STRATEGIC ISSUES – ENGLAND AND WALES

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THREE DEVELOPMENTS IN LAW ON FLOODING AND FLOOD RISK MANAGEMENT IN SPRING 2016

FLOOD RE LAUNCHES

The Prudential Regulatory Authority and Financial Conduct Authority announced that Flooding Reinsurance, or Flood Re, went live in April 2016. Flood Re is a scheme to help private home owners obtain affordable flood insurance with cover at a set price. Key things to be aware of are:

- Flood Re is a not-for-profit fund, owned and managed by the UK insurance industry. It is funded through an annual levy of £180 million on UK home insurers. Flood Re also has its own reinsurance policy in place to ensure that it will be able to cope with significant or multiple flood events.
- Flood Re works by providing commercial insurers with the opportunity to purchase subsidised reinsurance against flood risk where they are not prepared to underwrite that flood risk themselves.
- Insurers using Flood Re will need to adhere to capped premiums for their customers, set by reference to the council tax band of the property and rising in line with inflation.
- The scheme will not cover commercial property or mixed use property.
- The scheme will not cover all types of domestic properties; it does not cover leasehold flats, buy-to-let properties and properties built after 1 January 2009.
- More information can be found in the Flood Re-insurance (Scheme Funding and Administration) Regulations 2015.[1]

The introduction of Flood Re is a major milestone for domestic properties affected by flooding. It remains to be seen how many insurers will use Flood Re and whether the fund will be sufficient to reduce the burden on the insurance industry in the event of another major flooding incident.

NEW FLOOD RISK PERMITS

On 6 April 2016, flood defence works affecting main rivers were brought within the environmental permitting regime in England and Wales.

New 'flood risk permits' replace the old system of flood defence consents under the Water Resources Act 1991 and consents for land drainage and sea defence works under Environment Agency and Natural Resources Wales bye-laws. The move to bring flood defences within the environmental permitting regime was driven by a desire for greater simplification and consistency and has been implemented through delegated powers in the Water Act 2014.

A one-stop-shop for flood risk activities and flood defences?

The provisions relating to flood risk activities and flood risk permits are contained in a new Schedule 23ZA to the Environmental Permitting (England and Wales) Regulations 2010.[2]

Activities that constitute a flood risk activity and require a flood risk permit are set out in paragraph 3 of Schedule 23ZA. They include:

- erecting or repairing any structures in, over or under a main river;
- works on main river beds and banks such as dredging or taking sand;
- diverting the flow of water into a main river or altering the level of water in a main river; and
- activities on floodplains within a specified distance of a main river or culvert likely to divert or obstruct floodwaters.

An important benefit created by flood risk permits, according to the Government's proposals for consultation in December 2014, is that individuals and businesses (operators) can make a single application and obtain a single permit in respect of all regulated activities at an installation, including emissions to land, air and water, activities involving waste and now flood risk activities. In this way, the Environment Agency or Natural Resources Wales, as the case may be, acts as a 'one-stop-shop' for environmental permitting.

This is a sensible goal. However, it should be noted that the new flood risk permitting regime does not apply to all activities that operators may think relate to 'flood risks' or 'flood defences'. In particular, the new regime does not affect:

- Activities in respect of watercourses that are not main rivers. This means that operators may still be subject to local bye-laws under section 66 of the Land Drainage Act 1991.
- Activities that may affect the level of waste in a main river through impounding water or abstracting it. This means that operators building weirs for hydroelectric power stations or abstracting it for cooling water, for example, would still require an impoundment licence or abstraction licence under the Water Resources (Abstraction and Impounding) Regulations 2006.
- Activities regulated through marine licences, such as dredging of the sea bed, issued by the Marine

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1 SI 2015/1902.

2 SI 2010/675.

Management Organisation and Natural Resources Wales under the Marine and Coastal Access Act 2009. This means that operators may still need a separate marine licence.

These exclusions reflect the division of responsibilities for flooding and coastal defences between the national regulators and local bodies under the Flood and Water Management Act 2010. Whilst this division may be easily understood by central and local governments, especially from a funding perspective, it may create uncertainties in practice for operators who are unsure of which set of rules apply to them in respect of a given activity.

A reduced administrative burden for operators?

For common activities that present a lower risk of flooding or environmental harm, a standard rules permit will be available. This is intended to help reduce the administrative burden on operators and regulators. Nevertheless, a number of respondents to the Environment Agency's consultation on a standard rules permit earlier in 2016 raised concerns that the new regime may in fact increase the regulatory burden on operators looking to carry out relatively minor maintenance of watercourses to prevent flooding.

There are, however, a number of activities that are excluded from the requirement to obtain a permit and a number of other activities that can be carried out under a registered exemption. For example:

- *Exclusion*: carrying out of certain minor works on or affecting bridges and culverts for highways and public rights are excluded from the requirement to obtain a permit.
- *Exemption*: following a pilot earlier this year, operators will be allowed to dredge a maximum of 1.5 km of man-made ditches, land drains and agricultural drains without a permit, subject to certain conditions to protect designated sites and sensitive waterbodies.

The Environment Agency and Natural Resources Wales intend to issue full guidance on flood risk permits later this year.

DUTIES ON LOCAL AUTHORITIES FOR FLOODING: A FURTHER WARNING FROM THE COURTS

The recent case of *Robert Lindley Ltd v East Riding of Yorkshire Council*[3] highlights the importance of local authorities understanding their duties in relation to flooding and of taking proactive steps in dealing with flood risk. This case bears some comparison on its facts with the important decision of the Court of Appeal in *Lambert v Barratt Homes Ltd and Rochdale Metropolitan Borough Council* in 2010.[4]

Lambert v Barratt Homes Ltd and Rochdale Metropolitan Borough Council

In 2010, the Court of Appeal handed down an important judgment in relation to flooding and local authorities. In that case, the developer Barratt Homes Limited had purchased the lower section of playing fields owned by the Local Authority for the purposes of residential development. The Local Authority retained the higher section of playing fields. Significant rainwater from the playing fields drained through an open watercourse and culvert that ran between the playing fields and the properties. In the course of the development, Barratt Homes filled in the watercourse and culvert and as a result rainwater ended up flowing from the retained playing fields still owned by the Local Authority into the residential properties.

As well as finding Barratt Homes liable in negligence and nuisance for filling in the watercourse and culvert, the Court of Appeal also held that the Local Authority, as landowner, was under a measured duty of care to take steps to assist with the alleviation of the nuisance arising from the rainwater falling on the playing fields, which was flowing into the properties. The Local Authority was aware of the problem and was in a position logistically and financially to take the necessary steps to solve it.

The Court of Appeal judgment contains a helpful analysis of the case law surrounding the extent of the duty of care that landowners owe to their neighbours to abate a nuisance which they have not created. The Court of Appeal was satisfied that the Local Authority did owe a measured duty of care, which included allowing others to have access to the land, cooperating with any relief works and possibly even carrying out some of the works to its own land. The Local Authority may have taken some comfort in the fact that this duty did not necessarily extend to paying for the entire remediation scheme itself. The duty is not absolute; the extent of the duty depends on the facts of the case.

It was very clear in *Lambert v Barratt Homes Ltd and Rochdale Metropolitan Borough Council* that the financial means of the Local Authority was a key consideration. The Court of Appeal acknowledged that a Local Authority might be expected to have access to funds far in excess of those available to individuals. It may be the case that local authorities have 'deep pockets' compared with those of individuals but this oversimplifies the position. In reality, local authorities have a wide range of competing flooding responsibilities and have to prioritise how they spend their limited funding. From this perspective, it is not necessarily the case that a Local Authority has more money to spend on each household than an individual might have.

Robert Lindley Ltd v East Riding of Yorkshire Council [5]

In a case earlier this year, the courts revisited the duties imposed on local authorities in relation to flooding. The Lands Chamber found that East Riding of Yorkshire Council was liable for damage to crops caused by an operation to pump floodwater out of a neighbouring village and into a stream because of its duties under the Land Drainage Act 1991.

Pumps had been arranged by the Environment Agency but then left for the Local Authority to oversee. During the pumping, the stream overflowed and damaged crops in a field. The Local Authority had assumed that the Environment Agency remained responsible as it had procured the pumps in the first place.

3 [2016] UKUT 6 (LC) (11 January 2016).
4 [2010] EWCA Civ 681.
5 Note 3.

The Lands Chamber disagreed and held that the Local Authority had been the responsible party because it had been acting under its powers under the Land Drainage Act 1991 to reduce the level of water in the village, whereas the Environment Agency was merely providing assistance under the Flood and Water Management Act 2010. Key to the Lands Chamber's decision was its finding that the Local Authority had failed to carry out its duty under the Flood and Water Management Act 2010 to identify the relevant risk management authorities and what role it was fulfilling.

In accordance with section 14(5) of the Land Drainage Act 1991, the Local Authority was strictly liable to make full compensation to the injured person because the damage to the crops had been sustained by reason of the exercise of the Local Authority's powers.

A number of farmers have alleged that their crops have been affected by emergency flooding measures installed by local authorities. It remains to be seen whether this case will 'open the floodgates' to further claims.

Where does this leave local authorities?

A flooding event can have multiple and interlinked causes: extraordinary rainfall, flood defences that have not been properly maintained owing to lack of funding and new developments increasing the number of properties at risk of flooding.

Considering these two cases together at face value, local authorities may well feel that they are in a difficult position. In *Lambert v Barratt Homes Ltd and Rochdale Metropolitan Borough Council* the Local Authority failed to 'step in' and carry out relief works. In *Robert Lindley Ltd v East Riding of Yorkshire Council* the Local Authority did step in but failed to carry out those relief works properly and was therefore liable for the damage caused.

The key for local authorities is to understand the legal basis of their duties in a given situation and to act accordingly. The two cases may appear similar but they deal with different legal duties that local authorities hold, in that:

- *Lambert v Barratt Homes Ltd and Rochdale Metropolitan Borough Council* is about the duties on local authorities as landowners. In this situation, the measured duty of care applies.
- *Robert Lindley Limited v East Riding of Yorkshire Council* is about the duties of local authorities when exercising their powers as lead local flood authorities under the Land Drainage Act 1991. In this situation, strict liability under section 14(5) of the Land Drainage Act 1991 applied.

This distinction demonstrates that there are subtle but important distinctions between the different duties that local authorities may be responding to, depending on the legal basis of the duty.

On becoming aware of flood events in their areas, local authorities are under a duty under section 19 of the Flood and Water Management Act 2010 to carry out an investigation to establish:

- which risk management authorities have relevant flood risk management functions; and
- whether each of those risk management authorities has exercised, or is proposing to exercise, those functions in response to the flood.

In accordance with section 19(2) of the Flood and Water Management Act 2010, local authorities must publish the results of their investigations. Local authorities faced with flooding are therefore well advised to carry out their investigations carefully and to be mindful of the legal impacts of the different duties that may apply.