



Environmental responsibilities in an administration

Business Support and Insolvency - February 2010

A briefing from our Business Support and Insolvency team

In recent years a number of cases show the principles of environmental and insolvency law colliding. The courts have upheld the importance of compliance with environmental duties regardless of the company's solvency.

As officers of the court, an administrator must be aware of the environmental responsibilities a company may owe from the outset of their appointment, serious consequences, including personal liability can ensue from a breach. Environmental liabilities fall broadly into two categories:

1. Liability for acts and omissions in the course of running a business (for example, failure to obtain or comply with the terms of an environmental permit).
2. Liability as a result of the presence or escape of contamination on or under land in which that person has an interest (for example failure to clean up a source of ground water contamination).

Administration overview

An administrator is an officer of the court, agent of the company and fiduciary. An administrator must comply with all laws and regulations which apply to the company.

As agent for the company and legally responsible for managing its affairs, the administrator will be responsible for compliance with all applicable environmental laws and regulations. Claims against the administrator can arise from a challenge to the administrator's conduct or resulting from his misfeasance: failing to properly carry out his legal and regulatory duties.

Environmental regulation

Primarily overseen by local authorities and the Environment Agency (EA) which has enforcement powers including the ability to bring a criminal prosecution.

Some companies will have obvious environmental issues, in other cases these responsibilities and duties may be less apparent, or indeed hidden from view by the incumbent management team.

The officers of a company are usually at risk of a criminal prosecution if the EA establishes that the offence was committed with their consent, neglect or they 'turned a blind eye' to events which caused the environmental hazard. This is of great significance to an administrator and should have a distinct bearing upon how the activities of the company are controlled and monitored.

Moratorium in administration

In the case [Rhondda Waste Disposal Co Ltd \[2001\] Ch. 57](#) the Court of Appeal decided that the EA needed permission of the Court (if the administrator had previously refused to give consent) pursuant to section 43(6) Schedule B1 Insolvency Act 1986 to bring a criminal prosecution. When considering whether or not to allow the prosecution the court will look at the seriousness of the breach and whether it would be in the public interest to allow a prosecution.

In the Rhondda case the EA was granted permission with the Court adding that it is wrong to consider the interests of the creditors as trumping all other considerations. The decision highlights the fact that the Court view compliance with environmental responsibilities as important and necessary despite the company entering into administration.

In this case, the breach had occurred prior to the appointment of the administrator and so criminal proceedings were brought against the Company, but the same principle would apply if the breach had occurred following appointment and was due to the

negligence or misconduct of the administrator. In those circumstances a personal prosecution could follow.

Furthermore, an administrator is at risk of a creditor alleging negligence if the company had to pay a fine due to an environmental breach that occurred whilst the administrator was in office. Consequently, an administrator could be asked to reimburse the estate for the loss it has suffered, or face civil action in the court.

Safeguards

The risk of prosecution faced by an administrator for allowing (either wilfully or due to neglect) environmental breaches to occur is very real, perhaps more so given the greater use of the pre-pack administration sales process. A number of steps can be taken to minimise this risk of prosecution:

- Obtain as full a picture as possible, prior to appointment of all the environmental responsibilities, including breaches that need immediate remedial action and review all licences. The assessment will enable the administrator to develop an operational strategy (and gauge the likely cost) to ensure full compliance from the date of appointment.
- The EA issue a warning when a breach is not thought to be serious enough to warrant a prosecution. The administrator should be aware of any such warnings or notices issued before the appointment and the action taken by the company to ensure that no further breaches occur. The EA may take the view that another similar breach equates to persistent regulatory failure, concluding a prosecution should be sought.
- Adequate (and perhaps specialist) insurance should be in place which reflects the higher risk of prosecution which is faced by an administrator dealing with a company with specific environmental duties. This need should also be highlighted during the initial assessment.
- The relevant EA office should be promptly informed of the administrator's appointment. A positive inclusionary approach could head-off possible problems. The EA will usually work with the administrator to clarify his duties and responsibilities to ensure regulatory compliance with all applicable environmental legislation.
- Recognise and obtain experienced operational environmental advice promptly if the need arises.

The inherent cost of compliance can then be assessed and the effect upon the ability of the company to successfully trade, forecasted

- Obtain specialist legal advice to fully understand the nature of the responsibilities and the extent of potential liability.

Conclusion

Environmental law and regulation has become more extensive in recent years and applicable to an ever growing range of activities undertaken by a company. It is clear that administrators are at risk of personal liability in a variety of circumstances if they do not adequately control the trading activities and recognise these duties.

The EA have extensive powers to police the regulations and commence enforcement action which can range from a warning to criminal prosecution. In ignorance, or due to neglect the company, its officers and a duly appointed administrator can all face prosecution, if fault is found then a sizeable fine may follow.

At Morgan Cole we have wide experience of swiftly and proactively assessing risk, bringing and defending all manners of environmental claims. If you would like more details of our experience, in the first instance please contact the lead partner in our Business Support and Insolvency team, Paul Caldicott.



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