplies – these things are clearly waste. But sometimes there's gonna be a bit of doubt as to whether or not it's actually waste yet. Maybe, for example, it could be easily reused by you or someone else. Maybe it has a value to someone else. Maybe it hasn't actually obviously been discarded yet. All of these things make applying the definition quite tricky.
Sam Levy	So why is it so important to know whether something is waste or is not waste?
Aidan Thomson	Well, that's pretty simple because a huge amount of legislation applies to waste as soon as it's created to make sure that it gets dealt with as soon as possible by disposal, recovery or recycling so that it doesn't end up accumulating in the wrong place and causing an environmental or a health and safety problem. And compliance with the legislation is tricky and there are criminal and regulatory liabilities associated with getting wrong. So you need to know whether what you have is waste or not.
Sam Levy	So in a real estate context, how would waste come up?
Aidan Thomson	<p>Well, we find that waste generally comes up in three different scenarios. Well, first of all, buildings create waste when they're being operated and this needs to be managed by owners and managers to comply with the law, things like stationery waste, all sorts of things ... stationery waste, packaging waste, printer toners, food and catering waste, fluorescent tubes, waste batteries, waste electrical and electronic equipment like computers, chemicals. If you're manufacturing things as well at your building, there could be all sorts of other types of waste created as the building is used. So that's one kind of scenario.</p> <p>But then also in the real estate context, there are often circumstances where a large amount of waste is discovered on land or within a building. Perhaps it's been fly tipped there by a third party or maybe the owner is, you know, storing it there for another time, when in actual fact, the reality is he has no further use for it, which means that it's waste and it can't just be left there. And then there's a final scenario, the third of the three scenarios, is that waste often comes up in the property development context. Excavations and demolitions produce huge amounts of waste and this all needs to be handled properly.</p>

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Sam Levy	OK then. So let's consider each of those in turn. Firstly, Isabelle, what do property owners and managers need to know about waste generated as part of the operation of the building?
Isabelle Laborde	Well, Sam, like any other waste producer or holder, property owners and managers have a legal duty of care called the Waste Duty of Care to ensure that their waste is managed in accordance with legislation and does not cause harm to the environment.
Sam Levy	So could you tell us a little bit more about the Waste Duty of Care?
Isabelle Laborde	Well, it's a duty imposed on anyone handling waste to take all reasonable steps to ensure that the waste is not disposed of unlawfully or treated, kept or disposed of in a way that causes pollution or harm. There is also a duty to ensure that the waste does not escape from the person's control and is only transferred to an authorised person and with a written description that enables that person handling the waste to know enough about it to deal with it properly. It's an offense to breach the duty of care.
Sam Levy	Alright, so that sounds pretty serious then.
Isabelle Laborde	Oh, it is. The starting point to satisfy it is to have a clear idea of the types of waste you generate. Certain types of waste are subject to specific legislation. This will enable you to understand your obligations for the management of your waste.
Sam Levy	What types are you talking about here?
Isabelle Laborde	Well, it's certainly important to know whether you have any hazardous waste. Hazardous waste is a special category of the more common general or controlled waste.
Sam Levy	OK. So can you tell me a little bit more about hazardous waste? Aidan, have we lost Isabelle there?
Aidan Thomson	I think we have, Sam. Why don't you just continue asking the questions direct to me?
Sam Levy	Alright, alright. So, Aidan, can you pick up there and tell us anything more about hazardous waste specifically?
Aidan Thomson	Yes, I mean, it's controlled waste. Well, hazardous waste displays one of 15 hazardous properties such as explosive or highly flammable, carcinogenic or corrosive, and there's a ban on the mixing of hazardous waste and non-hazardous waste or the mixing of various categories of hazardous waste. So you have to be very careful, Sam, to know, you know, what kinds of waste do you have.
Sam Levy	Alright, so aside from the hazardous waste concept, are there any other types to be aware of?
Aidan Thomson	Yes. You have to pay special attention to waste that's in the so-called producer responsibility waste stream, such as waste batteries, waste electrical and electronic equipment and packaging waste. Each needs to be managed in accordance with this specific legislation.

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Sam Levy	Right. OK. So let's say I get a good handle on the types of waste that my building is producing. What happens next to make sure that the duty of care is complied with?
Aidan Thomson	Well, in short, what you've got to do is look after it, and then give it to an authorised person in the waste chain who will either dispose of it, recover it or recycle it himself or who will pass it onto someone else who will do those things.
Sam Levy	So how exactly can you do that?
Aidan Thomson	Well, you need to do due diligence on who you're giving the waste to, and what they intend to do with it, and you can check these things on the Environment Agency's Public Register which provides information on waste carriers and broker and dealer registrations as well as environmental permits and exemptions for waste operations. Your contractor should be on the register. If you can't find any trace of them, then that should be a red flag – cause if they're not legit and helping you to deal with your own duty of care. And every so often, you should update on all of your checks.
Sam Levy	Right. Got it. So is there anything else that you should do on top of the DD side of things?
Aidan Thomson	Very much so. Not only have you got to check these people out that you're giving the waste to, you need to keep the formal Waste Transfer Notes that you receive from the person to whom you pass your waste, and they've got to be kept for a minimum of two years. So these notes indicate the nature of the business that produced the waste, the type of waste, the amount of waste collected, how the waste is contained, the details of the company collecting the waste and the date and place of collection and the destination of the waste. So all sorts of things really, and you must by law be provided with one of these. Again, if you're not provided with one of these from the person that you give your waste to, it's a red flag and an indicator that you're not satisfying your duty of care.
Sam Levy	So what about hazardous waste specifically?
Aidan Thomson	Well, as Isabelle says, that has to be dealt with separately. Any movement of hazardous waste has to be accompanied by something called a Waste Consignment Note provided by the person that you give the waste to. They're pretty similar in content to the Waste Transfer Notes that I just described but Consignment Notes have to be kept for longer. They have to be kept for three years rather than just two.
Sam Levy	OK. So Isabelle, are you back online, just to check?
Isabelle Laborde	I'm back.
Sam Levy	We've got you. OK. Alright, so Isabelle, how about now let's move on to the second scenario? The scenario where waste is present on the property. So as Aidan said earlier, most commonly that's fly tipped waste put there by some third party, but it's not always that. Sometimes it's been put aside by the occupier to store for a rainy day, but in fact there was never any prospect of it being used by him and it's effectively discarded. So looking at the fly tipping angle first, what if you find that some waste has been illegally tipped on your land?

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Isabelle Laborde	Well, Sam, anyone who's fly tipped waste has breached their waste duty of care is in trouble, but only if they can be found. Regulators like the Environment Agency will carry out their own investigation and try to find the culprit, but these investigations don't always bear fruit. Either the perpetrator cannot be found or they can but they haven't got the resources to right their wrong. In those circumstances, the only real course of action is to arrange for the safe removal and disposal of the waste at your own cost.
Sam Levy	Right. OK. But can you be forced to remove the waste?
Isabelle Laborde	Absolutely. The regulator may serve a Section 59 notice on the occupier to remove waste deposited in breach of the duty of care, and it is an offense to fail to comply with a Section 59 notice without reasonable excuse. The enforcing authority has step in powers to do what is required by the notice and to recover its cost from the recipient of the notice.
Sam Levy	So what about where the occupier has just left waste to accumulate?
Isabelle Laborde	Well, power to require waste to be removed under Section 59 also applies to this scenario.
Sam Levy	OK. So can a landlord get dragged in, in that scenario?
Isabelle Laborde	Yes. Section 59 notices can be served on them too.
Sam Levy	So then that means that a landlord can be liable for its tenant's unlawful waste activities or the activities of the fly tippers? Is that right?
Isabelle Laborde	That's correct. More and more landlords have found themselves liable for clearing up waste left onsite especially where the tenant disappears.
Sam Levy	But how could the landlord be responsible if the tenant is in breach of the terms of its lease?
Isabelle Laborde	Well, the landlord could be criminally liable under the duty of care as knowing permitter of its tenant's unlawful waste operation or unlawful deposit of waste at the lease premises, if the landlord could have noticed that the waste was being accumulated in clear breach of the lease but took no action.
Sam Levy	OK. So in summary, one needs to beware the pitfalls of accumulating waste yourself or somebody else leaving it there on your property. So, Aidan, let's now move onto the third scenario which was waste in context of development. So you said earlier that a development site has the potential to generate significant volumes of waste from excavations and from demolition, which needs to be handled properly. So what sort of things should you be aware of?
Aidan Thomson	Well, first of all, the waste needs to be protected as part of the duty of care. If you let it escape or pollute the environment, the Environment Agency or another regulator might want to take some sort of action. Now you're at liberty to have the waste taken away straightaway by waste carriers if you want if you've done your due diligence on them and know where the waste is going and you get the relevant Consignment or Transfer Notes, then, you know, you've satisfied your duty of care.

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Sam Levy	But presumably that's gonna be very expensive, isn't it? We could be talking about thousands of pounds.
Aidan Thomson	Oh, yes, I mean it's all going to have to be transported away and there will be landfill costs and landfill tax, so it'll add significantly to the development costs.
Sam Levy	OK. So is there anything that can be done about that?
Aidan Thomson	Well, yes, there are a few things. In certain circumstances, you might be allowed to register what is called a waste exemption with the Environment Agency or apply to the Environment Agency for an environmental permit that enables you to dispose of some waste onsite, and you can't do these things automatically. It depends on volumes. It depends on the nature of the waste. It depends on the locality. But if you can, then obviously it's a much cheaper option.
Sam Levy	What if you do not get one of those exemptions or permits before you do that?
Aidan Thomson	Well, technically, you could be in trouble with the Environment Agency. In the absence of anything else, they might also issue one of those Section 59 notices that Isabelle mentioned earlier to get you to remove the waste that you've deposited, which could be very costly indeed. Haulage costs, landfill costs, landfill tax and so on.
Sam Levy	I know that a lot of the time there's no need to dispose of material onsite because the material is actually needed in the new development for things like landscaping, levelling and even as a construction material in some cases. So can you use waste for that?
Aidan Thomson	Yes, you certainly can, and you don't need an environmental permit to do so because when excavated material is used for these purposes, it's considered to be recovered, which means that it's technically not waste any more. So the waste regulatory burden disappears, but this area is very heavily policed and people like the Environment Agency are always on the lookout for invented landscaping, etc., that's just effectively a cover for what is to all intents and purposes waste disposal. The waste that you use has to be suitable for the new purpose that it's put to.
Sam Levy	Presumably showing this is something of a minefield.
Aidan Thomson	Yes, it is. It's quite involved. But something called the Claire protocol provides a framework which allows you to reuse excavated materials either onsite or on a third-party site without it being classed as waste, and developers really need to follow that.
Sam Levy	Presumably you need a good paper trail that shows what you've done to adopt and follow the Claire protocol.
Aidan Thomson	You certainly do, and if you don't, the Environment Agency might not believe that you've recovered the waste material with the result that it remains waste and remains subject to the waste regulation, and it might mean ultimately, that you have to remove it at significant cost.
Sam Levy	OK. So it sounds to me as though there's no hard and fast rule here. The waste arising from a development can be dealt with by any rule of the transfer to a waste area proposal

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	on site under environmental permits or waste exemptions or recovery as construction material.
Aidan Thomson	Yes, yeah. The waste plan for a new development usually contains a pretty bespoke plan for the waste created that utilizes a lot of the avenues available. It can be quite complex separating the waste out into its various fractions, hazardous and non-hazardous, for example. You know, each with a different route for being dealt with and so on.
Sam Levy	So thinking about property transactions for a moment, Isabelle, if I'm buying a property that I'll be using as the operating base, what should I be aware of?
Isabelle Laborde	Well, first of all, you want to be sure that there are no suspicious accumulations of the material onsite. If you're worried, then this can be established through a site visit. Remember that a new owner can be required to remove this if it is classed as waste. Then you need to do – well, you need a sense of how the waste duty of care is being complied with as you operate the property. If you are moving into an empty building, then you have a clean slate, and you can introduce a system that ensures compliance. On the other hand, if you're moving into a tenanted building, then you will need to know what is already happening and consider whether it satisfies your own duty of care. If the landlord is handling everybody's waste, then you need to ensure your waste is properly diligenced. This will also be helping the landlord.
Sam Levy	And Aidan, what if you're buying a property to redevelop it?
Aidan Thomson	Well, think very carefully in advance about how you'll deal with the waste that arises on redevelopment. Having everything removed to an offsite landfill is very expensive so you should be asking yourself whether when the time comes, you'll be able to take advantage of the Claire protocol or the environmental permits and exemptions that I mentioned earlier.
Sam Levy	<p>Understood. Understood. OK, well, I think it's time to leave things there. Waste is definitely something property managers and property developers to keep an eye on, and dealing with waste is clearly a very complicated area. Whichever of the scenarios we've talked about today, you always have to remember that waste found in unusual locations can be traced back to you, and if you're not dealing with waste properly and the trail does lead back to you, then you could find yourself in trouble. Regulators like the Environment Agency have extensive powers to have waste removed, and that can be a very expensive business. So it's really important to get these things right.</p> <p>Thank you everyone for attending and please do join us for our next session on chemicals regulation and emissions trading in the sort of post-Brexit world and that session will be on the 24th of [inaudible]. Thanks everyone.</p>