Neutral Citation Number: [2016] EWHC 2596 (QB)

Case No: C90CF029

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CARDIFF DISTRICT REGISTRY

Cardiff Civil Justice Centre
2 Park Street Cardiff CF10 1ET

Date: 26 October 2016

Before :

HIS HONOUR JUDGE JARMAN QC

- -

Between :

ELLIS JOHN PRICE **ELIZABETH JOYCE HARDWICKE**	**Applicants**
- and -	
POWYS COUNTY COUNCIL	**Respondent**

- -
- -

Miss Annabel Graham Paul (instructed by **JCP Solicitors**) for the **applicants**
Mr Stephen Tromans QC and Miss Rose Grogan (instructed by the **respondent)**

Hearing dates: 30 September 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HHJ JARMAN QC :

1. The applicants are the owners of a farm known as Rhosforlo Garth Builth Wells. The respondent (Powys) is the local authority with statutory duties in respect of waste management. From the early 1960s until 1993 its predecessors operated a landfill site (the site) on part of the farm. By a tenancy agreement (the tenancy) dated 1 August 2001 the applicants let to Powys a small piece of land adjacent to the site for the purpose of monitoring it and the installation and operation of a treatment and filtration plant and a pumping station. In 2015, Powys terminated the tenancy and removed the system, and maintains that it is not responsible for any privately owned landfill site upon which landfill operations had ceased before 1996. The applicants contend that that position is wrong in law. Part IIA of The Environmental Protection Act 1990, which was inserted by the Environment Act 1995, introduced for the first time provisions for determining who is the appropriate person to bear the responsibility imposed thereby to carry out works of remediation in respect of contaminated land as therein defined. No such land has yet been identified on the farm, but the applicants are concerned that there is a real risk that their land may become identified as contaminated in the future and seek a declaration that Powys is a person responsible within the meaning of that legislation.

2. There is no dispute as to the facts, which accordingly may be shortly stated. The applicants' predecessor allowed the Builth Wells Urban District Council to create the site in the early 1960s by culverting a water course and to tip domestic and commercial waste into the valley through which it runs.

3. Upon local government in 1974 reorganisation the Borough of Brecknock (Brecknock) became responsible for waste disposal and entered into a series of licences with the applicants and their then co-owner to tip "refuse" on the site. The terms of the licences included an agreement on the part of Brecknock before the expiration of the licence to leave the surface of the site at a height not exceeding the level of the adjoining land, and not to do or suffer to be done upon the site anything which may be or become a nuisance, damage, annoyance of inconvenience to the owners or occupiers of any adjoining property. By the last such licence in 1987 Brecknock agreed before the termination of the licence to grade the site, to cover it with top soil and to sow grass.

4. Tipping ceased in 1992 and Brecknock carried out the required works to bring the site back into agricultural use. After local government reorganisation in 1996, it was assumed by Powys that it assumed liability for the site. Powys wrote to the applicants saying that it had responsibility for all local authority environmental functions in the county and asking for permission to enter onto the site, to sink a borehole and to take samples of leachate levels. The watercourse runs into two rivers, Arfon Irfon and The Wye, both of which are designated as Sites of Special Scientific Interest.

5. That monitoring led to concern by Powys and the Environment Agency Wales (EAW) about leachate pollution of the rivers. Accordingly, in 1999 Powys asked the applicants for permission to install gravel drains around the edge of the site and land drains across the top. Permission was given and the works were carried out.

6. The remediation regime under the 1990 Act as amended was not brought into effect in Wales until September 2001. Powys sought to enter into the tenancy on the

assumption that it was bound by the regime. In the autumn of that year Powys, acting under the tenancy, constructed a leachate treatment plant adjacent to the site, and obtained a discharge consent from EAW. In 2006, a CCTV inspection of the culvert pipe revealed several cracks, but no works were then carried out for financial reasons. In 2009 EAW instructed Powys to carry out a further inspection, and that revealed significant structural deficiencies which required urgent repair. These were carried out, including relining the culvert pipe, at a cost of £105,000. In 2012, following what was described as a "pollution incident" at the site, Powys installed an overflow system to the treatment plant.

7. In 2013, the contaminated land officer of Powys, David Jones, was tasked with the consideration of closed landfill sites in the county within a policy of focusing on risk to human health with controlled waters being a secondary consideration, and because of stringent budgetary controls, targeting those sites where risk, environmental and financial, is seen as greatest. In an internal memorandum, he said this:

> "Since the closure of the landfills, and after the unification of the shires into Powys, it has been assumed that liabilities for the former shire landfills transferred to Powys CC. My initial consult with our legal also confirmed this. Indeed, the premise of the Part IIA Contaminated Land Regulations introduced in Wales in 2001 was that it would deal with retrospective contamination following the polluter pays principle. This key principle was tested for the first time in 2006 in a case which has set a legal precedent."

8. He then referred to *R (on the application of National Gas Grid (formerly Transco plc v Environment Agency* [2007] 1 WLR 318 where it was held that liability does not transfer from a previous company or statutory organisation to a later new organisation. After taken further legal advice, he expressed the opinion that the site (amongst others) had completed operations before 1994 and that Powys could not have been the original polluter.

9. Thereafter, Mr Jones had meetings with National Resources Wales (NRW), which had assumed the relevant functions of EAW, with a view to transferring the discharge permits to the landowners or surrendering them. On 27 March 2015 he wrote to the applicants giving three months' notice to terminate the tenancy. He referred to the case cited above and continued:

> "This means this Authority is not liable for any contamination from the site. In view of the facts outlined it is the internal legal department's view that the landowner (of the landfill) should assume responsibility for any potential liabilities associated with contamination."

10. The applicants instructed solicitors who wrote in reply to say that they did not accept that position and that it could not have been the intention that as a result of local government reorganisation public bodies could escape a liability that otherwise would exist. They gave notice that in the absence of a satisfactory solution, they would advise their client to commence proceedings for a declaration that the transfer of

liabilities from Brecknock to Powys included the contingent liability for contaminated land under the Part IIA regime of the 1990 Act.

11. In June 2015 NRW took leachate samples at the site, and in an email to Mr Jones on 9 July said this:

> "The freshwater Environmental Quality Standard for Iron is 1000 ug/L as an annual average. Section 15 (b) of your permit states "the discharge shall not contain quantities of any List II substance such as to cause or contribute to the concentration of the substance in the receiving water exceeding the relevant EQS." This will need to be determined, for example 12 months monitoring (Iron being a List II substance). It could be that after 12 months of monitoring the average is below the EQS and we could revisit the suggestion of surrendering the permit.
>
> At the moment, should we multiply the result of the downstream sample by 12, the result is above the EQS (1428 ug/L). The upstream sample would be marginally above the EQS (1033.2 ug/L) but it does appear the discharge from the treatment plant is having a detrimental effect on the watercourse. We need to work together to improve this impact. Obviously this is not a fair representation, which is why I have mentioned 12 months monitoring from the start of next month?"

12. However, Powys did not take up that proposal. It responded to the applicants' solicitors maintaining its position. It surrendered its discharge permit and terminated the tenancy. No further monitoring of the site has been carried out and NRW have not taken any further steps in relation to the levels of iron detected in June 2015.

13. I turn to the law. Powys was created by the Local Government (Wales) Act 1994 under which SI 1995/3198 was made. That abolished Brecknock, Radnorshire and Montgomeryshire on 31 March 1996 and replaced them with Powys as from the following day.

14. Section 22 of the 1994 Act transferred specific functions to Powys set out in schedules. Schedule 9 paragraph 17 made changes to the 1990 Act to refer to the new authorities.

15. Section 53 deals with the continuity of exercise of functions, and provides so far as material:

> "(1) The abolition of the old authorities shall not affect the validity of anything done by any of those authorities before their abolition.
>
> (2) Anything which at 1 April 1996 is in the process of being done by or in relation to an old authority in the exercise of, or in connection with, any relevant functions may be continued by or in relation to the authority ("the successor authority") by

> which those functions become exercisable or, as the case may be, become exercisable in respect of the area in question.
>
> (4) Anything done by or in relation to an old authority before 1 April in the exercise of or in connection with any relevant functions shall, so far as is required for continuing its effect on and after that date, have effect as if done by or in relation to the successor authority.
>
> (5) Subsection (4) applies in particular to-
>
> (c) any licence, permission, consent, approval, authorisation, exemption, dispensation or relaxation granted by or to an old authority.
>
> (6) Any reference in this section to anything done by or in relation to an old authority includes a reference to anything which by virtue of any enactment is treated as having been done by or in relation to that authority.
>
> (7) Any reference (however framed) to an old authority in any document constituting, or relating to, anything to which the provisions of this section apply shall, so far as is required for giving effect to those provisions, be construed as a reference to the successor authority."

16. Section 54(2)(c) gave to the Secretary of State power to make an order "for the transfer or property, rights or liabilities, and of related functions, from an abolished body or the Residuary Body to a new principal council or other public body or to the Residuary Body." Under that provision, the Local Government Re-organisation (Wales)(Property etc.) Order 1996 was made, article 2(7) of which provides:

> "Where property, rights liabilities or duties of an old authority or other body are vested, by virtue of this Order, in a new authority or other body, anything done by or in relation to the old authority or body in connection with such property, rights, liabilities, or duties shall be treated as if it had been done by or in relation to the new authority or body as the case may be."

17. Article 4 provides so far as material:

> "Where in relation to an old authority, there is only one successor authority, all the property, rights and liabilities of the old authority shall…vest in that successor authority."

18. It is common grounds that the word "liabilities" within that article includes potential liability. However, at the heart of this dispute is whether that word is wide enough to include a liability which arises for the first time by subsequent legislation, such as the remediation regime under the 1990 Act as amended.

19. That regime was inserted into the 1990 Act by section 57 of the 1995 Act to regulate the remediation of land where contamination results in significant harm to human health or to the environment, or where there is a significant possibly of such harm. It was brought into effect in Wales on 15 September 2001 by the Environment Act 1995 (Commencement No 20 and Savings Provision) (Wales) Order 2001. Under section 78E (1) of the 1990 Act the enforcing authority must serve on each person who is an "appropriate person" a remediation notice specifying what the person is required to do by means of remediation and when it must be done by.

20. Section 78F defines "appropriate person" as follows:

> "(1) This section has effect for the purpose of determining who is the appropriate person to bear responsibility for any particular thing which the enforcing authority determines is to be done by way of remediation in any particular case.
>
> (2) Subject to the following provisions of this section, any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person.
>
> (3) A person shall only be an appropriate person by virtue of subsection (2) above in relation to things which are to be done by way of remediation which are to any extent referable to substances which he caused or knowingly permitted to be present in, on or under the contaminated land in question.
>
> (4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of remediation, the owner or occupier for the time being of the contaminated land in question is an appropriate person."

21. Under section 78YA of the 1990 Act power was given to the Secretary of State to issue guidance to explain how local authorities should implement the regime including how they should go about deciding whether land is contaminated in the legal sense of the term. In Wales these powers now vest in the Welsh Ministers by virtue of section 162 and paragraph 30 of Schedule 11 to the Government of Wales Act 2006. Under those powers, the Welsh Minister issued Contaminated Land Statutory Guidance -2012. That refers to persons falling within subsection (2) above, namely those who caused or knowingly permitted contamination as Class A persons, and those falling within subsection (3) above, namely the owners or occupiers of the land, as Class B persons. Primary responsibility for remediation of contaminated land will rest upon the original polluter and it is only if no such persons can be found that responsibility will fall upon the owner or occupier of the land. It is accepted on behalf of the applicants that if the site is identified as amounting to contaminated land within the meaning of the 1990 Act, they would be Class B persons. The issue is whether Powys would come within Class A.

22. The identification of an appropriate person within section 78F of the 1990 Act was considered by the House of Lords in the *National Grid* case relied upon by Powys. That case involved not local government reorganisation, but the transfer of the property rights and liabilities of a private gas company to a state owned gas utility under the Gas Act 1948 and then to a public limited company under the Gas Act 1986. In each case the statutory provision provided that the successor company would take over the liabilities of the predecessor company "immediately before" the transfer date. The House of Lords held that in each case the transfer was limited to liabilities existing immediately before the relevant vesting date and did not encompass a liability created in 1995 by the amendment of the 1990 Act to remedy pollution caused by predecessors.

23. I was referred by counsel to a number of passages in the opinions of their Lordships. At page 1786C-D Lord Scott referred to the phrase "immediately before" in the Gas Act and said this:

> "The notion that that phrase can encompass a liability created by Parliament in 1995 by the amendment of the 1990 Act seems to me, with the greatest respect, unarguable. Parliament is, of course, sovereign and can impose what liabilities it sees fit on whom it chooses. But very careful statutory language would be needed to impose on a company innocent of any polluting activity a liability to pay for works to remedy pollution caused by other to land it had never owned or had any interest in it."

24. Lord Scott referred to the argument on behalf of the Environment Agency that the successor company took the assets and should also bear any liabilities relating to the site and said at 1786 F-G:

> "An immediate answer is that the liabilities imposed on British Gas plc by the 1986 Act were the liabilities existing immediately before the date of transfers and that those liabilities could not include liabilities coming into existence, some nine years later, under the 1995 amendment to the 1990 Act. But an additional answer is that the agency's attempt to cast the burden of paying for the remediation works on to Transco falsifies the basis on which the investing public were invited to subscribe for shares in British Gas plc."

25. Lord Hoffman agreeing with the reasons of Lord Scott said at 1782B:

> "No such liability existed until Part IIA was inserted into the 1990 Act by the Environment Act 1995. It is true that the legislation was retrospective in the sense that it created a potential present liability for acts done in the past. But that is not the same thing as creating a deemed past liability for those acts. There is nothing in the Act to create retrospectivity in this sense."

26. Lord Neuberger at 1788 A-B put it this way:

> "There are no doubt arguments for extending "the polluter pays" principle to a company which has acquired the whole business (or at least the whole of the relevant part of the business) of the polluter, at least in some circumstances, perhaps particularly where the company concerned has taken a statutory transfer of the business. However, there are also arguments against extending the principle of "the polluter" beyond the original polluter, for instance to entities which happen to have acquired the whole or part of the business of the polluter, perhaps particularly where members of the public have been invited to subscribe for shares in such an entity, when there was no statutory liability in respect of contaminated land at all."

27. In *Bavaird v Sir Robert McAlpine and others* [2013] CSIH, the Scottish Court of Session (Inner House) considered the potential liability of a local authority for exposing an employee to asbestos during employment with a predecessor authority. The order transferring liabilities from the latter to the former included in the transfer "any property, rights or liabilities." At paragraph 26 of the opinion of Lady Paton, she referred *Walters v Babergh DC* (1983) 82 LGR 235 which was a case concerning local government reorganisation in England and cited Woolf J, as he then was, at pages 242-243, who said:

> "The whole tenor of the order is designed to ensure that the reorganisation would not affect events which would otherwise have occurred further than is absolutely necessary because of that reorganisation. That the public should be able to look to the new authority precisely in respect of those matters which it could look to the old authority; that the public's position should be no better or no worse."

28. At paragraph 34 Lady Paton adopted that reasoning, and held that word "liabilities" in the transfer order in question includes contingent liabilities and potential liabilities such as liabilities which emerged after the date of the transfer as a result of anything done before. Such a construction would not treat as negligent actions which were not so categorised beforehand and this was in contrast to the circumstances in *National Grid.*

29. Miss Paul, for the applicants in this case, submits that the primary reason given by their Lordships in *National Grid* was that the liabilities transferred were those existing "immediately before" the transfer date and this phrase is absent from the 1996 order which applies in the present case. Moreover, the secondary reason, as to the basis on which investors subscribed for shares in that case is absent in the present.

30. Miss Paul submits that in this case, as the liabilities of Brecknock were transferred not to a private company, but to another local authority, the chain of succession involved passing liabilities from one emanation of the State to another, and that public policy militates in favour of a purposive approach to the transfer of liabilities in order that members of the public are in the same position in relation to the new authority as they would have been in relation to the old authority. The observations of Woolf J in *Walters*, she submits, are directly in point.

31. Mr Tromans QC, for Powys, submits that there is no provision in section 78F which suggests that the polluter's successors, whether a private company or a public body, are deemed to be responsible for the acts of the original polluter. Moreover, the 1996 Order does not assist the applicants. Both articles 2(7) and 4 use the language of vesting which indicates that such liabilities must, as at the date of transfer, have been vested in the old authority. While different words are used to those in the Gas Acts, the effect of the transfer is similar. The 1990 Act was not in force when Powys was created. The land was not contaminated in 1996 and indeed has not even now been determined to be contaminated within the meaning of the 1990 Act, and so there was no liability on Brecknock under that act when it ceased to exist.

32. Moreover, Mr Tromans submits, if Parliament had intended all liabilities, including those created by legislation coming into force in the future to be transferred it could and should have provided for this in very clear words, as Lord Scott indicated in *National Grid.* No such clear words are used in the 1996 Order. Lord Scott and Lord Neuberger, in that case, were applying general principles of statutory construction, and there is no reason why the requirement of clear words are needed to apply liability under legislation not in force at the time of transfer should not apply equally to public authorities. The cases of *Walters* (which was cited in argument in *National Grid*) and *Bavaird* concerned contingent liabilities resulting from acts committed in breach of a legal duty existing before the statutory transfer but which did not become actionable until damage occurred afterwards. That is a very different situation to the one in the present case, where the law in force at the time of transfer gave no basis for liability.

33. I accept this distinction, and I accept that there has been no decided case where the word "liabilities" in the context of transfer orders has been held to include a potential liability arising from a change of law after the date of transfer. The question is whether as a matter of construction that word in the 1996 Order should be construed so widely as to include potential liability arising from the change in law which occurred in September 2001. Mr Tromans submits that would be wrong as a matter of principle.

34. In my judgment, the reasoning of their Lordships in *National Grid* was based upon the facts of that case and upon factors which are not present here. In saying that he found it quite impossible to say that the liability under the 1990 Act existed, even as a contingency, "immediately before" the transfers, Lord Hoffman referred to a phrase in the Gas Act which does not appear in the 1996 Order. The other reason expressed or adopted by each of their Lordships, that the imposition of such liability upon a successor would falsify the basis on which the investing public were invited to subscribe for shares in British Gas plc, is also absent from the present case.

35. I accept that it would be a very wide construction of the word "liabilities" in the 1996 Order to include liability under the 1990 Act which was brought into existence some five years later. In my judgment, however, the tenor of the 1996 Order, as it was in *Walters,* is that the public should be able to look to Powys precisely in respect of those matters which it could look to Brecknock and should be in no worse position as a result of local government reorganisation. It is not "absolutely necessary," to adopt the phrase of Woolf J, that Powys should avoid liability under the 1990 Act when Brecknock, had no reorganisation occurred, would not escape liability. In my judgment that principle is strong enough to justify such a wide construction.

36. That however, is not the end of the matter. Mr Tromans submits that there are a number of factors which show I should decline to exercise the court's discretion to grant the declaration sought. It has been emphasised that the jurisdiction of the court to grant a declaration is not to declare the law generally or to give advisory opinions but is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else (see *Gouriet v Union of Post Office Workers* [1978] AC 501).

37. Wall LJ summarised the principles on which the discretion should be exercised in *Rolls-Royce Plc v Unite the Union* [2010] 1 WLR 318 as follows so far as applicable to the facts of the present case:

> "(1) The power to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.
>
> (3) Each party must, in general, be affected by the court' determination of the issues concerning the legal rights in question.
>
> (4) The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue…
>
> (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue."

38. The first factor upon which Mr Tromans relies is that there is no real and present dispute between the parties. None of the applicants' land has been determined to be contaminated land within the meaning of section 78A(2) of the 1990 Act, which is land which appears to the local authority to be in such a condition by reason of substances in, on or under the land that "(a) significant harm is being caused or there is a significant possibility of such harm being caused; or (b) significant pollution of controlled waters is being caused or there is a significant possibility of such pollution being caused."

39. Under section 78B(1)(a) local authorities are under a duty to inspect land in their areas for the purposes of identifying contaminated land. Powys has undertaken such inspection and has identified the site as potentially contaminated land, one of 10,000 sites in its area which Powys has so identified. Those sites which pose the greatest risk will be investigated first and the site does not come within that priority and has not yet been the subject of a detailed investigation to determine whether it is contaminated land. Moreover, NRW has not provided any information to suggest that it is.

40. In my judgment, there is a real and present dispute between the parties as to the extent to which the applicants are entitled to look to Powys as an "appropriate person" to carry out any remediation works under the 1990 Act. Powys accepted responsibility for the site for a number of years until 2015, when it was clearly said on its behalf that it no longer accepted any responsibility for contamination of the site. During that time Powys carried out works on a number of occasions at the site in an attempt to prevent leachate contaminating the watercourse and thus the rivers.

41. The finding of NRW in July 2015 was that it appeared that the discharge from the treatment plant was having a detrimental effect and that NRW and Powys "needed to work together to improve this impact." Further monitoring was suggested to achieve a 12 months' average, but that was not carried out, and Powys has not worked with NRW to improve the impact. As Miss Paul submits, the position which Powys has adopted affects the current maintaining and monitoring of the site as well as any future liability under the 1990 Act. In my judgment there is a real and substantial risk that the site will be found to be contaminated land in the foreseeable future. It is understandable why the applicants need to know whether Powys is an appropriate person.

42. The second main factor relied upon by Mr Tromans in submitting that no declaration should be granted is that there is an alternative remedy. Section 78L of the 1990 Act provides for an appeal against a remediation notice to the National Assembly for Wales. Under the Contaminated Land (Wales) Regulations 2006/2989, which govern such appeals, a person served with such a notice may appeal against the local authority's decision that they are an appropriate person and/or on the ground that some other person in addition to them is an appropriate person. Mr Tromans submits that there is a possibility the applicants will also be an appropriate person as they permitted the tipping. In that event, provision is made for the apportionment of liability. All parties who may be affected have an opportunity to participate, unlike the present proceedings. By those proceedings, the applicants are seeking to circumvent the statutory appeal procedure.

43. In my judgment, that remedy is not yet available to the applicants as no remediation notice has been served. Moreover, the potential availability of the appeal procedure does not assist them in deciding how to proceed now in relation to potential liability. A declaration that Powys is an appropriate person would not prejudice any determination that another person (perhaps including themselves) may in addition be such a person or the apportionment of liability in that event, but such a declaration will make clear to the parties that the applicants are not solely, at least, responsible for potential liabilities. In the letter dated 27 March 2015, Powys expressed the view that "the landowner (of the landfill) should assume responsibility for any potential liabilities associated with contamination." On the conclusions I have reached, that is not an accurate statement of the law, and in my judgment the applicants are entitled to the declaration sought.

44. Miss Paul relied upon two alternative points, which do not arise for determination in light of my conclusions. Counsel helpfully indicated that they would make written submissions on any consequential matters which cannot be agreed, and that I should determine those issues on the basis of those submissions. Such submissions should be made within 14 days of handing down.