
ENVIRONMENTAL LAW

Liabilities of Lenders

QUESTIONS AND ANSWERS

Question - Lionel Hogg (Feez Ruthning):

I have two questions. Firstly, might there be some irony if banks start becoming involved in due diligence not only at the outset but also in on-going monitoring? Do you see any risk that if there is on-going monitoring and something goes wrong, the bank might get caught up in that? Secondly, is it at all possible, and I do not know the practicalities of this on a day-to-day basis, but is there any real prospect of the banks being able to shift the risk of liability on to an insurance company at the borrower's expense both for what the borrower does and for the potential joint liability of the banks? I know that would not be particularly palatable to business, but I just wonder in all of this, why the banks ought always to be the ones bearing the risk of liability and if that sort of thing is not palatable to business if it is possible to insure in some sort of way at the borrower's cost - why that should not be done?

Response - Paul Delemarre (Speaker):

Well I might try and answer some of that. In relation to your point about due diligence, I think you have raised a legitimate concern. I think probably the best example is in circumstances where a lender wishes to avail himself of a sort of innocent purchaser defence, the more knowledge they have the greater the risk that they will not be able to avail themselves of that defence. So legislation really has to consider and exempt in fact knowledge that is gained in the process of trying to control environmental risk from coming back to haunt the lender. I think that is the real issue that is going to have to be faced in legislation. In terms of shifting the risk to insurers, I could not really tell you whether it is possible to do this in a general sense, but I would point out that certainly in some jurisdictions it is not possible to effect insurance that would protect directors or officers. In the **Bata** case that Christine mentioned (**R v Bata Industries Limited** - unreported oral decision of Judge Edward P Ormston of the Provincial Division of Ontario Court of Justice handed down on 6 April 1992), the directors who were found liable for Bata's contravention of the environmental legislation were ordered to pay significant penalties and the court specifically said that even if the company did have adequate insurance that should not be available to the directors - the directors were personally responsible and they would have to wear that liability. So there may be constraints like that on passing on the risk to insurers.

Response - Denis Clifford (Commentator):

In the New Zealand context I think the possibility that systems that have been set up to protect can subsequently impugn is more than an irony, it is actually built into the statute to the extent that to find a director liable it is necessary to affirmatively prove that the director had actual knowledge of what was going on and failed to take appropriate action. The prosecutor's task would be greatly facilitated if internally a bank had a whole series of due diligence reports, assessments, recommended action that may have come from the bank's own internal expert which the customer naturally resisted or was financially unable to carry out. So the consequence of the system is, it is more than an irony, it is actually something that the statute itself, I think, raises the very clear possibility of.

Response - Christine Burnup (Commentator):

I would just add to that a couple of points. The situation we are dealing with is absolutely incredibly difficult to disentangle, partly because we are dealing with a situation where we do not even know how clean is clean. I mean the standards are shifting all the time so that to ask someone to take that risk on really open up a bit of a black hole underneath them. The sort of suggestion that we were putting to government to try and clarify some of this was to really draw a line between the legacy of contamination if you like, so that past practice is one thing and there has to be some way of the community being able to deal with that past practice, and then in terms of the future that we look at a different approach. At the moment we have really got the worst of all possible worlds and we have got this incredible difference between the way States treat similar cases. I do not think that was a helpful comment either, but I felt that I had to add it.

Response - Glen Smith (Chairman/Commentator):

Perhaps the other comment on the issue of financiers becoming involved in compliance is that most of the defences centre around them having acted reasonably to try to monitor the situation so that without doing anything they are probably not going to have a defence. The second matter from a practical viewpoint I guess is if they do nothing then the possibility exists that either the land is going to become contaminated or the customer is going to end up not complying with licensing requirements and will be able to carry on their business. So when you weigh up those risks as against the risk of becoming involved because you have put in place a monitoring program, it seems to me that the risk is much smaller by monitoring than by doing nothing.