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Trustee personal liability for contaminated land remediation: the UK position

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ABSTRACT

Part IIA of the Environmental Protection Act 1990 creates a liability risk for trusts and trustees. Trustees may indeed be found liable pursuant to Part IIA's definition of an "owner" of contaminated land. This definition includes trustees to avoid the situation of people evading liability by transferring affected land into trust funds. However, the risk to trustees is sufficiently low. The law shows that trustees possess a lien over their trust funds that can be used to indemnify liabilities. Furthermore, Part IIA's proportionate approach to sustainable development considers the "hardship" that liability can cause to trustees and obviates the risk.

INTRODUCTION

The author of this article was moved to undertake research into the potential remediation liability that may be incurred by UK trusts and trustees, having read about the situation in the USA. But, in terms of the UK position, no substantial academic writing has been undertaken on this subject, and a knowledge gap existed (until this article) within the literature basis. It is noteworthy that a small paragraph is dedicated to trustee liability for contaminated land in Tromans and Turrall-Clarke's text titled *Contaminated Land*[1]; this seminal work further inspired the paper. The article represents an unlikely melding of two very different subjects, but its content may nonetheless prove interesting and useful to some.

Succinctly, it is here argued that remediation liability for contaminated land is a sufficiently low risk for trustees based in the UK. However, having considered the statutory regime in force, this work will nevertheless show that a direct liability risk exists. The regime's definition of "owner" makes it possible for trustees to be found liable. This work also argues that, given the clean-up costs, contaminated land could also create a significant financial risk for any trust holding such land as an asset. However, these risks are somewhat obviated by the regime's focus on proportionality. Notwithstanding liability, the work more broadly assists in understanding the trustees' rights to a trust fund, and how these rights are reflected during the power of investment.

This article examines the so-called "classes" of liability in Part IIA of the Environmental Protection Act (EPA) 1990.[2] This legislation establishes the regime for contaminated land identification and remediation in England and Wales.[3] In short, the importance of Part IIA for trusts and trustees lies in the substantial remediation costs that are attributed to the clean-up of contaminants. Such remediation can, in some circumstances, cost millions of pounds.[4] Here it will be shown that a remediation notice served on a trustee may create substantial losses for the trust fund and result, in certain circumstances, in trustee personal liability. Nonetheless it is argued that the risk of trustee personal liability for such costs is very low. Indeed, to be personally responsible to bear remediation costs, it appears that the trustee would have to show possession of land outside of their normal administrative powers and duties. However, the contaminated land regime shows that it may also be possible for liability to be incurred where a trustee

[1] Stephen Tromans and Robert Turrall-Clarke, *Contaminated Land* (2nd edn, London: Sweet & Maxwell) 176.
[2] Environmental Protection Act (EPA) 1990, pt IIA.
[3] Department for Environment, Food & Rural Affairs (DEFRA), *Environmental Protection Act 1990: Part 2A—Contaminated Land Statutory Guidance* (HM Government, April 2012) <Environmental Protection Act 1990: Part 2A—Contaminated Land Statutory Guidance (publishing.service.gov.uk)> accessed Sunday 21 April 2024. See the foreword by Richard Benyon.
[4] 'Land contamination costs homeowners £11.5bn' (*legalfutures.co.uk*, 20 July 2011) <Land contamination costs homeowners £11.5bn—Legal Futures> accessed Sunday, 21 April 2024.

breaches their fiduciary duties to their principal-beneficiaries.[5] In any case, diligent trustees may be covered if they have acquired the appropriate legal indemnity insurance.[6]

It goes without saying that having contaminated land as a trust asset also has significant consequences for the equitable proprietary owner—that is, the beneficiaries of the trust.[7] Exploring the situation for beneficiaries is highly interesting and could well represent the subject matter of another, independent piece of research. For instance, a future project may indeed assess the ability for Part IIA liability to transfer to beneficiaries through their "right to occupy" land under the Trusts of Land and Appointment of Trustees Act (TOLATA) 1996.[8] But, for want of space and time, this work confines its remit to trusts and trustees only. To further establish the article's boundaries, it must be stated that this is by no means a comparative piece between the legal regimes of the UK and USA. The USA's legal position has of course resonated deeply with the author, and ultimately, has influenced the writing of this article (see below). However, the focus of this work rests firmly on the legal situation for trustees based in England and Wales. Again, a comparative piece on contaminated land liability for UK and US trustees represents perhaps a future line of enquiry to expand the research area. Finally, future research could look more closely at how personal liability for environmental risks surrounding land could be transferred to a trustee under their investment powers and duties.[9] For instance, if trust property is bought as an investment and is later identified as contaminated, this is likely to mean that the property is worth a lot less following its determination. Should the trustee be personally liable to account for such an investment decision? This question is not dealt with in detail in this article. There is enough to discuss simply with the Part IIA regime.

In the United States hazardous waste is governed by a remediation regime established some forty-four years ago (at the time of writing) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 1980[10] (as amended).[11] Research reveals that CERCLA has led to actual cases of trustee personal liability for hazardous waste remediation, which is both interesting and—concomitantly—worrying. In 1993, for example, the district court of Arizona ruled in *City of Phoenix v Garbage Services Co.* (1993)[12] that a trustee of a testamentary trust was personally liable to bear the "response" costs attributed to land identified as hazardous under CERCLA 1980![13] Such costs include any actions that are undertaken to clean-up hazardous waste to the required standard.[14] Writing at the time Walsh opined that "The Arizona court's decision has sent shock waves throughout the trustee community."[15] Here Walsh's observation is not at all surprising given that, on first blush, the link between trustees and land affected by contamination seems somewhat tenuous. But while an unlikely risk, the severe consequences attributable to remediation liability cannot be gainsaid.[16]

As well as being a somewhat esoteric risk for trusts and trustees research into land contamination may seem unexpected given that the area is not at the centre of today's environmental *Zeitgeist*, which is rightly dominated by climate change. Nonetheless, despite not being at the forefront of environmental risk appreciation today, contaminated land is still an important environmental subject that must be both respected and considered. For instance, the threat that contaminated land poses to the environment and human health has recently been reviewed in the UK by the public response surrounding "Zane's law", whereby campaigners are calling for legislative reform and greater public sector funding for contaminated land identification and remediation.[17] This campaign comes after the tragic death of a seven-year-old boy, Zane Gbangbola, from hydrogen cyanide gas poisoning in 2014.[18]

As already stated, the specific object of this article is to examine the potential risk of contaminated land liability for trusts and trustees. Part IIA provides the legislative framework that enacts the "contaminated land regime" in England and Wales.[19] The regime's "overarching objectives" are threefold according to the statutory guidance: "(a) To identify and remove unacceptable risks to human health and the environment. (b) To seek to ensure that contaminated land is made suitable for its current use."[20] However, the statutory guidance's description of the regime's third overarching objective is interesting because it shows that Part IIA was not enacted to cruelly impose liability onto potentially liable persons. Paragraph 1.4 of the guidance states that Part IIA approaches liability allocation in such a way: "(c) To ensure that the burdens faced by individuals, companies and society as a whole are proportionate, manageable and compatible with the principles of sustainable development".[21]

It is important to say in this introduction that since 2000—when the regime was first brought into force—no trustee has

[5] n 3, para 8.20.
[6] 'A guide to understanding Contaminated Land Legal Indemnity Insurance' (*Today's Conveyancer*, 3 November 2021) <A guide to understanding Contaminated Land Legal Indemnity Insurance | Today's Conveyancer (todaysconveyancer.co.uk)> accessed Sunday, 21 April 2024.
[7] Tara J Rose, 'Thanks For My CERCLA Liability, Dad!' (*Properties Magazine*, 1 July 2020) <http://digital.propertiesmag.com/publication/?m=15890&i=666455&p=38> accessed Sunday, 21 April 2024.
[8] Trust of Land and Appointment of Trustees Act 1996, ss 12-13.
[9] See Trustee Act 2000.
[10] The Comprehensive Environmental Response, Compensation and Liability Act of 1980, PL 96-510, 94 Stat 2767. Abbreviated to CERCLA 1980.
[11] The Superfund Amendments and Reauthorization Act of 1986, PL 99-499 ("SARA").
[12] *City of Phoenix v Garbage Services Co.* 827 F Supp 600 (D Arnz 1993). Also known as "Phoenix II".
[13] Tracy Spencer Walsh, 'CERCLA Alert—Trustees, Trust Not! Personal Liability Ahead: An Analysis Of *City Of Phoenix v Garbage Services Company*' (1994) 5 Fordham Environmental Law Journal 459.
[14] ibid.
[15] ibid.
[16] See *R (Crest Nicholson Residential Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWHC 561 (Admin) and *R (Redland Minerals Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2010] EWHC 913 (Admin).
[17] 'Make toxic landfills safe—Support Zane's Law!' (*Zane's Law*, no date) <Home - (zaneslaw.co.uk)> accessed Sunday, 21 April 2024.
[18] ibid.
[19] n 3, section 1.
[20] ibid, para 1.4.
[21] ibid.

been found liable under Part IIA. The reason for this is not necessarily because the regime poses no threat at all to trusts or trustees, but rather because Part IIA has been applied less litigiously than CERCLA has in the USA. In total, Part IIA has generated only a limited number of cases of, what may be called, "direct" liability.[22] Still, the amount of liability generated by legislation should not always be a determiner of its success; it is clear that Part IIA has had positive, indirect implications. For instance, the enactment of Part IIA had the effect of corporatizing environmental lawyers while creating a new market of opportunities and challenges.[23] Furthermore, the Environment Agency's April 2016 report into the state of contaminated land in England discovered that since the regime's introduction and up to 2013, "local authorities have spent at least £32 million on inspecting more than 11,000 sites".[24] Ultimately this has resulted in "the determination of more than 511 contaminated land sites where remediation was needed".[25]

In evaluating Part IIA's risk for trustees this article is also adding to the area's current understanding of Part IIA's "owner" and "occupier" liability, also known as "householder" liability.[26] The regime's so-called householder liability has received criticism in the House of Commons.[27] In a debate held on Tuesday, 10 February 2015 Mr David Heath MP discussed the case of a couple who owned land contaminated by a former gasworks.[28] Upon the identification of the land by the local authority, the householders were fixed with circa £260,000 to £270,000 remediation costs.[29] Mr Heath MP argued that it was wrong to give the regime's regulatory authorities the ability to foist liability onto innocent parties, simply because they owned the land.[30] Allocating liability on this basis is not, for instance, in the spirit of the polluter pays principle.[31] Also, describing this form of liability as that which applies to "householders" is somewhat incorrect. The risk of a trust fund or trustee bearing the remediation costs shows that Part IIA clearly extends beyond ordinary householders, to those with property rights.

For liability to materialise against a trustee contaminated land must form the subject matter of the trust. Trusts of land must, of course, be made in accordance with the statutory formality requirement outlined in the Law of Property Act 1925.[32] More still, it is argued here that there are two primary means by which such land could become a trust's subject matter. On one hand, contaminated land may be devised as an asset directly by the trust creator by way of a *inter vivos* or testamentary trust.[33] On the other, contaminated land may be purchased as an investment.[34]

This article begins by providing a succinct overview of Part IIA's structure and objectives before looking at the classes of liability. Thereafter this work goes on to evaluate how the risks from contaminated land can transfer to trust funds and trustees.

PART IIA'S STRUCTURE, DEFINITION, AND OBJECTIVES

A significant source of inspiration for the Part IIA regime was the legislative framework governing statutory nuisance, as contained within the EPA 1990.[35] Although enacted in 1995[36] the regime was not introduced into England and Wales until 2000 and 2001, respectively.[37]

The statutory provisions are set out in the EPA 1990. However, the legislation is further fleshed out in other statutory and technical guidance and documents.[38] Of particular importance to understanding the regime is Part IIA's "statutory guidance", which was most recently revised in 2012.[39] The statutory guidance is issued by the Secretary of State for Environment, Food, and Rural Affairs under section 78YA of the EPA 1990.[40] The guidance explains "how local authorities should implement the regime, including how they should go about dealing whether land is contaminated land in the legal sense of the term".[41]

For the first time in UK legal history, Part IIA offered a statutory definition of "contaminated land".[42] The regime's definition of the term is as follows:

> "Contaminated land" is any land which appears to the local authority in whose area it is situated to be in such condition, by reason of substances in, on or under the land, that – (a) significant harm is being caused; or (b) significant pollution of controlled waters is being caused or there is a significant possibility of such pollution being caused.[43]

[22] Some examples of cases brought under Part IIA include *R (National Grid Gas Plc) v Environment Agency* [2007] 1 WLR 1780 (also known as "Transco") and *Price v Powys County Council* [2017] EWCA Civ 1133.
[23] Steven Vaughan and Robert G Lee, 'The contaminated land regime in England and Wales and the corporatisation of environmental lawyers' (2010) 1 International Journal of the Legal Profession 35.
[24] Environment Agency, *Dealing with contaminated land in England: A review of progress from April 2000 to December 2013 with Part 2A of the Environmental Protection Act 1990* (EA, April 2016) <State_of_contaminated_land_report.pdf (publishing.service.gov.uk)> accessed Sunday, 21 April 2024, 4.
[25] Stuart Bell, Donald McGillivray, Ole Pedersen, Emma Lees, and Elen Stokes, *Environmental Law* (9th edn, OUP 2017) 610–611.
[26] HC Deb 10 February 2015, vol 592, col 207WH.
[27] ibid.
[28] ibid.
[29] ibid.
[30] ibid.
[31] ibid, col 210WH. See n 25 *Environmental Law* p. 583.
[32] Law of Property Act 1925, s 53(1)(b).
[33] *X v A & Others* [2000] Env LR 104.
[34] Trustee Act 2000, s 3.
[35] EPA 1990, pt II. See, for instance, above at n 25 *Environmental Law* p. 596 which makes a comparison between the duty to serve a remediation notice under Part IIA and the duty to serve an abatement notice under the statutory nuisance regime.
[36] Environment Act 1995, s 57.
[37] Environment Agency, *Dealing with contaminated land in England: Progress in 2002 with implementing the Part IIA regime* (EA, September 2002) <3693 contaminated land for PDF (publishing.service.gov.uk)> accessed Sunday, 21 April 2024.
[38] n 3.
[39] ibid.
[40] EPA 1990, s 78YA.
[41] n 3, para 2.
[42] EPA 1990, s 78A(2)(a)–(b).

This definition reveals much about the contaminated land regime. For instance, it demonstrates that local authorities are generally responsible for determining if land or controlled waters are legally "contaminated". The role of local authorities is further delineated at section 78A(9) of the EPA 1990.[44] Under that section the so-called "enforcing authority" is the local authority in whose area it is situated.[45] Section 78B(1) of the EPA 1990 states that the enforcing authority "shall cause its area to be inspected from time to time to (a) identify contaminated land; and (b) of enabling the authority to decide whether any such land is land which is required to be designated as a special site".[46] However, section 78A(9) also states that the "appropriate Agency"—that being the Environment Agency in England and the Natural Resources Wales in Wales—is responsible for any "special sites".[47] In short, special sites are more significant with respect to their potential for harm.[48]

Given the seriousness of remediation liability, the guidance suggests that Part IIA should be used "only where no appropriate alternative solution exists".[49] Thus any "harm" that is caused by contamination must be regarded as "significant"[50] before Part IIA can be engaged. For the regime's purposes "harm" means "harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes harm to his property".[51] Contaminated land should be clearly identified after a risk assessment has demonstrated that there are extant or likely unacceptable risks.[52]

Now that the structure and objectives of Part IIA have been discussed, the following section goes on to look at how the law deals with "remediation" under the contaminated land regime.

REMEDIATION

Before looking specifically at the potential liability for trusts and trustees under Part IIA, it is first important to detail how remediation is conducted under the regime. This section is brief, but it provides some insight into the type and standard of works that responsible parties must undertake under Part IIA.

Section 78A(7) defines "remediation" for the purposes of Part IIA.[53] With respect to this section the statutory guidance states that, "Once land has been determined as contaminated land, the enforcing authority must consider how it should be remediated and, where appropriate, it must issue a remediation notice to require such remediation."[54] The statutory power to serve a remediation notice on each appropriate person is granted under section 78E(1).[55] The remediation should be reasonable, having regard to: (a) the likely costs involved and (b) the seriousness of the pollution and/or harm.[56] Pursuant to section 78E(5), the enforcing authority must state what remediation is to be done, and to what standard.[57] The guidance opines that remediation's broad aim should be:

> (a) to remove significant contaminant linkages, or permanently to disrupt them to ensure they are no longer significant and that the risks are reduced to below an unacceptable level; and/or (b) to take reasonable measures to remedy harm or pollution that has been caused by a significant contaminant linkage.[58]

Therefore, a person fixed with Part IIA liability will not necessarily have to undertake full remediation but would nevertheless be required to remove any inherent "contaminant linkages": ie, where a contaminant affects or has the potential to affect a receptor.[59] As scientific advances have been made into remediation techniques, it is clear that a range of approaches can now be used to clean-up contaminated land, from *ex situ* to *in situ* treatments.[60] A deep exegesis of these techniques is not, however, necessary for this article. While these techniques are highly interesting, they are perhaps too numerous and scientifically complex to be useful for this article's purpose.

PART IIA'S LIABILITY

This section is the most important of the work. It is hereby shown that it is possible for trustees to become a person responsible to bear the remediation costs pursuant to Part IIA. Generally speaking, the different types of liability under the contaminated land regime have been well evaluated by many authors, and especially by Lawrence and Lee.[61] As noted before, however, this article seeks to add to the previous writings by exploring the possibility for a trustee being found liable.

This section is further divided up into two sub-sections. The first sub-section introduces, what may be described as, the "classes" of Part IIA liability. Following this, the second sub-section discusses "owner" and "occupier" liability in

[43] ibid.
[44] ibid, s 78A(9).
[45] ibid.
[46] ibid, s 78B(1)(a)–(b).
[47] ibid, s 78A(9).
[48] ibid, s 78A(3). See also n 3, para 6.1.
[49] n 3, para 1.5.
[50] EPA 1990, s 78A(7); n 3, paras 4.1–4.4.
[51] ibid, s 78A(4).
[52] n 3, para 1.3.
[53] EPA 1990, s 78A(7).
[54] n 3, para 6.1.
[55] EPA 1990, s 78E(1).
[56] ibid, s 78E(4); n 3, para 6.2.
[57] n 3, para 6.2.
[58] ibid, para 6.5.
[59] ibid, para 6.
[60] Nhamo Chaukura, ES Muzawazi, G Katengeza, Alaa El Din Mahmoud, 'Remediation technologies for contaminated soil systems' in Willis Gwenzi (ed), *Emerging Contaminants in the Terrestrial-Aquatic-Atmosphere Continuum* (Elsevier 2022) 353–365.
[61] Permitting Uncertainty: Owners, Occupiers and Responsibility for Remediation.

greater detail; it is there where links are truly forged between Part IIA and liability for trusts and trustees.

The "classes" of liability

A person who is liable under the regime is described as an "appropriate person".[62] Appropriate persons must "bear responsibility for any particular thing which the enforcing authority determines is to be done by way of remediation in any particular case".[63] Thus the question at issue is, can trustees be determined as an appropriate person under Part IIA?

Succinctly, there are two primary forms of Part IIA liability. Pursuant to section 78F(2) of the EPA 1990 a person will be found liable for contaminated land remediation if they "*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".[64] The statutory guidance describes a person liable under section 78F(2) as a "Class A" person.[65] In practice it is highly unlikely that a trustee, as an administrator of the trust, would be found liable as a person that caused the contamination. On that basis a deep analysis of this point is unnecessary.

It is not outside the realm of possibility that a trustee could be found directly liable for knowingly permitting contamination to occur. Trustees have a statutory power to delegate their delegable functions to agents, custodians, and nominees.[66] If an agent, for instance, pollutes the land and the trustee, with knowledge, turns a blind eye to this situation, they may be determined as a Class A person under Part IIA for their "Nelsonian" knowledge.[67] From a theoretical perspective trustee direct liability as a Class A person may make for some interesting future research. But without common law precedents to draw upon, it is highly difficult to understand how liability as a Class A person may apply to trustees specifically.

Thus the author believes that it is far more probable that a trustee would be considered liable under Part IIA's second class of liability. A person under this head of liability is described by the statutory guidance as a "Class B" person.[68] Section 78F(4) of the EPA 1990 states:

> 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.[69]

On this basis, where the person who caused or knowing permitted the contamination cannot be found, the current owner or occupier is liable to bear the costs of remediation.[70] A statutory exemption is granted to the Crown (or, more properly, the Duchy of Cornwall) where it acquires affected land by way of *bona vacantia*.[71] This class of person liability further leads to the question of, how does the statutory framework define the terms "owner" and "occupier"? The below sub-sections deal with these concepts, linking them to trusts law.

"Owner" and "occupier" liability

It is apparent that Part IIA's definition of the word "owner" includes trustees. This can be seen in section 78A(9) of the EPA 1990, which states that:

> [A] person (other than a mortgagee not in possession) who, whether in his own right *or as trustee for any other person*, is entitled to receive the rack rent of the land,[72] or, where the land is not let at a rack rent, would be so entitled if it were so let.[73]

This definition should be of interest to trustees, as it recognises them as Class B persons, via their legal proprietary right over a trust of land. In discussing the draft Bill in the House of Lords, Lord Crickhowell showed his concern about the definition of "owner" in Part IIA applying to trustees, as follows:

> [T]rustees, including those who hold only bare legal title to the land—they have no beneficial interest in the trust assets—are presently caught by the definition of "owner" and personally held liable. That is the point. Trustees may be liable in certain circumstances, but why should they be personally liable in circumstances such as these?[74]

However, Viscount Ullswater mentioned in the debate that including trustees within the definition was essential to prevent the unfair evasion of liability: "The problem of exemption for liabilities is that it would open up an avenue through which people could seek unfairly, we believe, to evade liabilities by transferring their land into trust companies." [75]

The above definition of "ownership"—together with a person in occupation (see below section)—is predicated on having possession or control over the land.[76] This explains why, for instance, ownership liability is not forthcoming for a "mortgagee not in possession".[77] In that situation the provision of loan finance is conducted at arm's length,[78] and such a

62 EPA 1990, s 78A(9); n 3, para 6.2.
63 ibid.
64 ibid, s 78F(2). Italics added.
65 n 3, para 7.3(a).
66 Trustee Act 2000, ss 11–14.
67 *Baden v Société Générale pour Favoriser le Developpement du Commerce et de l'Industrie en France* [1983] BCLC 325.
68 n 3, para 7.3(a).
69 EPA 1990, s 78F(4). Italics added.
70 ibid.
71 ibid, s 78F(5A).
72 n 33, 107. In this case Arden J stated in this case that "A rack rent means a rent reflecting the full annual value (s.78A(9))."
73 EPA 1990, s 78A(9). Italics added.
74 *Hansard*, HL Vol 562, col 164.
75 ibid, col 165.
76 ibid.
77 ibid.
78 Parker Hood and John Virgo (ed), *Principles of Lender Liability* (OUP 2012) 236–237.

relationship does not cloak the lender with the necessary degree of possession or control required for direct liability to form.[79] Of course, the above statutory definition implies that the situation would be different if a mortgagee foreclosed upon a property to protect its secured interest in, for instance, the event of a mortgagor's default.[80] The situation is also not the same for trustees, as they are apparent fiduciaries and assume this role upon taking up the office.[81]

Frustratingly the word "occupier" is left undefined in the statutory framework.[82] As such, Tromans and Turrall-Clarke question, therefore, whether "occupation will have to be determined on the facts of each case".[83] They suggest further that "The test is that of the degree of control exercised over the land rather than exclusively of rights of occupation: a licence entitling a person to possession may make someone an 'occupier'."[84] While it is possible for a claim of occupiers' liability to be taken against trustees,[85] it is more likely for a beneficiary to be the actual person in occupation of trust property. For instance, trustees have the power to acquire land, both freehold and leasehold, inter alia, "for occupation by a beneficiary".[86]

A LIEN OVER THE TRUST FUND

Tromans and Turrall-Clarke acknowledge that "The trustee will however have a lien over the trust funds to be indemnified for work and expenses properly incurred in relation to liabilities under Pt IIA."[87] This is good news for trustees and must be explored further.

"Lien" comes to us via the Old French from Latin *ligamen*, meaning a "binding".[88] The *Oxford Dictionary of Law* defines the lien concept as: "The right of one person to retain possession of goods owned by another until the possessor's claims against the owner have been satisfied."[89]

Interestingly, the rule that trustees have a lien over their trust funds to indemnify any costs and expenses in relation to their current and future liabilities was analysed by Arden J (as she was then), sitting in the Chancery Division, in the case of *X v A* [2000].[90] In this case "X" was the sole trustee of the testator's will. The residuary estate was left to the testator's wife for life with remainder to his children.[91] The trustee became concerned about the impact that the contaminated land regime would have on the land held within the estate.

It is important to note that *X v A* [2000] was decided in 1999, the year before Part IIA was brought into force, and before the statutory guidance was published. In light of the uncertainty surrounding Part IIA's application Arden J stated that "The trustee sought directions as to whether it had a lien over the trust fund for liabilities, including future and contingent liabilities."[92] Relying on cases such as *Re Pauling's Settlement Trusts (No. 2)* [1963][93] Arden J held:

> A trustee has a lien over the trust fund for his proper costs and expenses and that these extend to an indemnity against future liabilities. […] The lien extends to all trustees as such. In my judgment these include liabilities under Part IIA of the Environmental Protection Act 1990 even though they are contingent upon a number of matters, including the commencement of Part IIA.[94]

Arden J thereafter went on to apply the above ratio to the trustee's power of investment, linking the concept of the lien to Hoffmann J's judgment in *Nestle v National Westminster Bank plc* (1988).[95] An important point was raised by counsel for the trustee, that is to what extent can a trustee take into account their own interests when making investment decisions given that a lien exists?[96] Counsel could find no authorities to answer this question, but Arden J ruled that the trustee when choosing investments "can take into account its own interest by virtue of its lien".[97] But she goes on to opine that "it [the trustee] must act impartially as between itself and the other beneficiaries. […] It must act in an even-handed way, taking into account the different rights and interests of the trust assets".[98]

The next section looks at how the trustees' lien has been adopted in the statutory guidance on Part IIA, whereby the regime considers the hardship caused by liability.

HARDSHIP: THE REGIME'S CONSIDERATIONS FOR TRUSTEES

The statutory guidance has embraced Arden J's judgment in *X v A* [2000], and this section outlines how the guidance deals with "hardship". The short paragraph written by Tromans and Turrall-Clarke enlightens readers about circumventing trustees' hardship in Part IIA, as follows:

> The possible hardship of the provisions applying to trustees was drawn to the attention of the Government in debate. The response was that to provide an exemption for

[79] ibid.
[80] ibid, 579.
[81] Graham Virgo, *The Principles of Equity & Trusts* (5th edn, OUP 2023) 466–467.
[82] n 1, 172.
[83] ibid.
[84] ibid.
[85] *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] PIQR P1.
[86] Trustee Act 2000, s 8(1)(b).
[87] n 1, 177
[88] Elizabeth A Martin (ed), *Oxford Dictionary of Law* (4th edn. OUP 1997) 267.
[89] ibid.
[90] n 33.
[91] ibid, 105.
[92] ibid.
[93] *Re Pauling's Settlement Trusts (No. 2)* [1963] Ch 576.
[94] n 1, 108.
[95] *Nestle v National Westminster Bank plc* (29 June 1988, unreported); *Nestle v National Westminster Bank plc* [1994] 1 All ER 118 (Staughton LJ).
[96] n 1, 109.
[97] ibid.
[98] ibid.

> trustees would be to open up an easy route for evasion. Therefore there is no provision in the legislation to protect trustees as such, for example by reference to reasonableness of conduct (as in the case of insolvency practitioners) or by limiting liability to the extent of assets held.[99]

Section 8(b) of the statutory guidance provides a specific direction as to how remediation should be applied to, inter alia, express trusts and charities.[100] This section deals with the "considerations to which the enforcing authority should have regard when making any cost recovery decisions, irrespective of whether the appropriate person is a Class A person or a Class B person".[101] Importantly these considerations have been applied to obviate any "hardship" which cost recovery may inevitably cause to liable parties.[102] On the ground of hardship, it is only right to make concessions for trustees.

Paragraph 8.19 of the statutory guidance seeks to obviate the hardship of allocating trustees with clean-up liability.[103] Where land subject to a trust is contaminated, the statutory guidance permits trustees to use their powers of administration over the trust to release funds to pay for the necessary remediation works.[104] The guidance suggests that where a trustee is an appropriate person, the trustee can use the trust fund or borrow money on the trust's behalf to cover the remediation costs:

> Where the appropriate persons include persons acting as trustees, the enforcing authority should assume that such trustees will exercise all the powers which they have, or may reasonably obtain, to make funds available from the trust, or from borrowing that can be made on behalf of the trust, for the purpose of paying for remediation.[105]

Moreover the guidance states that, where appropriate, the enforcing authority can waive or reduce the costs to be imposed on the trustee as an appropriate person:

> The authority should, nevertheless, consider waiving or reducing its costs recovery to the extent that the costs of remediation to be recovered from the trustees would otherwise exceed the amount that can be made available from the trust to cover those costs.[106]

Costs recovery should not be waived or reduced by the enforcing authority where the trustee has tried to evade liability, or has acted in breach of their fiduciary duty:

> (a) where it [the authority] is satisfied that the trust was formed for the purpose of avoiding paying the costs of remediation; or (b) to the extent that trustees have personally benefited, or will personally benefit, from the trust.[107]

It is also worth noting that the guidance examines the extent to which remediation costs can be obviated for charities.[108] It suggests that remediation costs can be waived or reduced for charities, charitable trusts, and charitable companies at the enforcing authority's discretion.[109] However, to do so, the authority must determine the extent to which cost recovery will "detrimentally impact that charity's activities".[110] Of course the regime is aware of the public benefit that charities have to the community, and leniency is therefore afforded where the imposition of remediation costs will impact the charity and its community benefit; in such a case, the authority can waive or reduce the liability.[111]

CONCLUSION

In sum, this article's analysis has shown that the likelihood of a trustee incurring direct liability under the Part IIA contaminated land regime is significantly low. An evaluation of Part IIA's classes of liability has demonstrated that there are two types of liable person: Class A persons and Class B persons. The former category relates to those persons that *caused or knowingly permitted* the contamination. Given the trustees' position, it was held that this is sufficiently unlikely to be an issue in practice. Therefore, accountability as a Class B person was identified as the most likely class of Part IIA liability that could attach to trustees. Class B persons include *owners or occupiers* of contaminated land. It was shown that trustees are recognised in the statutory definition of "owner" contained within Part IIA. Nevertheless, the direct threat is low as the statutory guidance for the contaminated land regime recognises the trustees' lien and, as such, allows trustees to bear the remediation costs from their trust funds, or by borrowing on their trusts' behalf. Furthermore, in a situation where the costs are likely to create a hardship, the regime grants enforcing authorities the power to waive or reduce remediation costs to reveal the burden imposed on trustees. An interesting finding is how the guidance states that personal liability can attach to the trustee that acts to evade liability or operates in breach of fiduciary duty. Thus liability for contaminated land remediation costs can directly impact both trusts and trustees, but the risk is low.

[99] ibid, 176–177.
[100] n 3, paras 8.19–8.21.
[101] ibid, para 8.12.
[102] ibid.
[103] ibid, para 8.19.
[104] ibid.
[105] ibid.
[106] ibid, para 8.20.
[107] ibid.
[108] ibid, para 8.21.
[109] ibid.
[110] ibid.
[111] ibid.

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