



Laying down the law

Beware illegal waste activities

Ross Fairley issues a warning to landlords about the consequences of tenants' illegal waste operations



Resource minister Dan Rogerson recently acknowledged the need for “more systematic” regulation to tackle illegal waste activities in a letter to the waste industry. The minister talked of greater scrutiny of operators applying for environmental permits to carry out waste operations, as well as heightened enforcement and data sharing.

Earlier in the year, Defra allocated £5 million to the Environment Agency to help tackle illegal waste exports and to reduce the number of active illegal waste sites. Endowed with this sum, the agency is expected to toughen its stance against waste crime and bolster its regulation of permitted sites. The agency is likely to increase its scrutiny of operators applying for permits by conducting detailed checks of the operators' financial credentials, technical abilities and past behaviour.

A quartet of problems

With the number of illegal waste sites on the rise and the expensive consequences for landowners leasing land to waste operators, the improvements the new funding intends to bring are badly needed. Whatever the reason for this increase, lack of enforcement is having a notable impact on landlords whose tenants engage in waste operations outside the bounds of their permit or without a permit at all.

The problems faced by landlords when tenants participate in illegal waste activities are numerous and varied, but commonly include the following:

- loss of amenity of the rented premises, and associated difficulties in attracting tenants to occupy land adjacent to disruptive waste operations;
- the obligation to clear up sites at great cost where the tenant has gone into

liquidation or otherwise refuses to comply with legislation;

- increasing difficulty in convincing insurance providers to provide cover for waste management sites; and
- difficulties in enforcing lease terms without having to forfeit the lease and become responsible for waste remaining on the land if the tenant has gone into liquidation.

If the agency fails to take action against illegal behaviour, and if forfeiting a tenant's lease risks leaving the landlord with the hugely expensive task of disposing of the remaining waste, what options are available?

Taking action

Landlords should carefully consider the terms of the lease and the tenant's history. Where waste operations are concerned, the land owner should ensure that an express covenant is included in the lease, to the effect that operations carried out on the land are to be at all times in full compliance with planning and environment law and are not to amount to a nuisance. In addition, the landlord should insist that the tenant obtains insurance for the waste operations they intend to carry out.

The landlord throughout the term of the lease should closely monitor the activities carried out at the site. If suspicion arises that the tenant is failing to comply with its environment permit or is in breach of its planning permission, the landlord should contact the agency or planning authority at an early stage in order to put the authorities on notice, and to encourage early action. There is no obligation on the agency to investigate or prosecute waste offences, but regular dialogue and information sharing can sometimes compel the regulator to bring enforcement proceedings. It is open to the agency to carry out remedial works itself and recoup its costs of doing so from the tenant.

If illegal activities persist on the site despite the lease terms, and in the absence

of enforcement action, normal remedies for breach of lease terms can be sought in the county court. These include damages for breach of contract, an application for an “order for specific performance” (such as the removal of any waste stored unlawfully) or an injunction (ordering the tenant to cease its waste operations).

However, these remedies are of limited benefit if, as is common, the tenant goes into liquidation and becomes unable to comply with the terms of a court order. Forfeiture of the lease is the ultimate remedy open to a landlord. As for the remedies listed above, this option loses its appeal if the tenant goes into liquidation, making the landlord responsible for clearing out volumes of wastes when repossessing the land.

Counting the cost

The costs incurred by landlords in dealing with the aftermath of the illegal waste activities have been disproportionate in recent years. Landlords should actively negotiate the terms of their tenants' leases and monitor their tenants' activities to avoid illegal waste operations developing to such an extent that they become unaffordable to rectify.

A case in point

In April 2012, Chelmsford crown court fined Kevin O'Sullivan £34,985 and ordered him to pay £13,000 toward the Environment Agency's costs for renting 16 units at industrial estate he owned for operations involving vehicle breaking, skip waste transfer, waste burning and scrap storage. O'Sullivan told the court he thought his tenants had the correct papers, but none had permits. The court heard that some of the waste was hazardous and had contaminated the ground, while plastics, rubber and treated wood was burned illegally. An extensive clean-up was needed for many of the sites. In addition to the fine and costs award, the court ordered O'Sullivan to hand over £207,000 under the Proceeds of Crime Act for rent payments he received.

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