CONTAMINATED LAND

Recent Developments

STEPHEN TROMANS QC

BACKGROUND: PART 2A EPA 1990

- In force since April 2001
- Authorities have inspected 11,000 sites and determined over 500 as contaminated
- Very little by way of decided cases or appeals
- Difficulties with the scheme
- End of capital grant for local authorities 2017
- At least 10,000 sites remain for inspection

New sources of concern

- Fly tipping
- Micro-plastics (see CIWEM Report August 2017)
- Persistent fluorinated chemicals, e.g. PFOS, PFOA
- “Zombie pollutants”
- Coastal erosion

SUCCESSION TO LIABILITY

- House of Lords decision in *National Grid Gas v. Environment Agency* – privatised company did not succeed to any liability of nationalised gas board upon privatisation/transfer

- Court of Appeal decision in *Price & Hardwicke v. Powys CC* [2017 EWCA Civ 1133
  - Former landfill
  - Transfer after Part 2A enacted but before in force
  - Liabilities did not include the possibility of Part IIA liability
  - Cases on contingent liability of local authorities distinguished (see *Walters v. Babergh DC* (1983) 82 LGR 235)

APPEAL DECISIONS

- *St Leonard's Court* – contamination of water resources by bromide and bromate. Discussion of causing

- *Willenhall Gasworks* – presence of "gasworks waste" within housing estate. Issues of validity of determination, and knowingly permitting

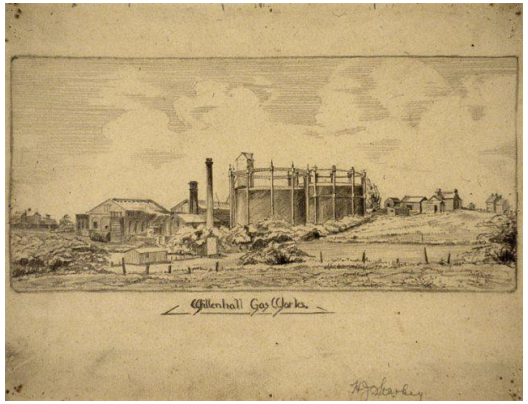
St LEONARD'S COURT

- Contamination by bromide and bromate from former chemical works carried out by Redland. Site redeveloped by Crest Nicholson. Preliminary works broke up hardstanding and allowed contaminants to be washed deeper into soil. Shallow excavation did not remove contaminants. Crest found to have "caused".

- Inspector and SoS decision upheld: *R (Crest Nicholson Residential Limited) v. Secretary of State* [2010] EWHC 561 (Admin)

- Decision on appeal that Redland and Crest be liable for scavenge pumping as an interim measure upheld; also decision on partial application of "sold with information" test in Crest's favour was upheld (awareness of bromide in upper parts of soil): *R (Redland Minerals Limited) v. Secretary of State* [2010] EWHC 913 (Admin)

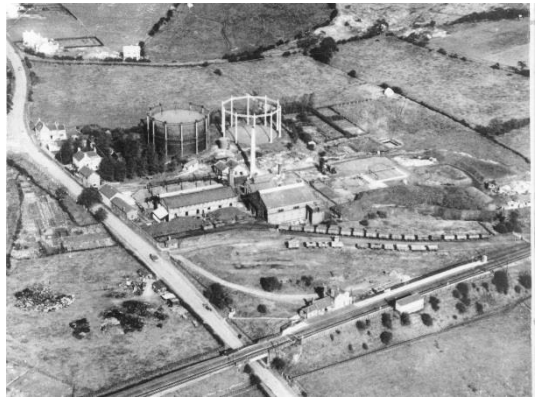
WILLENHALL DESIGNATION



- Agreed that case for existence of pollutant linkage with B(a)P. Walsall's approach to SSAC, zoning and topsoil were upheld as reasonable
- Advice to Walsall fell short of expert standard
- Failure to investigate high results as possible anomalies – relevance of CIEH guidance
- Shortcomings in Walsall's approach to SPOSH. No toxicological assessment undertaken. No risk assessment based on sound science.
- Failure to consider financial and stress impacts on residents in para. 4.27 appraisal

WILLENHALL
LIABILITY ISSUES

- Sale by council to developer
- Developer did not “cause” by moving material/infilling
- “Knowingly permitting”
  - Knowledge must relate to B(a)P not general gasworks waste, but no ned for knowledge of its health risks
  - Finding that developer did knowingly permit, despite fact that at the time chemical analysis of soil was unlikely
  - Council not unreasonable to exclude itself from liability under “sold with information” test



CONCLUDING THOUGHTS

- Ongoing viability of Part 2A?

- Lessons for local authorities
  - Importance of sound technical basis for determination
  - Use of experts
  - Preparation for appeal

- Lessons for developers/purchasers
  - Risks of liability for causing
  - Knowingly permitting test
  - Sold with information test

PART IIA: A Case Study

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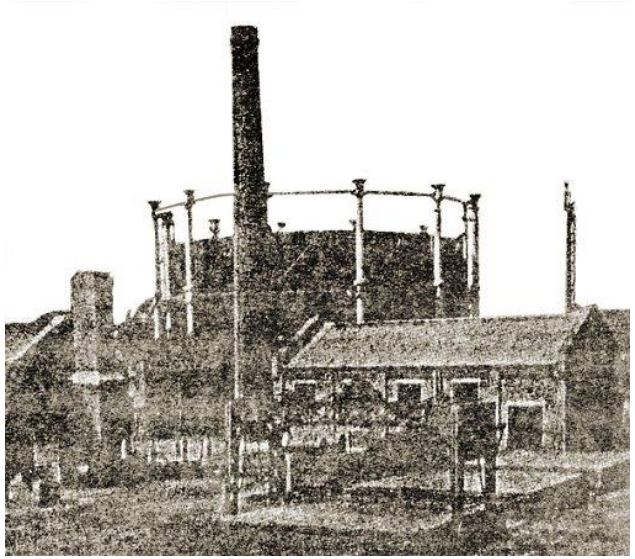
Stonegate Housing Estate Willenhall

- Land identified as contaminated March 2012 by Walsall MBC
- Remediation Notice March 2015
- Inquiry December 2015
- SoS Decision April 2017

Site history

- Willenhall Town gasworks from 1892 till 1957
- Period as gas holder station till 1965
- Area acquired for housing redevelopment by Council in 1965
- Sold to Appellant in February 1972
- Part sold on to E Fletcher in June 1972



Determination

- Consultants appointed to investigate in 2007
- Area divided into seven zones
- Zones 4 and 7 determined
- Determination made under 2006 Guidance
- 2012 Guidance came into force shortly after
- No obligation on Council to review determination
- Linkage of Benzo-a-Pyrene and young resident female child

Matters endorsed in appeal

- Council's consultants derived site specific assessment criterion of 1.02 mg/kg using CLEA model as a concentration at which there is likely to be minimal risk. Found to be "authoritative and soundly based"
- Approach to zoning not unreasonable
- Samples from top metre could reasonably be treated as representative of soils to which human receptors might be exposed

Council's obligations

- Council remained ultimately responsible to ensure advisers are competent – "intelligent customer"
- Lack of experience of lead consultant
- Reports factually incorrect and included a "schoolboy error" confusing SSAC and HCV
- Fell short of expert advice and should have been picked up by Council

Representative results?

- Council's expert acknowledged they simply did not know whether elevated samples were a genuine risk across the zone or merely hotspots
- No excuse for not carrying out further exploration to confirm in accordance with CIEH Guidance
- Mean concentration of 38 mg/kg not reliable
- Lack of scientific and technical assessment of risks arising as required by 2006 Guidance

SPOSH

- 2008 non-statutory guidance confirmed DQRA usually required if SGV exceeded
- 2006 Guidance referred to “unacceptable intake” but did not define it
- Ultimately risk assessment informs but cannot answer the question of policy
- Simple exceedance of SSAC does not imply SPOSH
- No proper exposure and toxicological assessment based on sound science undertaken

2012 Guidance

- Possible to “cure” initial unreasonableness by later evidence and SoS discretion
- Issue of whether Category 2 or 3
- SP1010 on CS4L for B(a)P said 5 mg/kg was “minimal risk”
- Failure to follow up review work on recognised expert in 2014
- Errors identified in DQRA work meant not possible to show “strong case”
- Failure in 4.27 appraisal to consider property blight and stress due to determination

Conclusions

- No absolute requirement of assessment process and balance must be struck
- However, determination has serious consequences and there is a public interest in ensuring decisions are made in a rigorous and robust manner
- Note also the criticism for lack of proper data: costs

Ground (c)

- No evidence Jim 2 “caused” (compare St Leonard’s Court decision)
- Knowledge of harmful properties/risks of B(a)P not necessary
- Knowledge of coal tar, coke, ash, clinker sufficient
- Knowledge of “gas works waste” not sufficient
- Control for 3 months sufficient to have “permitted”

Ground (d) and (e) – other persons

- Council could exclude itself under Test 6 as not having introduced receptors.
- Gas companies could not be found, but if they could would also be excluded under Test 6
- E Fletcher was also a “knowing permitter”, but had been dissolved and it was not reasonable to expect Council to seek its restoration to the register

Conclusions

- Relevant lessons for developers of land in the era before site investigations were common
- For councils: importance of good consultants and overseeing them properly; thorough preparation of evidence; proper risk assessment and investigation of outlier results
- Context – current lack of funding for councils to investigate and identify

Practical advice – what to do in Walsall before Christmas

- Excellent Premier Inn with enticing range of eateries nearby
- Great art gallery
- Good market with excellent pork pie stall
- Christmas lights could be better
- Very good Gala Baths, but since closed

Thank you for your attention