

## Environmental Issues in Corporate Insolvency

The implications of taking an appointment over an insolvent business which is regulated by environmental law can be far reaching. Environmental regulation has become more stringent and the sanctions for breach can leave the IP exposed to liability, including (amongst other things) costs sanctions.

The main environmental regimes referred to in this update are the contaminated land and water pollution regimes.

Breaches of environmental law may lead to sanctions being brought by the regulator (the Local Authority or the Environmental Agency) against a company and may include criminal prosecution, the requirement to take remedial action to clean a site up or to ensure that it complies with environmental law, the duty to comply with an enforcement notice and potentially civil liability for any damage caused. Subject to the terms of their appointment, an IP may become personally liable for environmental issues caused by the insolvent company.

Pursuant to the Environmental Protection Act 1990, if land has become contaminated, and remedial works are necessary then, the regulator can serve a remediation notice setting out the remedial action required. The IP may become personally liable to bear the costs of such remediation work if he caused or knowingly permitted the pollution to enter the land, subject to a defence that he acted reasonably.

The Water Resources Act 1991 also imposes criminal liability to a person who causes or knowingly permits water pollution and also contains powers for the regulator to recover costs from anyone who caused or knowingly permitted water pollution.

Under the Environmental Permitting Regulations (England and Wales) 2010 (as amended), any business operation that is deemed to require regulation (and is not exempt) is known as a “regulated facility” and the operator of the regulated facility is required to obtain and comply with the conditions of an environmental permit (“Permit”).

The appointment of an administrator or liquidator has no effect on the operator and the operator must still comply with the Permit and any conditions attached to it or risk committing an offence. The IP is bound by the conditions of the Permit as well as the directors and company officers. On appointment, the Permit should be checked to ensure that the Permit conditions are being complied with. The Permit will ordinarily contain a clause requiring the regulator to be contacted in the event of insolvency. In any event, the regulator should always be consulted routinely as soon as an IP is appointed.

If it is considered that an operator has contravened, is contravening, or is likely to contravene the conditions of the Permit, an “enforcement notice” can be served on the operator by the regulator. Clearly, the service of an enforcement notice, which suspends/prohibits certain (or all) regulated activities, will have a negative impact on the sale value and/or on whether the sale proceeds.

Permits can be transferred as part of any proposed sale of the assets. Generally, the IP can apply to transfer or surrender whole or part of the Permit. However, approval of any transfer can take several months whilst the regulator carries out its own due diligence on the transferee.

If a sale is not intended, then the IP should consider (in consultation with the regulator) any liabilities that may arise following the closure of any regulated facilities, including any liability to clean up contaminated land/water. Consideration should be given as to whether the Permit can be disclaimed or surrendered.

Environmental issues in insolvency can be myriad and complex and it is recommended that legal advice is obtained. If you have concerns or queries about any of the issues dealt with in this update or on insolvency and/or restructuring related matters please contact either [Adrian Wilmot](mailto:awilmot@pitmans.com) or [Suzanne Brooker](mailto:sbrooker@pitmans.com) and we will be happy to provide you with advice and assistance.

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