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The Environmental Liability of Lenders in England: Is the Tide Coming in?

Jonathan H. Marks*

I. Introduction

During the last two decades of the twentieth century, the ebb and flow of legislative and judicial activity in the United States has raised important issues regarding the potential exposure of lenders to environmental liability. Although such activity has

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I am indebted to Professors Lissa Lamkin Broome and Donald Hornstein for their comments on and assistance with the references to lender liability in the United States. I am grateful to them and to all the other faculty, staff, and students at the University of North Carolina School of Law, Chapel Hill, who made my two visits during the academic year 2000–2001 so rewarding.

1 Lenders' concern arose from the imposition of liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), referred to collectively as "the Superfund legislation," 42 U.S.C. §§ 9601–9675 (1980) (amended 1986). Under that legislation, cleanup costs are recoverable from an "owner or operator," 42 U.S.C. § 9607(a), the definition of which excludes a "person, who without participating in the management of a facility, holds the indicia of ownership primarily to protect his security interest in the vessel or facility" ("the secured creditor exemption"), 42 U.S.C. § 9601(20)(A). However, the broad approach adopted by some courts as to the meaning of management participation caused particular concern. See United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990). Although the U.S. Environmental Protection Agency (USEPA) tried to clarify the position in 1992 by formulating a lender liability rule, National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability under CERCLA, 57 Fed. Reg. 18,344, 18,368 (Apr. 29, 1992) (codified at 40 C.F.R. § 300.1100 (1992)), this rule was struck down on the grounds that the USEPA had no authority to enact such a rule and that it was for the courts to interpret the secured creditor exemption. Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994). The USEPA and the Department of Justice responded to this decision by issuing a joint statement in 1995 affirming their intention "to follow the provisions of the Lender Liability Rule as
created a few ripples in England, the water there has generally been a great deal calmer. As a result, some lenders might assume that the risks of environmental liability being imposed under English law are illusory rather than real. This article seeks to identify and analyze realistic risks to lenders and to provide guidance as to how such risks should be assessed and their materialization avoided.  

This article is divided into three parts. The first part considers the potential grounds upon which a lender might incur environmental liability under English law. A detailed analysis of all the common law and statutory regimes that might impose such liability is not within the scope of this article. However, attention is focused on the statutory provisions that present the most material risks to lenders, and, in particular, on the new contaminated land regime. For the purpose of this discussion, the potential grounds of liability are divided into two categories that cut across both civil and criminal liability.

(a) Liability imposed on a lender as a result of the lender's active or passive participation in the chain of causation, which
resulted in the pollution concerned. Such liability is referred to here as "participatory liability."6

(b) Liability imposed on a lender arising out of the lender's rights of ownership or occupation of property. Such rights ordinarily arise as a result of security taken by the lender. Liability imposed in these circumstances is referred to here as "proprietary liability."7

The second part of this article examines the potential consequences of environmental liability for recovery by a lender and, in particular, its effect on the value of any security and on the borrower's covenant to repay.8

The third part considers steps that may be taken to reduce the probability of a lender's economic or proprietary interests being adversely affected by the imposition of environmental liability.9 Particular attention is paid to making preliminary inquiries, drafting loan and security documentation and enforcing repayment.10

II. The Potential Grounds of Lender Liability

A. Participatory Liability

1. Causing

Several regimes impose liability for "causing or knowingly permitting" pollution.11 A useful starting point for the analysis of

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6 See infra notes 11-77 and accompanying text.
7 See infra notes 78-113 and accompanying text.
8 See infra notes 114-120 and accompanying text.
9 See infra notes 121-145 and accompanying text.
10 See infra notes 121-145 and accompanying text.
11 Water Resources Act, 1991, c. 57, § 85(1) (Eng.). Other regimes include:
   (a) Water Resources Act, 1991, c. 57, §§ 161(A)–(D) (Eng.), pursuant to which a person who caused or knowingly permitted polluting matter to enter controlled waters may be served with a notice requiring him to carry out anti-pollution works;
   (b) the new contaminated land regime, which is discussed further below. See Environmental Protection Act, 1990, c. 43, §§ 78A-78YC (Eng.); infra note 44; and
   (c) section 33 of the EPA 1990, which prohibits (inter alia) the deposit of controlled waste in or on land except in accordance with a waste
such liability is section 85(1) of the WRA. This section provides that a person may be guilty of an offense if, in the absence of consent, he "causes or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters."12 Before considering the application of this provision to a lender, it is necessary to examine briefly the general scope of the liability imposed.

Liability for "causing" is strict in that "it does not require mens rea in the sense of intention or negligence."13 In Alphacell v. Woodward14 Lord Wilberforce stated: "[C]ausing . . . must involve some active operation or chain of operations involving as the result the pollution of the stream . . . . In my opinion, "causing" here must be given a common sense meaning and I deprecate the introduction of refinements, such as causa causans, effective cause or novus actus."15

One or more persons may cause pollution by carrying out separate and distinct acts, each of which contributes to the pollution, and without any of which the pollution would not have occurred.16 In Environment Agency v. Empress Car Co., Lord Hoffmann stated that "[t]he only question was whether something which the defendant had done, whether immediately or antecedently, had caused the pollution."17

management licence and provides that a person shall not "knowingly cause or knowingly permit" such a deposit.

12 Water Resources Act, 1991, c. 57, § 85(1) (Eng.).
15 Id. at 834.
16 Attorney-Gen.'s Reference (No. 1 of 1994), [1995] 1 W.L.R. 599, 613–14 (C.A. 1994). See also Env't Agency v. Empress Cars Co., [1999] 2 A.C. 22, 30 (H.L.), in which Lord Hoffmann said that the court should not ask, "What caused the pollution?" because that question may have a number of correct answers; the proper question was, "For the purpose of section 85(1) [of the WRA], 'Did the defendant cause the pollution?'"
In order to answer the question, "Did the defendant cause pollution?" Lord Hoffmann said that:

[O]ne cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. Does the rule impose a duty which requires one to guard against, or makes one responsible for, the deliberate acts of third persons?18

The mere provision of financial assistance should not ordinarily be considered an "active operation" in the chain of causation for the purpose of the approach adopted by Lord Wilberforce in *Alphacell.*19 Alternatively, adopting the approach of Lord Hoffmann in *Empress Car Co.*, one could argue that the purpose of the Act20 was not to require lenders to guard against or to be responsible for the acts of the borrower.21

It is extremely unlikely that a lender would find itself liable for "causing" pollution simply by funding the polluting operations of the borrower or by withdrawing a facility in accordance with its terms when the monies might otherwise have been used to fund remedial work. However, a lender is likely to be at risk where it is involved in the management of the borrower’s business and/or exercises control over its daily operations.22

2. Knowingly Permitting

In *Alphacell*, Lord Wilberforce made it clear that “knowingly

\[\text{was any further requirement of such a positive act.}\]

18 *Empress Car Co.*, [1999] 2 A.C. at 28. When the statute does make the defendant responsible for the acts of third persons, the liability of the defendant will depend upon whether the act of the third party should be regarded as ordinary or a "normal fact of life" (in which case the defendant will be liable) or as extraordinary (in which case he will not). *Id.* at 32.

19 [1972] 1 A.C. 824, 834 (H.L.) Examples of active operation might be the "maintaining of a system, the carrying on of an enterprise [or] the management of a going concern." *Empress Car Co.*, [1999] 2 A.C. at 37.

20 Water Resources Act, 1991, c. 57, § 85(1) (Eng.).

21 See Lord Hoffmann’s approach to the construction of section 85(1) of the WRA, which he had taken in regard to the policy of the Act. *Empress Car Co.*, [1999] 2 A.C. at 32–35.

22 For examples of the matters that might lead to such control, see the discussion of shadow directors, *see infra* notes 23–43 and accompanying text.
permitting . . . involves a failure to prevent the pollution . . . accompanied by knowledge."[^23] Again, it is useful to consider the scope of these requirements before considering their application to lenders.

The requirement of knowledge raises two important issues. First, to which elements of the offense does the requirement of knowledge relate? The answer to this question depends upon the construction of the relevant statutory provision.[^24] It is therefore impossible to provide an answer of uniform application. In relation to section 85 of the WRA, it is arguable that knowledge that the relevant matter is poisonous, noxious, or polluting and knowledge that it is entering controlled waters are both required.[^25]

Second, when will a defendant be held to have constructive knowledge of the relevant elements of the offense? The approach of the courts to this issue may reduce the importance of the first issue. In *Westminster v. Croyalgrange*[^26] Lord Bridge said:

"[I]t is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed."[^27]


[^24]: See *Shanks McEwan v. Env't Agency*, [1999] Q.B. 333, 342–45 (Q.B. Div'l Ct. 1997) (in which it was held that for the purpose of section 33(1)(a) of the EPA 1990, the requirement of knowledge related only to the deposit of the waste and not whether the deposit was made in accordance with a waste management license); *Ashcroft v. Cambro*, [1981] 1 W.L.R. 1349 (Q.B. Div'l Ct. 1981) (in which it was held that for the purpose of section 3(1)(a) of the Control of Pollution Act of 1974, chapter 40, the requirement of knowledge related only to the deposit of waste and not whether such deposit was in breach of a condition of a waste disposal license). Cf. *Westminster v. Croyalgrange*, [1986] 1 W.L.R. 674, 681–82, 684 (H.L.) (in which it was held that, for the purpose of the Local Government (Misc. Provisions) Act of 1982, chapter 30, the prosecution must prove that the defendant knew both that his property was being used as a sex establishment and also that such use was not in accordance with the terms of a license granted under the Act).


In light of the court's approach to constructive knowledge, a lender is unlikely to be acting in its own best interests if it seeks to avoid any exploration of potential pollution or environmental liabilities.

Not only must knowledge of the pollution be established under section 85(1) of the WRA, but it must also be demonstrated that the pollution was permitted by the lender. Before being held to have permitted pollution, it is suggested that a lender must (1) possess the power to prevent the pollution and (2) fail to take reasonable steps to exercise that power. In the ordinary course of events, it is unlikely that a lender would be considered to possess the necessary power to prevent a borrower from polluting. However, if a lender exercises control over the day-to-day operations of the borrower, there is a risk that it would be perceived as possessing such a power.

An examination of the English authorities that consider the liability of shadow directors is helpful in discerning when a lender may or may not be found liable for causing or knowingly permitting. This is because a person is similarly at risk of being

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28 Water Resources Act, 1991, c. 57 (Eng.).

29 In Berton v. Alliance Econ. Invs., [1922] 1 K.B. 742, 759, Atkin L.J. said that "the word 'permit' means one of two things, either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it." The first meaning is reiterated in Tophams v. Sefton, [1967] 1 A.C. 50, 75 (H.L.), in which Lord Upjohn said that the word 'permit' connoted the necessity (in order to undertake a proposed course of action lawfully) to ask and obtain permission from a party who had the right to refuse. The second meaning is reflected in the decision of the Divisional Court in Schulman's Inc., CO/1372/90, 1991 Q.B. LEXIS (Crown Office List Dec. 3, 1991), in which convictions for knowingly permitting the pollution of controlled waters were overturned because there was no evidence that the appellant could have prevented such pollution.

30 See, e.g., Berton, [1922] 1 K.B. 759, in which Atkin L.J. said (in the context of covenants in a lease) that "acts of sympathy or assistance" which fall short of the two meanings of 'permit,' supra note 29, do not amount to permission.

31 In Re Hydrocam (Corby) Ltd., [1994] 2 B.C.L.C. 180, 183, Millett J. (as he then was) described a shadow director as someone who "does not claim or purport to act as a director" but who "lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself." More recently, however, in Sec. of State for Trade v. Deverell, [2000] 2 W.L.R. 907, 920 (C.A.), Morritt L.J. said that a person may be held to be a shadow director even though he takes no steps to hide the part which he plays in the affairs of the company.

32 It is by no means clear that the English courts would adopt the same test in order to establish the environmental liability of lenders. However, in the absence of clear and
held liable as a shadow director of a company if he exercises control over the management of that company.  

For example, in *ex p Copp*, a bank commissioned a report on the affairs of a corporate customer from its own financial services section. The company then took various steps to implement the recommendations contained in the report. Knox J. held the argument that the bank had acted as a shadow director was not "obviously unsustainable." At trial, however, the judge observed that the allegation was “rightly abandoned,” implying that this was due to the absence of supporting oral evidence.

In *Re Tasbian (No.3)* the Court of Appeal held that there was an arguable case that a “company doctor” was a *de facto* or shadow director. In reaching that conclusion, the court attached particular weight to the monitoring of the company’s trading and binding authority, cases on the liability of shadow directors might provide useful guidance to a court grappling with lender liability. *See Deverell*, [2000] 2 W.L.R. at 916–20.

33 In *Hydrocam*, [1994] 2 B.C.L.C. at 183, Millett J. said that in order to establish shadow directorship, there should be a pattern of behavior in which the board of directors does not exercise any discretion or judgment of its own but acts in accordance with the directions of the shadow director. The Court of Appeal has recently stated that although it must be shown that the board is accustomed to act on the directions or instructions of the shadow director, it is not necessary for such directions or instructions to extend over all or most of the activities of the company. *See Deverell*, [2000] 2 W.L.R. at 920.


35 *Id.* at 18.

36 *Id.* at 21.

37 *Id.* The issue arose on an application to strike out the claim. In order to reject such an application, it was unnecessary for the judge to determine finally the merits of the case.


40 *Id.* at 304. For the purpose of the application in that case, it was also unnecessary for the Court to determine finally the merits of the claim. *Id.*

41 In *Hydrocam*, [1994] 2 B.C.L.C. at 183, Millett J. distinguished a shadow director from a *de facto* director and defined the latter as someone who “is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such.” However, in *Deverell*, [2000] 2 W.L.R. at 920, Morritt L.J. refused to express a view as to whether the categories of *de facto* and shadow director were mutually exclusive.
the exercise of control of the company's bank account through the
bank mandate.\footnote{Re Tasbian (No.3), [1993] B.C.L.C. 297, 302–03.} Such control was real, not illusory: The "doctor"
refused to countersign salary checks and decided which creditors
should be paid and in what order.\footnote{Id. at 304.}

By comparing the position of a lender with that of a shadow
director, it may be argued that unless a lender has control over or
close involvement in the management of the borrower, a lender is
unlikely to be liable for "knowingly permitting." In particular, it is
suggested that it would be unreasonable for the courts to require a
lender to exercise control over the borrower by relying upon
covenants that were inserted into a loan agreement for a different
purpose, namely, to protect the lender's interests. However, in
order to minimize the risk of being found liable for "knowingly
permitting," a lender should avoid inserting any provision into a
loan agreement that confers power on the lender to enter the
borrower's property, to execute remedial work, and to pass on the
cost of such work to the borrower.

3. \textit{Causing or Knowingly Permitting the Contamination
of Land}

Liability for causing or knowingly permitting pollution is also
imposed by the new contaminated land regime.\footnote{The "old" contaminated land regime was set out in section 61 of the EPA 1990.
That regime set out provisions for the recovery of the costs of preventive measures from
the owner (who was not defined). However, the regime was never implemented and has

The new regime came into force in England on 1 April 2000. See SI 2000/340; and Contaminated Land (Eng.) Regulations, (2000) SI 2000/227. Local authorities were each required to publish a strategy for the identification of contaminated land by July 2001. The Environment Agency has estimated that in the United Kingdom more than 300,000 hectares of land covering between 5,000 and 20,000 "problem sites" may be
contaminated.

The regime is set out in sections 78A to 78YC of the EPA 1990, which were
of the regime will not be considered in detail here.\textsuperscript{45} In summary, however, the new regime provides for the imposition of liability for the remediation of contaminated land\textsuperscript{46} (or the costs of remediation) on the “appropriate person” or persons, who are divided into two categories.\textsuperscript{47} The first comprises those persons who have caused or knowingly permitted the substances by reason of which the land is contaminated to be in, on or under the land (referred to by the government as the “Class A liability group”).\textsuperscript{48} The second category, comprising the owner or occupier for the time being (and referred to by the government as the “Class B liability group”), may be liable if, after reasonable inquiry, no appropriate person in Class A can be found.\textsuperscript{49}

Some assistance as to the scope of Class A liability may be derived from statements made by the government during parliamentary debates on the Environment Bill (“the Bill”)\textsuperscript{50} and from the DETR Circular.\textsuperscript{51} With regard to liability for “causing,” Earl Ferrers referred to the decisions in \textit{Alphacel}\textsuperscript{52} and \textit{Attorney-General’s Reference (No. 1 of 1994)}\textsuperscript{53} and said:

[W]hether a lender could be held to have caused substances to be in, on or under the land will depend on whether it took some active participation in the operation or chain of operations

\begin{itemize}
\item DETR Guidance], which is important for the detailed operation of the regime. \textit{The New Regime, supra note 5}, app. D at 474–532.
\item For a detailed analysis of the new contaminated land regime, see \textit{The New Regime, supra note 5}.
\item Pursuant to section 78A(2) of the EPA 1990, contaminated land is defined as any land which appears to the local authority \ldots to be in such a condition by reason of substances in, on or under the land, that (a) significant harm is being caused or there is a significant possibility of such harm being caused, or (b) pollution of controlled waters is being, or is likely to be caused.
\item Environmental Protection Act, 1990, c. 43, § 78A(2) (Eng.).
\item \textit{Id.} § 78F(2), (4).
\item See DETR Guidance, \S D5, \textit{reprinted in The New Regime, supra note 5}, app. D at 505.
\item Environmental Protection Act, 1990, c. 43, § 78F(4) (Eng.).
\item 565 PARL. DEB., H.L. (5th ser.) (1995) 1497.
\item See supra notes 14–19 and accompanying text.
\item \textit{Id.}
\end{itemize}
resulting in those substances being in, on or under the land. The act of lending per se does not amount to such active participation.54

After the Bill received Royal Assent, the DETR Circular re-stated the government’s position: “[T]he test of ‘causing’ will require that the person concerned was involved in some active operation, or series of operations, to which the presence of the pollutant is attributable. Such involvement may also take the form of a failure to act in certain circumstances.”55

With regard to the definition of “knowingly permitting,” the government’s view is that this would require “both knowledge56 that the substances in question were in, on or under the land57 and the possession of the power to prevent such a substance being there.”58

More specifically, the government sought to comfort lenders by suggesting that the second element of “knowingly permitting” is (as has already been suggested above)59 unlikely to be satisfied because:

there is no judicial decision which supports the contention that a lender, by virtue of the act of lending the money only, could be said to have “knowingly permitted” the substances to be in, on


56 The government stated that where an owner, occupier, or other appropriate person is given notice (pursuant to § 78B(4) of the EPA 1990) that land is contaminated, it would not give rise to the requisite knowledge (otherwise the distinction between liability for knowingly permitting and liability as owner/occupier would be elided). See DETR Circular, ¶ 9.13, Annex 2, reprinted in THE NEW REGIME, supra note 5, app. D at 451. The same point has also been made in relation to consultation with the owner/occupier pursuant to section 78H(1) of the EPA 1990 as to what shall be done by way of remediation. See DETR Circular, ¶ 9.14, Annex 2, reprinted in THE NEW REGIME, supra note 5, app. D at 451.

57 This is consistent with the language of section 78F(2) of the EPA 1990, which makes clear that only knowledge of the deposit (rather than its contaminating nature or potential) is required. See also Shanks & McEwan Teesside Ltd. v. Env’t Agency, [1999] Q.B. 333, 342-45 (Q.B. Div’l Ct 1997); Ashcroft v. Cambro, [1981] 1 W.L.R. 1349 (Q.B. Div’l Ct. 1981).


59 See supra notes 23–43 and accompanying text.
or under the land such that it is contaminated. This would be the case if for no other reason than the lender, irrespective of any covenants it might have required from the polluter as to its environmental behaviour, would have no permissive rights over the land in question to prevent contamination occurring or continuing.\(^{60}\)

However, the DETR Guidance relating to the exclusion of appropriate persons from the Class A liability group (when there are two or more such persons in that group) may send a confusing message to lenders.\(^{61}\) The DETR Guidance provides that the following are excluded activities:\(^{62}\) (1) providing or withholding of financial assistance by way of (inter alia) a loan or mortgage;\(^{63}\) (2) “carrying out action for the purpose of deciding whether or not to provide such financial assistance;”\(^{64}\) and (3) providing advice (including legal and financial advice): in relation to acts/omissions by reason of which the client has been held to have caused or knowingly permitted the presence of the pollutant;\(^{65}\) or for the purpose of assessing the condition of the land;\(^{66}\) or “for the purpose of establishing what might be done by way of remediation.”\(^{67}\)

The DETR Guidance emphasizes that the existence of an exclusion does not imply that the carrying out of the excluded activity would be “causing or knowingly permitting.”\(^{68}\) However,
lenders may derive limited comfort from this for three reasons. First, the presence of the provisions at least appears to contemplate the possibility that the activities identified could constitute causing or knowingly permitting. Second, the exclusions will not apply if the lender is the only appropriate person in Class A who can be found. Third, the exclusions do not apply to activities that are “associated” with those described in that paragraph.

Whatever message the foregoing provisions might convey to lenders, it is submitted that the approach adopted by the English courts under the new contaminated land regime should be similar to the approach already discussed in relation to other statutory regimes which impose liability for “causing or knowingly permitting” pollution. Consequently, the provision or withholding of finance is unlikely in itself to give rise to liability for causing or knowingly permitting. However, the exercise of control over the day-to-day management of the borrower may well give rise to such liability.

4. An Alternative Approach: The “Person Responsible”

In contrast with the regimes referred to above, the statutory nuisance regime in the EPA 1990 adopts different terminology. The “person responsible” (who may be served with an abatement notice) is defined as “the person to whose act, default or sufferance the nuisance is attributable.” There will only be a default, however, where there is an obligation ‘under the legislation to act.’ Although it has been suggested that “suffer” may have a

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69 Such a situation might arise, for example, where the borrower is a company that has been dissolved and struck off the register of companies. In certain circumstances, however, a dissolution may subsequently be declared void or a dissolved company restored to the register. See Companies Act, 1985, c. 6, §§ 651, 653 (Eng.).

70 See supra notes 11–43 and accompanying text.

71 Environmental Protection Act, 1990, c. 43, § 79(7) (Eng.).

72 Id. § 80(2)(a). Pursuant to section 80(1)(a), such a notice may be served “requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence.” The notice may also require the “execution of such works, and the taking of such other steps as may be necessary for those purposes.” Id. § 80(1)(b).

73 Id. § 79(7).

wider meaning than "permit," the courts have tended to treat the words as having a similar meaning. Therefore, the approach adopted in the statutory nuisance regime in the EPA 1990 should not present lenders with a greater risk of liability than the regimes referred to above, which impose liability for "causing or knowingly permitting" pollution.

B. Proprietary Liability

1. Liability as Owner

Not surprisingly, environmental liability regimes usually impose liability upon the owner of land. However, there is no uniform definition of owner. The meaning therefore depends upon the particular common law or statutory regime and on the court's view of the purpose and scope of that regime.

For example, an owner may be served with an abatement notice regarding a statutory nuisance pursuant to section 80 of the EPA 1990. The EPA 1990 does not define "owner" for the purpose of the statutory nuisance regime in general. However, a definition is provided specifically for the part of the regime that governs the recovery of abatement costs incurred by a local

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75 Barton v. Reed, [1932] 1 Ch. 362, 375 (Ch. 1931).
77 See supra notes 11-43 and accompanying text.
78 These include:
(1) the statutory nuisance regime in section 80 of the EPA 1990 (which is discussed further below);
(2) the contaminated land regime (which is discussed infra notes 93-99 and accompanying text); and
(3) nuisance at common law. See CLERK & LINDSELL ON TORTS, ¶¶ 19-57-19-60 (A.M. Dugdale et al. eds., 18th ed. 2000).
It should be observed that paragraph 89 of Schedule 22 of the EA 1995 provides that "no matter shall constitute a statutory nuisance to the extent that it consists of or is caused by any land being in a contaminated state." Environment Act, 1995, c. 25, ¶ 89(3), sched. 22 (Eng.). This is discussed further in paragraphs 59 to 63, Annex 1 of the DETR Circular, reprinted in THE NEW REGIME, supra note 5, app. D at 425.
79 Such a notice may be served on the owner where, for example, the person responsible for the nuisance cannot be found or the nuisance has not yet occurred. See Environmental Protection Act, 1990, § 80(2)(c).
authority as a charge on premises. For that purpose alone, section 81A(9) defines an “owner” as being:

in relation to any premises ... 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 premises or, where the premises are not let at a rack rent, would be so entitled if they were so let.

A mortgagee who is not in possession would not be an owner for the purpose of that definition. On the other hand, it would be consistent with the approach of the courts to the interpretation of other statutory regimes if a mortgagee in possession were held to be an “owner” for the purpose of section 81A(9) of the EPA 1990 and/or the statutory nuisance regime in general. Moreover, such a mortgagee would appear to be at equal, if not greater, risk of being found liable as an occupier for the reasons set out below.

2. Liability as Occupier

There are a number of regimes that impose environmental liability on an occupier. However, the term is usually undefined.

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80 Environmental Protection Act, 1990, § 81A(9).

81 In Camden LBC v. Gunby, [2000] 1 W.L.R. 465 (Q.B. Div'l Ct. 1999), the Divisional Court held that the definition of “owner” for the purpose of section 80 of the EPA 1990 was derived from the legislative history of statutory nuisance and was different from section 81A(9). Gunby, [2000] 1 W.L.R. at 472. In the former provision, the owner was “the person for the time being receiving the rackrent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person” (emphasis added). Gunby, [2000] 1 W.L.R. at 469. The Divisional Court held in Midland Bank v. Conway, [1965] 1 W.L.R. 1165, that mere receipt of rent by the bank acting solely pursuant to its duty (in the banker-customer relationship) to act as banker did not make the bank such an agent. Midland Bank, [1965] 1 W.L.R. at 1170.


83 The term is used, for example, in the statutory nuisance regime, where the occupier may (like the owner) be served with an abatement notice where the person responsible for the nuisance cannot be found or the nuisance has not yet occurred. See Environmental Protection Agency, 1990, § 80 (Eng.); in relation to waste removal notices served pursuant to section 59 of the EPA 1990, which may require an occupier to remove controlled waste (which has been deposited in contravention of section 33(1)) unless he can satisfy the court that he neither knowingly caused nor knowingly permitted
For this reason, attention has sometimes been directed toward authorities dealing with other statutory provisions. In the context of liability pursuant to the Occupiers’ Liability Act 1957,\(^{84}\) for example, it has been held that the lawful assertion of a right to enter and control premises coupled with the consequent vacation of the property by the existing occupier is sufficient to give rise to occupation.\(^{85}\)

However, in *Southern Water Authority v. Nature Conservancy Council*\(^{86}\) Lord Mustill warned against the use of authorities that “draw their meaning entirely from the purpose for which and the context in which they are used.”\(^{87}\) In that case, his Lordship was dealing with the meaning of occupier in section 28 of the Wildlife and Countryside Act 1981 (as amended) which concerns the regime relating to sites of special scientific interest.\(^{88}\) Providing a definition which was specific to the provisions of that regime, Lord Mustill said that an occupier must “stand in such a comprehensive and stable relationship with the land as to be, in company with the actual owner, someone to whom the mechanisms [of section 28] can sensibly be made to apply.”\(^{89}\)

Although a mortgagee in possession is at risk of falling within any definition of occupier,\(^{90}\) a mortgagee who is *not* in possession is unlikely to fall within such a definition. The question is therefore likely to turn upon when a mortgagee is deemed to be in possession. It is suggested that where a mortgagee lawfully demands possession, and as a result the mortgagor hands over the deposit; in the new contaminated land regime, see *infra* notes 93–96; and in nuisance at common law. See *Clerk & Lindsell on Torts*, ¶¶ 19.54–19.55 (18th ed. 2000).

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\(^{84}\) Occupiers’ Liability Act, 1957, c. 31 (Eng.).


\(^{87}\) *Id.* at 781.

\(^{88}\) Wildlife and Countryside Act, 1981, § 69 (Eng.).


\(^{90}\) At least one mortgagee in possession has been served with a waste removal notice. See *Devonshire WRA v. Roberts Warren & Snow*, [1995] 7 Envtr. L. & Mgmt. 105 (where such a notice was served on Midland Bank PLC who had repossessed a property previously used as a waste tire dump and the bank agreed to clean up the site without appealing against the service of the notice).
keys to the lender, or simply abandons the property, the lender is at risk of being held to be in possession of the property.11

3. Liability of Owner/Occupier for Contaminated Land

Under the contaminated land regime, liability is imposed on members of the Class B liability group, which comprises the owner and/or the occupier, in the event that no member of the Class A liability group can be found. "Owner" is defined in section 78A(9) of the EPA as:

a person (other than a mortgagee not in possession) who, whether in his own right or as a trustee for any other person, is entitled to receive the rack rent of the land, or where the land is not let at a rack rent, would be so entitled if it were so let.14

Banks have taken little comfort from the exclusion of mortgagees not in possession from the definition of "owner." During the passage of the Bill, concerns were debated in the House of Lords regarding the potential liability of a mortgagee as owner when a property is abandoned or the keys are returned and the mortgagee simply enters the premises in order to secure them. However, the government ultimately rejected these concerns and refused to amend the Bill.16

There is, moreover, no definition of "occupier." It is suggested that a mortgagee may be considered to be in possession and to be liable as an occupier if it lawfully demands possession and as a result the mortgagor simply hands in the keys to the mortgagee or


92 But see Kirby v. Cowderoy, [1912] A.C. 599, 606 (P.C.) (in which it was stated that what amounts to possession will depend on the circumstances of the case including the character of the property).

93 The Class A liability group contains those who caused and/or knowingly permitted the pollutant to be in, on, or under the land. See supra notes 49-50 and accompanying text.

94 Environmental Protection Act, 1990, § 78A(9) (Eng.).

95 The point was made in relation to the proposed definition of owner (rather than to the absence of a definition of occupier). See 560 Parl. Deb., H.L. (5th ser.) (1995) 1445. Examples that caused particular concern (because of the presence of potential pollutants) included petrol stations and dry cleaning establishments. Id.

96 See 562 Parl. Deb., H.L. (5th ser.) (1995) 1043. The reason given was that a mortgagee in possession was already liable under existing regimes, for example, as an occupier under the statutory nuisance regime.
abandons the property. On the other hand, where the mortgagor abandons possession without reference to any act of the mortgagee or any agreement with the mortgagee, the latter is unlikely to be held to be in possession or deemed to be an occupier of the property by reason of the abandonment alone.

Where there are two or more appropriate persons within a Class B liability group, the government has provided two grounds upon which a person may be excluded from the group. However, neither of those is likely to be of any relevance or assistance to lenders or mortgagees.

4. Receivers

A receiver appointed pursuant to a lender's security may incur liability as an occupier of premises. A receiver is ordinarily an agent of the mortgagor and so the mortgagee should not normally incur any liability as a result. However, if a mortgagee interferes in the conduct of the receivership, the receiver may become the agent of the lender and the lender may thereby become

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97 See 562 PARL. DEB., H.L. (5th ser.) (1995) 1041 (suggesting that thirty-five percent of mortgage possessions in England are cases in which possession is voluntarily given).

98 It is arguable that in such cases a mortgagee would not be in possession because it had not taken "control and dominium" of the property. See Noyes v. Pollock, 32 Ch. 53, 62, 64-65 (Ch. 1886).

It should also be noted that the mortgagor who has voluntarily surrendered possession of the property might still be served with a remediation notice. See Environmental Protection Act, 1990, § 78G(1) (Eng.). In such a case, the mortgagee will be obliged to permit the mortgagor to enter the property in order to comply with such a notice. See Environmental Protection Act, 1990, § 78G(2) (Eng.).


101 See Law of Property Act, 1925, c. 20, § 109(2) (Eng.), which provides that a "receiver appointed by the powers conferred by this Act, or any other enactment replaced by this Act, shall be deemed to be the agent of the mortgagor; and that the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgagee deed otherwise provides." See also Insolvency Act, 1986, c. 45, § 44(1)(a) (Eng.), which provides that the administrative receiver of a company is deemed to be the company's agent unless and until the company goes into liquidation. It is also common for security documents to provide expressly that a receiver is deemed to be agent of the mortgagor.

102 A lender would incur liability, however, if the lender agreed to indemnify the receiver in respect of the latter's liability.
liable for the acts and omissions of the receiver. Consequently, if the receiver is in occupation, the mortgagee might (by interfering in the conduct of the receivership) similarly be held to be in occupation. The basis for such a finding is that the receiver was in occupation as agent of the mortgagee and/or that the mortgagee (through the receiver) was exercising sufficient control over the property.

It should be noted that receivers might benefit from the provisions in the contaminated land regime which exclude from liability persons “acting in a relevant capacity.” This term is defined to include not only a person acting as an insolvency practitioner and the official receiver (acting as an insolvency practitioner or as a receiver or manager), but also a person acting as a receiver or manager by virtue of any enactment or an order of court or any other instrument. However, such exclusions would not apply insofar as the “presence [of a contaminating pollutant] is a result of any act or omission made by him which it was unreasonable for a person acting in that capacity to do or make.”

The element of reasonableness raises difficult questions. In particular, it is not clear whether, and if so, in what circumstances and to what extent, an insolvency practitioner would be expected to investigate for possible contamination. However, if a receiver decides to carry on the business of the mortgagor on the premises, the obligations imposed upon him will likely be greater.

5. Lender Acting as Trustee

The contaminated land regime raises a further important issue relating to the potential liability of lenders. The definition of “owner” in section 78A(9) of the EPA 1990 includes a trustee. That definition is not limited by any requirement that the trustee

104 Environmental Protection Act, 1990, c. 43, §§ 78X(3)–(4) (Eng.).
105 See Insolvency Act, 1986, c. 45, § 388 (Eng.).
106 Environmental Protection Act, 1990, c. 43, § 78X(3)(a) (Eng.).
107 It may be useful to consider by analogy Medforth v. Blake, [2000] Ch. 86 (C.A.), in which it was held that although the receiver is not obligated to carry on the business of the mortgagor, if he does so he owes an equitable duty to the mortgagor to manage the property with due diligence.
108 See supra note 94 and accompanying text.
possess a beneficial interest in the land concerned or exercise any control over the land. Although concerns were expressed about this element of the definition in the debate on the Bill in the House of Lords, the government decided not to amend it. It should also be noted that neither of the potential grounds of exclusion from liability in the DETR Guidance were directed at or likely to assist trustees.

A lender acting as trustee is therefore clearly exposed to potential liability as an owner under the contaminated land regime. However, such a lender may derive some comfort from its entitlement to be indemnified from the trust funds for the costs of remediation work incurred in respect of contaminated land. In order to enforce that right, the lender trustee has a lien over the trust funds in respect of such sums.

III. Potential Effect on Recovery

This section discusses the potential effect that pollution may have on a lender’s recovery from a borrower. There are three ways in which pollution may affect a lender’s security. The first (and most obvious) is that the value or even the marketability of the property may be affected. The second way is that if the borrower is required to incur costs remedying pollution or contamination (or to reimburse a public authority for the cost of remedial works), this may affect the borrower’s ability to repay the loan and reduce the value of the borrower’s covenant to do so. The third manner

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111 See THE NEW REGIME, supra note 5, app. D at 521 (which sets out the exclusions in paragraph D.89 of the DETR Guidance).


113 See id. at 493–94.

114 If, for example, the Environment Agency seeks to recover from the borrower the cost of anti-pollution works pursuant to section 161D of the WRA, such costs are recoverable as a simple debt. Such a debt is not included in the special category of “preferential debts” listed in the Insolvency Act. Insolvency Act, 1986, c. 45, Sched. 6 (Eng.). Therefore, if the borrower becomes insolvent and (in the case of an individual) is made bankrupt or (in the case of a company) goes into liquidation, that debt will not take priority over other unsecured debts of the borrower. Compare the position under other regimes, discussed infra, in which the debt gives rise to a statutory charge and is
in which a lender’s security might be prejudicially affected results from the potential imposition of a statutory charge. Such a charge may be imposed in a limited number of regimes such as the contaminated land regime and the statutory nuisance regime.

In the contaminated land regime, for example, where an enforcing authority carries out remediation work in respect of contamination arising from the owner having caused or knowingly permitted the pollutant to be in, on or under the land, the costs of such work and interest thereon shall be a charge on the premises. The intention of the statute would appear to be that such a charge would take priority over a lender’s pre-existing security. There are two matters that support this view. First, and most importantly, other statutes with language similar to the provisions have been held to have such an effect. Second, this view is consistent with the requirement that a charging notice is served not just on the owner, but on “every other person who, to the knowledge of the authority has an interest in the premises capable of being affected by the charge.”

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115 See, e.g., Environmental Protection Act, 1990, § 78P (Eng.) (contaminated land); Environmental Protection Act, 1990, § 81 (Eng.) (statutory nuisance).

116 Environmental Protection Act, 1990, §§ 78P, 81 (Eng.). On the other hand, the cost of anti-pollution works, which may be recovered by a local authority pursuant to section 161D of the WRA, is only recoverable as a simple debt. See supra note 114.

117 Environmental Protection Act, 1990, §§ 78P(4), 78P(7) (Eng.). An enforcing authority has (for the purpose of enforcing the charge) “all the powers and remedies” which it would have under the Law of Property Act, 1925, and otherwise, “as if it were a mortgagee by deed having powers of sale and lease, of accepting surrenders of leases and of appointing a receiver.” Id. § 78P(11).

118 Where the effect of giving priority to the statutory charge would be to deprive a lender of its security, the lender might argue that this gives rise to an interference with its property rights in breach of Article 1 of the First Protocol of the European Convention on Human Rights (which was incorporated into English domestic law by the Human Rights Act, 1998 with effect from 2 October 2000). However, the protection conferred by this provision is not absolute and interference may often be justified by the circumstances. See RICHARD CLAYTON & HUGH TOMLINSON, THE LAW OF HUMAN RIGHTS ¶¶ 18.64–18.81 (2000).


120 Environmental Protection Act, 1990, § 78P(6) (Eng.).
IV. Steps to Protect Lender’s Position

This section describes the steps a lender might take in order to insulate itself as far as possible from potential environmental liabilities. The discussion is merely intended to provide some general guidance and does not purport to be exhaustive. Before proceeding with any transaction, a prudent lender should, of course, seek specialist legal advice that has been tailored to the circumstances of the case.

For comprehensive protection, the position of the lender requires careful consideration at all stages, particularly when (1) preliminary inquiries are made prior to the provision of any finance, (2) loan and security documentation are drafted, and (3) enforcement and, in particular, repossession of the property are required. Each of these stages will be considered in turn.

A. Preliminary Inquiries

A lender’s evaluation of the risk of potential environmental liabilities should involve an assessment of the past as well as the future. With regard to the past, a potential lender should consider both the history of the site and any consequent risk of pollution and the history of the borrower’s conduct, including previous convictions. As to the future, the lender should consider the risks of pollution arising from the activities that the borrower intends to carry out on the site.

An evaluation may take place in two phases or stages. The first phase is a desktop analysis of information provided both by the borrower and independently of the borrower. This evaluation is particularly important where the lender proposes to take security over the land or premises of the borrower.\(^\text{121}\)

General inquiries should include whether the borrower has been a defendant in civil or criminal proceedings in connection with its business activities, the use of its property, or for breach of environmental laws or regulations. Inquiries relating to the contaminated land regime\(^\text{122}\) might include: (1) whether the

\(^{121}\) See supra notes 78–99 and accompanying text.

\(^{122}\) Other basic inquiries directed at other regimes might include: (a) whether the borrower carries on or intends to carry on any activity requiring an authorization under section 6 of the EPA 1990, a waste management license under section 35 of the EPA 1990, or a discharge consent, and (b) whether any existing or anticipated funds in the
borrower owns or occupies any land which has been identified as contaminated land, (2) whether it has been consulted by an enforcing authority regarding a proposed remediation notice, (3) whether it has been served with a remediation notice, (4) whether it has been served with a charging notice, (5) whether it has been or is being prosecuted for failure to comply with a remediation notice, (6) whether it has reason to believe that any of the foregoing might occur at any time in the future, and (7) whether it intends to acquire or to occupy any land in respect of which any of the foregoing questions would be answered in the affirmative.\textsuperscript{123}

An affirmative answer to any of these questions may indicate that further inquiries are required regarding either the condition of any site or the past, present, or intended activities of the lender.

Consideration should also be given to (1) any evidence of the prior use of the site derived from maps (including, where appropriate, Ordnance Survey,\textsuperscript{124} geological, and hydro-geological maps) and from previous regulatory approval (in the form of permits, authorizations, licenses, consents, and planning permissions), and (2) any evidence of prior infringements of environmental laws (such as statutory charges, abatement notices, and previous convictions), whether such infringements involve the borrower or any property owned by the borrower.

Further sources of information for this desktop analysis are the contaminated land registers, which are maintained by enforcing authorities pursuant to the provisions of the contaminated land regime.\textsuperscript{125} These registers contain information relating to (inter alia) remediation notices,\textsuperscript{126} remediation statements and declarations,\textsuperscript{127} appeals against charging notices,\textsuperscript{128} notices given

\textsuperscript{123} The request should be broad enough to include the acquisition of any business that owns or occupies any such land.

\textsuperscript{124} Ordnance Survey is an executive agency responsible for national mapping in Britain.

\textsuperscript{125} Environmental Protection Act, 1990, § 78R (Eng.). Such registers are open to public inspection. \textit{Id.} § 78R(8).

\textsuperscript{126} Environmental Protection Act, 1990, § 78R(1)(a) (Eng.).

\textsuperscript{127} \textit{Id.} § 78R(1)(c).

\textsuperscript{128} \textit{Id.} § 78R(1)(d). However, the contaminated land regime does not provide for the registration of the charging notice itself.
by appropriate persons of what they claim has been done on the site by way of remediation,\textsuperscript{129} and convictions for offenses for failing to comply with a remediation notice.\textsuperscript{130} Although such inquiries provide useful information for a lender who is seeking to assess the risks of environmental liabilities, such inquiries cannot guarantee a clean bill of health.\textsuperscript{131} It may therefore be necessary to carry out a second phase of inquiry involving the further investigations discussed below.\textsuperscript{132}

Important questions might be asked in a local search such as whether the local authority has inspected the land, and, if so, the details of any site investigation reports,\textsuperscript{133} whether the local authority has carried out or intends to carry out a consultation regarding the proposed service of a remediation notice, and whether a charging notice has been served.\textsuperscript{134} The last point is particularly important because the contaminated land regime does not provide for the registration of charging notices.\textsuperscript{135}

The second phase of the evaluation of the risks of

\textsuperscript{129} \textit{Id.} § 78R(1)(h)–(j). It should be noted that no such entry shall constitute a representation by the body maintaining the register that the work stated to have been done has in fact been done or as to the manner in which it has been done. \textit{Id.} § 78R(3).

\textsuperscript{130} \textit{Id.} § 78R(1)(k); see also \textit{id.} § 78M.

\textsuperscript{131} \textit{See supra} note 127. Moreover, pursuant to sections 78S and 78T of the EPA 1990, information may be excluded from the register on the grounds of national security and commercial confidentiality respectively. \textit{See also} DETR Circular, §§ 17.8–17.9, Annex 2, \textit{reprinted in} THE NEW REGIME, \textit{supra} note 5, app. D at 467.

\textsuperscript{132} \textit{See discussion infra} Part IV(B).

\textsuperscript{133} \textit{See DETR Circular, §§ 3.38, Annex 2, reprinted in} THE NEW REGIME, \textit{supra} note 5, app. D at 435. This suggests that such inquiries might be made in relation to land that has not been identified as contaminated. Paragraph 3.39 Annex 2 of the DETR Circular also acknowledges that the authority may be obliged to provide information pursuant to the Environment Information Regulations (1992) SI 1992/3240, as amended. \textit{Id. See also} R v. British Coal Corp. \textit{ex parte} Ibstock, [1995] Env. L.R. 277 (Q.B., 1994) (interpreting these regulations).

\textsuperscript{134} As a result of the incorporation of the European Convention on Human Rights by the Human Rights Act 1998 (which requires public authorities to act compatibly with Convention rights), it might also be possible to invoke Article 10 of the Convention. This may require the government to make available to the public information on environmental matters, although it does not impose a positive obligation on States to collect, process and disseminate such information. \textit{See Guerra v. Italy, 26 Eur. Ct. H.R. 357, §§ 52–53 (Eur. Comm’n on H.R. 1998)}.

environmental liability should involve on-site physical investigations. Such investigations are normally carried out once the potential pollutants or sources of contamination have been identified. Specialist environmental consultants should be engaged to carry out such investigations and to prepare a report. Prior to the engagement of such consultants, there should be a clear agreement between the lender and the borrower as to who is to engage the consultant, who is to bear the risks (including the cost of insurance), and who is to bear the costs of making good after such investigations have been carried out. The report should contain an express acknowledgement that it is being prepared for the purpose of providing information to enable the named lender to decide whether to provide financial assistance to the borrower (and to secure the facilities on the relevant property) and that the report can be relied upon by the lender for this purpose. The report should also state what tests were carried out, by whom they were carried out, and what equipment was used. Finally, the results of the tests should be presented clearly, and any assumptions or standards relied upon in order to assess those results should be fully explained.

B. Drafting Loan and Security Documentation

In addition to the preliminary inquiries mentioned above, the lender should also take steps to protect itself when the loan and security documents are being drafted.

The loan agreement should contain warranties relating to the information and responses to basic inquiries provided by the borrower regarding the condition of the property. Covenants should also be inserted as to (1) the nature and extent of the

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136 It is suggested that the safest course would be to require the borrower to engage and pay for the consultants.

137 Such a provision would assist a lender in the event that it wishes to bring an action in negligence against a consultant who was engaged by the borrower. If, however, the lender wishes to obtain contractual rights against the consultant, the lender should consider purchasing from the consultant a further copy of the report to be addressed to the lender or obtaining a collateral warranty.

138 Although the required qualifications and, if possible, the identity of the consultant should be agreed to beforehand by the borrower and the lender, the report should also state the qualifications possessed by all those involved in carrying out such tests or contributing to the report.
activities which the borrower intends to carry out on the site, (2) compliance with environmental laws and regulations, (3) the procurement and maintenance by the borrower of adequate insurance against environmental liabilities, and (4) the reporting of any changes which might affect the matters warranted by the borrower.

The lender can further protect itself in several ways. First, the lender should be given the right to demand information and to inspect documents relating to environmental compliance. Second, the loan could also require the borrower to bear all remediation costs and associated expenses. Third, the loan could further provide that the borrower will indemnify the lender against any environmental liability incurred by the lender in connection with the loan, any security for the loan, or any activity of the borrower.

In addition, the borrower's breach of environmental laws or regulations could be made an event of default permitting the lender to demand early repayment. The identification of relevant land as contaminated or the service of a remediation notice could also constitute an event of default. In some cases, lenders may wish to provide for remedies that are not as severe as making demand for repayment of the whole of any loan or other facility. In such cases, partial acceleration clauses (making only part of a loan repayable on demand) should be considered. Other possible approaches include a discount in interest rates in the event of compliance with environmental laws or an increase in interest rate in the event of default.

It is submitted that the approaches referred to in the previous paragraph are preferable to provisions which permit the lender to

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139 In the contaminated land regime, where a copy of such an agreement has been provided to the enforcing authority, the authority should generally make determinations on exclusion, apportionment and attribution of liability in accordance with its provisions. See DETR Guidance, ¶ D.38, reprinted in THE NEW REGIME, supra note 5, app. D at 510. However, the agreement will be disregarded where it would increase the share of costs theoretically to be borne by a person who would benefit from a limitation of recovery on hardship grounds pursuant to section 78P(2) of the EPA 1990. See DETR Guidance, ¶ D.39, reprinted in THE NEW REGIME, supra note 5, app. D at 510. Such hardship includes the threat of closure or insolvency of small or medium-sized enterprises. See DETR Guidance, ¶ E.21–26, reprinted in THE NEW REGIME, supra note 5, app. D at 528.

140 This should include breaches of environmental laws which took place prior to the date of the loan, but which (for whatever reason) were not disclosed by the borrower to the lender.
take steps to prevent or to remedy any breach of environmental laws and to pass on the costs of any such steps to the borrower. Such provisions should be avoided in order to prevent any claim that the lender had the power to prevent or remedy pollution but unreasonably failed to exercise that power.\textsuperscript{141}

The lender should also take steps to protect itself when any security documents are being drafted. Such documents should reflect, insofar as it is appropriate, the provisions in the loan agreements referred to above. In addition, the usual clause should provide that in the event that a receiver is appointed, he is to be the agent of the borrower/mortgagor (not the lender/mortgagee).\textsuperscript{142} Finally, security documents should provide that any costs incurred or payable by the lender in respect of remediation work, any associated expenses, and any other sums payable under the borrower’s indemnity to the lender are fully secured.

C. Enforcement of the Loan and Repossession of Property

Making demand for repayment is not in itself likely to result in additional liabilities being imposed on the lender.\textsuperscript{143} However, the lender is at risk of such liabilities if he takes possession of his security. He will be at risk in the event that he asserts his right to possession if, following such an assertion, the borrower hands over the keys of the property to the lender or voluntarily abandons the property.\textsuperscript{144} Prior to seeking possession of any property, the lender should therefore consider whether a further environmental survey should be carried out.

The appointment of a receiver is likely to be a safer course for a lender than taking possession as a mortgagee. However, such a lender should ensure that it does not interfere in the conduct of the receivership (otherwise it might still find itself liable for the acts or omissions of the receiver).\textsuperscript{145}

V. Conclusion

In the absence of a developed body of English case law on

\textsuperscript{141} See discussion supra Part I (a).
\textsuperscript{142} See discussion supra Part I (B)(iv).
\textsuperscript{143} See discussion supra Part I (B)(ii).
\textsuperscript{144} See discussion supra Part I (B)(i)-(iii).
\textsuperscript{145} See discussion supra Part I (B)(iv).
lender liability, it is difficult to state with certainty when such liability may be incurred. It is unlikely that a lender would be saddled with participatory liability, that is, liability that is imposed for causing or knowingly permitting pollution or on similar grounds.\textsuperscript{146} Such liability should not result from the mere provision or withholding of financial assistance by a lender. However, where the lender exercises control over the management of the borrower (and in particular, the operational activities of the borrower), it may well incur environmental liability on the grounds that it has participated, either by its acts or omissions in the polluting conduct of the borrower.\textsuperscript{147} Liability imposed on this basis would be consistent with both the approach recommended by the Commission of the European Communities in its proposals for an environmental liability regime\textsuperscript{148} and with recent legislative\textsuperscript{149} and

\textsuperscript{146} See discussion supra Part I.

\textsuperscript{147} See discussion supra Part I.

\textsuperscript{148} In its White Paper on Environmental Liability, the Commission of the European Communities proposed that “[l]enders not exercising operational control should not be liable.” White Paper on Environmental Liability, COM(2000) 66 final ¶ 4.4. It is currently anticipated that a draft framework directive will be prepared towards the end of 2001. Compare Council Directive 96/61, art. 2(12), 2000 O.J. (C 375) (defining “operator” as “any natural or legal person who operates or controls the installation or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of the installation has been delegated”), with Pollution Prevention and Control Regulations, (2000) SI 2000/1973, ¶ 2(1) (implementing Council Directive 96/61/EC and defining “operator” as “the person who has control over [the] operation” of an installation, while not expressly referring to decisive economic power).

\textsuperscript{149} The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amended the secured creditor exemption by defining impermissible participation in management to require actual involvement with the management and operation of the facility and not merely having the capacity to influence or the unexercised right of control facility operations. 42 U.S.C. § 9601(20)(E)-(F) (1998). While the borrower remains in possession, a secured creditor will only be deemed to have impermissibly participated in management where it:

exercises decision-making control over environmental compliance matters of the facility to the extent that it has assumed responsibility for hazardous substance management; or exercises control similar to that of a facility manager over a) day-to-day environmental compliance decision-making, or b) all or substantially all of the facility’s operational functions (as distinguished from financial or administrative functions) other than those related to environmental compliance.

\textit{Id.}
judicial developments in the United States.

Proprietary liability, that is, liability imposed on the owner or occupier of property, is unlikely to be incurred by a mortgagee who is not in possession of the property. On the other hand, a mortgagee in possession may well be subject to such liability. A mortgagee will therefore be at risk where it lawfully asserts its right to possession and as a result the mortgagor voluntarily hands over the keys to the lender and/or abandons the property.\footnote{150}

It is suggested that there are four points which lenders should bear in mind in order to reduce the risk of liability being incurred on either of the grounds discussed. First, a lender should ensure that sufficient inquiries and investigations into actual and potential contamination are carried out before agreeing to provide financial assistance, particularly where the lender intends to secure the loan. Second, a lender should encourage and require compliance with environmental laws and regulations by the borrower. Third, a lender should ensure that it does not become intimately involved in the management of the borrower and, in particular, of its day-to-day operations. Fourth, a lender should think carefully before seeking to obtain possession of a property. Where there is a material risk of pollution or contamination, a lender should consider whether it wishes to examine an up-to-date environmental report before proceeding further.

If sufficient care is exercised in the manner described above, the development of a body of English case law on lender liability may be far less likely to occur. If lessons can be learned from the ebb and flow of lender liability in the United States, it is possible that (in England, at least) the tide may never come in.

\footnote{150}{See, e.g., United States v. Bestfoods, 524 U.S. 51 (1998) (discussing the liability under CERCLA of a parent company for the costs of cleaning up waste generated at the facility of a subsidiary). In \textit{Bestfoods}, the Supreme Court held that in order to "sharpen the definition for the purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." \textit{Bestfoods}, 524 U.S. at 66.}

\footnote{151}{Compare the position of a lender who forecloses in the United States. Such a lender will not be held liable as an "owner or operator" if it seeks to sell or divest itself of the property "at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements." 42 U.S.C. § 9601(20)(E)(ii). In this respect, a lender in England appears to be in a worse position than a lender in the United States.}