

Common Law and Contaminated Land

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Evolution of environmental law
Principles of liability
Common law causes of action
Negligence actions against professionals
Liabilities for groundwater pollution

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Evolution of Environmental Law

Prior to mid-1800s

No general recognition of environmental harm and/or such harm accepted as way of life

Causation generally not recognised, especially latent harm to property and people

Remedy for any actions for environmental harm is nuisance

- ❖ public - criminal and tort
- ❖ private - tort

No liability for remediating contamination

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Mid-1800s

Beginning of creation of specific environmental offences with emphasis on health

- ❖ statutory nuisances
- ❖ water pollution

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Mid-1800s to mid-1900s

Emphasis continues to be on health not environmental harm

Increase in controls on water and air pollution but still preliminary

Preservation of cultural environment

- ❖ historic buildings
- ❖ ancient monuments

Conservation of scenic environment

- ❖ national parks

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Mid-1900s

Preliminary recognition of environmental harm caused by chemicals in US

- ❖ Silent Spring, Rachel Carson
- ❖ The Closing Circle, Barry Commoner

Increasing evidence of environmental degradation

- ❖ water
- ❖ air

Increasing evidence of harm to human health and preliminary recognition of causal links with chemicals

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1970s and 1980s

Preliminary controls on disposal of waste on land

Strict liability for water pollution recognised but House of Lords states that: "offences are not criminal in any real sense, but are acts which in the public sense are prohibited under a penalty"

Enforcement of environmental offences is rare

Parliamentary hearings on hazardous waste and contamination

Beginning of EC influence on UK environmental law

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1990s

EC is major influence on UK environmental law

Environmental Protection Act 1990

Water Resources Act 1991

Eastern Leather plc v. Cambridge Water Company (H.L. 1993)

Environment Act 1995

Environment Agency created 1996

Works notices 1999

Liability for remediating contamination as well as criminal liability

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Early 2000s

Environmental legislation continues to expand, mainly from EC

Contaminated land regime 2000

❖ liability for remediating contamination from past pollution incidents

Increased prosecutions for environmental offences but mainly low penalties

Few common law actions for environmental harm still but law continues to develop

Liability for damage to natural resources?

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Principles of Liability

Fault-based liability

Strict liability

Several liability

Joint and several liability

❖ *Fairchild v. Glenhaven Funeral Services*

Causation

❖ bodily injury; *Reay v. British Nuclear Fuels plc* and *Hope v. British Nuclear Fuels plc*

❖ property damage

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Common Law Causes of Action

Nuisance

❖ private nuisance

❖ public nuisance

Rule in *Rylands v. Fletcher*

Negligence

Trespass

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Private nuisance

Unlawful interference with a person's use or enjoyment of land or some right over or in connection with land

❖ encroachment on neighbour's land

❖ direct physical injury to neighbour's land

❖ interference with neighbour's quiet enjoyment of land

• location of land

❖ permanent, continuing or adopted nuisance

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Public nuisance

An unlawful act or failure to discharge a legal duty to act when the effect of the act or failure materially affects the convenience and comfort of a class of people or their health, lives or property

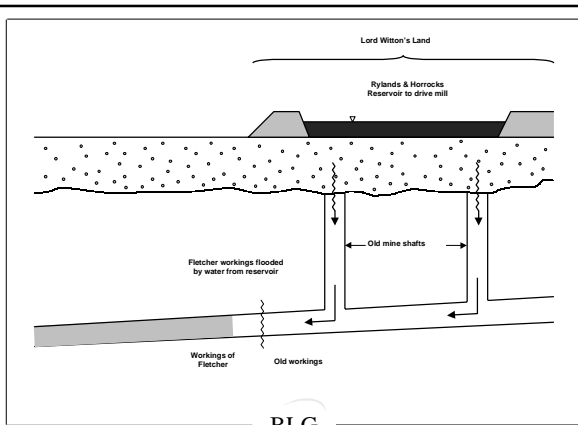
- ❖ Criminal offence
- ❖ Civil action if person affected by public nuisance proves that he suffered harm not suffered by general public

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Rule in *Rylands v. Fletcher*

A person who controls land is strictly liable for the natural consequences of the escape of a substance which he brought onto or which accumulated on the land, provided that the use of the land is non-natural

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Negligence

A person who owes another person a legal duty to exercise care is negligent if he breaches the duty and the breach causes the other party damage which is a foreseeable consequence of the breach

- ❖ difficult to prove negligence for past pollution incidents

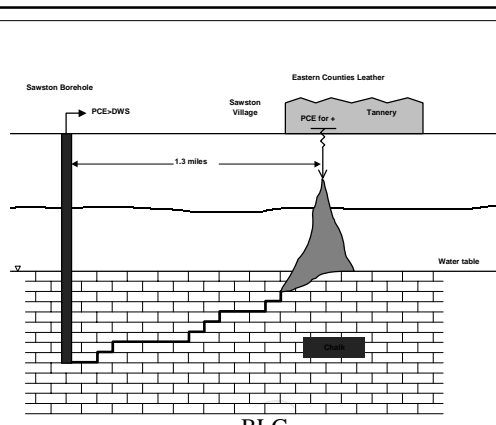
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Trespass

An unjustifiable direct and immediate interference with the possession of land

- ❖ do not need to prove damage
- ❖ not likely to be used much in environmental actions

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Private Nuisance/Rule in *Rylands v. Fletcher*

Cambridge Water Company v. Eastern Counties Leather plc

Prior to 1976 Eastern Counties Leather (ECL) owns and operates tannery in Sawston, Cambridgeshire

Regularly spills organochlorines

1976 Cambridge Water Company (CWC) purchases land including borehole at Sawston Mill, 1.3 miles from tannery

Hutchings & Harding (HH) purchases tannery near Sawston Mill

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1980 EC drinking water Directive

1983 CWC discovers organochlorines exceeding permitted level in abstracted water; ceases using borehole; constructs new borehole at different location at approximate cost of £1 million

Mid-1980s CWC traces organochlorines to tanneries operated by ECL and HH

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CWC brings action against ECL and HH in nuisance, rule in *Rylands v. Fletcher* and negligence

High Court holds that:

- ❖ HH did not cause pollution
- ❖ ECL not liable because no reasonable foreseeability
- ❖ storage of organochlorines is natural use of land

High Court finds that aquifer below tannery contains 10 to 100 tonnes of organochlorines

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Court of Appeal holds that ECL is liable; relies on *Ballard v. Tomlinson* (C.A. 1885)

- ❖ *Ballard*: printing works disposes of sewage and refuse in well; "filth" migrates to brewery's well
- ❖ ECL has interfered with CWC's natural right to pump groundwater from its well; therefore, spillages of organochlorines are actionable nuisance

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House of Lords holds that ECL is not liable

- ❖ relevant environmental harm, that is, pollution of groundwater, was not reasonably foreseeable when spillages of organochlorines occurred
- ❖ storage of chemicals is non-natural use of land
- ❖ organochlorines in aquifer were "irretrievably lost in the ground below" and had "passed beyond the control of [ECL]"; therefore, ECL not liable for harm from ongoing migration of organochlorines
- ❖ consideration of *Leakey v. National Trust* (C.A. 1980)

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Graham and Graham v. Re-Chem International Ltd (H.C. 1996)

- ❖ reasonable user; incineration of hazardous waste is not activity within principle of give and take between neighbours
- ❖ causation

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Hunter v. Canary Wharf and Hunter v. London Docklands Development Corporation (H.L. 1997)

- ❖ must have right to exclusive possession of land to bring action in private nuisance
- ❖ no action for bodily injury

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Jan de Nul v. Axa Royale Belge

- ❖ siltation of nature reserve is property damage even though investigation shows no long-term harm to reserve

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Public Nuisance

Railtrack plc v. London Borough of Wandsworth (C.A. 2001)

- ❖ Feral pigeons roost under railway bridge and foul pavement
- ❖ Wandsworth spends additional £12,000 per year to clean pavements
- ❖ Railtrack offers to let Wandsworth enter land to abate nuisance; Wandsworth declines
- ❖ Railtrack is liable for continuing nuisance

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Marcic v. Thames Water Utilities Ltd (C.A. 2002)

- ❖ Thames Water begins using predecessors' sewerage system
- ❖ System regularly floods Mr Marcic's garden and adversely affects his house
- ❖ Thames Water is liable for adopting nuisance; priority repair programme is not reasonable reason for failure to abate nuisance

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A.B. v. South West Water Services Ltd (C.A. 1993)

July 6, 1988

4.30pm to 5.45pm: 20 tonnes of aluminium sulphate is accidentally discharged into South West Water Authority's treatment works near Camelford; enters public drinking water supply reservoir for 20,000 people; level of aluminium in water is 3,000 times EC limit

11.00pm: Authority begins flushing water supply into River

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July 14, 1988 – South West Water Authority:

- ❖ apologises for “wrong and inconvenience” caused by accident
- ❖ recognises that some people “may have suffered particular damage”; will consider claims for compensation
- ❖ confirms that water “now has the right alkalinity and is safe to use and drink”

August 25, 1988 – Health Authority report states:

- ❖ “no reason to expect long or delayed harm”
- ❖ “some people will have experienced unpleasant effects but these should be relatively short lived”
- ❖ advises against using water from hot taps for drinking or cooking

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October 1988 to March 1989 – Authority cleans reservoir and water mains of deposited aluminium compounds

Late 1988 – Authority pays £38,000 in compensation including:

- ❖ £1,800 for bottled water
- ❖ £11,000 for poisoned exotic fish
- ❖ £20,000 for sickness

January 1989 – North Cornwall Residents Association established; requests public inquiry

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July 1989 – government-sponsored report published:

- ❖ “main cause of ill-health ... is psychosomatic”
- ❖ no toxic effects
- ❖ no long term ill health
- ❖ recommends survey of pregnancies and provision of clinic

August 1989 – government states that report is comprehensive and authoritative; rejects request for public inquiry

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November 1989 – Director of Public Prosecutions takes over private prosecution brought by Anglers’ Co-operative Association against Authority for causing a pollutant to enter River Camel and a fishery; adds offence of causing public nuisance; Bodmin Magistrates Court postpones hearing

January 8, 1991 – after 17-day trial, Exeter Crown Court convicts Authority of causing public nuisance and causing pollutant to enter River Camel; acquits Authority of polluting fishery; imposes £10,000 fine with £25,000 costs

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1991 – 180 persons who drank polluted water sue Authority for causing a public nuisance, supplying defective product and other causes of action; lawsuit includes claims for:

- ❖ aggravated damages on basis that plaintiffs’ “feelings of indignation were justifiably aroused by the [Authority’s] highhanded manner”
- ❖ punitive damages

March 1992 – High Court dismisses Authority’s motion to strike out claims for aggravated and punitive damages; states that only arguable cause is public nuisance

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November 1992 – Court of Appeal reverses High Court; aggravated damages not available because:

compensation for:

- ❖ anxiety and distress is in claim for pain and suffering; and
- ❖ anger and indignation is not pain and suffering

punitive damages not available for public nuisance

May 1994 – 148 claimants accept damages of between £680 and £10,000 each; 11 claimants settle later

October 1994 – High Court dismisses one remaining claim for failure to prove that drinking polluted water caused injury

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Negligence

Margereson v. J.W. Roberts Ltd and Hancock v. J.W. Roberts Ltd (C.A. 1996)

1896 to 1951 JW Roberts (subsequently T&N) manufactures asbestos-containing materials in factory in Armley, Leeds; factory surrounded by housing and school; children play on asbestos sacks on loading dock; asbestos fibres extracted from factory

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1990 Arthur Margereson, who lived 200 yards from factory since birth in 1925 until age 18 develops mesothelioma; issues writ in 1991; dies later that year

1992 June Hancock, who lived near factory from 1938, when 2 years old, until teenager, develops mesothelioma; issues writ in 1994

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Claimants succeed in negligence claims in High Court; agreed damages of £50,000 (Mr Margereson) and £65,000 (Mrs Hancock)

Court of Appeal affirms judgment that T&N owed duty to claimants for exposure to asbestos dust outside factory; conditions were comparable to those in factory; information showing potential dangers of asbestos existed "long before [1925]"

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Compensation for "Damage to any Property" Under Nuclear Installations Act 1965

Merlin v. British Nuclear Fuels (H.C. 1990)

- ❖ radionuclides in house near Sellafield are not "property damage"

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Blue Circle Industries plc v. Ministry of Defence (C.A. 1998)

July 1989 Storm causes ponds at Ministry of Defence's (MoD's) Atomic Weapons Establishment to overflow onto marshland on Blue Circle's (BC's) estate; MoD investigates

Dec 1992 Sun Micro Systems offers BC £10.1m for estate

Jan 1993 MoD informs BC of contamination; sale collapses

May to Dec 1994 MoD cleans up contamination at cost of £350,000; contamination does not exceed regulatory limits

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High Court hold MoD is liable for causing "damage to property" under Nuclear Installations Act 1965

Court of Appeal affirms

- ❖ property damage has occurred
- ❖ foreseeable losses include loss of sale of estate after discovery of contamination
- ❖ total award is £6.6 million to include: loss of 75% chance of sale (based on £4.07 value of estate in 1994 when contamination cleaned up); cost of running estate from 1993 to 1996 when hearing began; 100% of £600,000 reduction in value due to residual stigma plus interest

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Negligence Actions Against Professionals

Surveyors
Accountants
Solicitors
Environmental consultants

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Surveyors

Management of client's estate or property

- ❖ direct liability for environmental offence, remediation costs or common law damages
- ❖ negligent advice resulting in client being liable for environmental offence, remediation costs or common law damages

Valuations of property

- ❖ negligent advice resulting in incorrect valuation of property due to contamination

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Agency work

- ❖ negligent advice resulting in client inadvertently becoming liable due to acquisition of freehold or leasehold interest in contaminated property
- ❖ negligent advice resulting in client retaining remediation liabilities when disposing of contaminated land
- ❖ leases
 - environmental covenants
 - common covenants

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Accountants

Failure to take account of environmental liabilities when valuing company

Failure to account for environmental liabilities under Financial Reporting Standard 12

Appointment as receiver or liquidator

- ❖ some protection from Part IIA liabilities for insolvent company with assets including contaminated land
- ❖ conflict between insolvency law and environmental law

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Solicitors

Law Society's warning card on contaminated land liabilities

- ❖ "in every transaction you must consider whether contamination is an issue"

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Failure to:

- ❖ advise client of potential environmental liabilities in residential or commercial transaction
- ❖ recognise that contaminated land liabilities have been shifted to (or remain with) client
- ❖ recognise environmental significance of lease provisions
- ❖ conduct adequate environmental due diligence
- ❖ prepare adequate contractual provisions to allocate liability
- ❖ obtain necessary permit or other approval
- ❖ ensure permits are transferred when facility/land is sold

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Environmental consultants

Failure to advise client of presence or nature of contamination

Provide incorrect advice due to misunderstanding environmental law

Cause contamination during investigatory or remedial work

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Urban Regeneration Agency v. Mott MacDonald

History of Chatham Docks

- ❖ Early 1500s: River Medway used to shelter fleet
- ❖ 1581: Royal Navy builds dry dock in St Mary's Creek
- ❖ 1500 – mid-1800s: Royal Navy uses St Mary's Island as dump

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- ❖ 1860s: three basins excavated in St Mary's Creek to facilitate construction of iron-clad vessels; spoil raises island 8 feet; 21 acre brickfield on island used to manufacture 100 million bricks; coal ash, slag and rubble dumped on spoil
 - ❖ 1880 – 1910: asbestos from ship rebuilding and decommissioning dumped on island
 - ❖ 1982: dumping ceases; average depth of dumped material is 5 metres
- No record of location of waste

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English Estates (EE) purchases 155 acres of St Mary's Island to develop for 1,500 homes

EE hires Mott MacDonald (MM) to investigate and remediate contamination

MM digs trial pits and takes samples to one metre below ground level

Three divisions of MM investigate past uses of island

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Contracts between EE and MM provide that:

- ❖ MM will exercise reasonable skill, care and diligence
- ❖ "unacceptable" material will be removed
- ❖ removal of "unacceptable" material will be waived "if 'local' conditions encountered during excavation required it"
- ❖ excavation, removal and/or treatment will be "to a standard sufficient to permit residential and/or commercial development of the site"

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MM recommends removing ash to average depth of 0.5 metres and maximum depth of 0.75 metres

MM concludes that 363,000 cubic metres of "unacceptable" material should be removed from St Mary's Island at cost of £23 million

1,173,486 cubic metres of "unacceptable" material removed at cost of £67.6 million

580,000 cubic metres of "unacceptable" material left on site

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High Court concludes that:

- ❖ EE would not have remediated site for residential use but for its reliance on MM's advice
- ❖ MM failed to exercise reasonable skill, care and diligence
- ❖ MM should have conducted comprehensive study of past uses and fully considered same
- ❖ investigations should have led MM to conclude site was heavily contaminated to depth of 5 metres or more
- ❖ contractual language did not clearly specify standard of remediation
- ❖ public may perceive risk from contamination even when experts do not do so
- ❖ MM failed to provide EE with clear and comprehensive advice that would enable EE to consider all factors influencing MM's proposed remediation
- ❖ MM should have advised EE that remediation for residential use would cost between £40 million and £50 million and was, therefore, uneconomic

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High Court holds:

- ❖ 50 per cent chance EE will not recover full remediation costs from development
- ❖ EE lost chance to cease remediation early in project

Provisionally awards £18.5 million to EE

Case settles for undisclosed amount

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Liabilities for Water Pollution

Water Resources Act 1991, §§ 161 to 161D

A person who causes or knowingly permits "any poisonous, noxious or polluting matter or any solid waste matter":

- ❖ to be at a "place from which it [is] likely ... to enter any controlled waters" is liable for the "works or operations for the purpose of preventing it from doing so"
- ❖ to be or to have been present in controlled waters is liable for "removing or disposing of the matter" and "remedying or mitigating any pollution caused by its presence in the waters"

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Empress Car Company (Abertillery) Ltd v. National Rivers Authority

Vandal opens unlocked tap on diesel tank; diesel enters River Ebbw Fach

NRA prosecutes Empress Car for causing a pollutant to enter controlled waters

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Tredegar magistrates court convicts Empress Car

Empress Car appeals to Newport Crown Court; fails

Empress Car appeals to Divisional Court; fails

House of Lords holds that vandal's act did not break causal link between Empress Car's storage of diesel and entry into river

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House of Lords establishes guidelines

- ❖ prosecution must identify act committed by defendant
- ❖ act need not be immediate cause of pollution; can include maintaining tanks when immediate cause is lack of maintenance, act of third party or natural event
- ❖ did defendant(s) act cause pollution; more than one person can cause pollution
- ❖ if defendant creates situation in which act of third party or natural event causes escape of pollutant, defendant is guilty if act or natural event is "ordinary"

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Remediation involving Environment Agency

- ❖ potential prosecution
- ❖ potential service of works notice

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Eastern Counties Leather Part II

Mar 1994	ECL sells tannery business to ECL Group
June 1994	ECL reaches agreement with Environment Agency (EA) to contain and prevent migration of organochlorines in aquifer by pumping and treating water as part of tanning process
1997	EA is awarded £1.5 million from central government to clean up pollution; requests ECL to continue co-operating in clean up

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1998	ECL asks EA for its position on recovering its costs from ECL
Mar 1999	EA invoices ECL for £26,456.30 for interim payment for investigation costs
Apr 1999	EA sends ECL letter threatening proceedings if invoice not paid

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Nov 1999	EA sends ECL letter stating that it will send further invoice; requests ECL to forward proposals for remediation
Mar 2000	EA sends ECL letter stating that it will serve works notice if ECL does not submit satisfactory remediation plan with acceptable timetable for conducting work by 1 May 2000

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Issue: Is EA's March 2000 letter a "claim" under indemnity between ECL and ECL Group which defines "Pollution Claim" as:

"any demands, *claims*, actions or proceedings made or commenced by the NRA [the Environment Agency's predecessor] against [ECL] arising out of or in connection with [the alleged spillage by ECL of PCE on the Site or the dumping by ECL of waste contaminated by PCE in either case prior to 1976]"

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High Court rules:

- ❖ March 2000 letter is "claim" because it is unequivocal assertion of EA's intention to rely on statutory right against ECL to recover costs incurred in conducting remedial actions
- ❖ November 1999 letter is not "claim" whether or not EA sent invoice
- ❖ ECL is not prohibited by indemnity for notifying EA of indemnity which was close to termination

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