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Japanese Knotweed: Response to HM Revenue & Customs Technical Note dated 24 November 2008 on changes to Land Remediation Relief

The City of London Law Society ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This submission on Japanese Knotweed (prepared in response to HM Revenue & Customs Technical Note dated 24 November 2008 on changes to Land Remediation Relief ("LRR")) has been prepared by the CLLS Planning & Environmental Law Committee. The Committee is made up of a number of solicitors from City of London firms who specialise in planning & environmental law. The Committee's purpose is to represent the interests of those members of the CLLS involved in this area of law.

We welcome the proposal to include land that is infested with Japanese Knotweed ("JK") within the definition of contaminated land, for the purposes of LRR, from 1 April 2009.

However, we do have a number of concerns regarding the stated intentions of the revised legislation and the intended scope of the relief, which we have outlined below.

Availability of LRR for land contaminated by JK, which occurs post-acquisition

The technical note states, at paragraph 4.19, that "Japanese Knotweed is unusual in that manifestations can occur through no fault of the landowner or occupier. In view of this, it has been decided that the requirement that the site was contaminated at acquisition should not apply in the case of Japanese Knotweed".

We consider this to be an appropriate departure from the standard test, under the LRR regime, which otherwise states that contamination must be subsisting at the time of the acquisition. Paragraph 4.19 recognises that the nature of JK and its ability to migrate to sites by a number of methods, means that it would be inappropriate to apply the standard test in this case.

The note also states, at paragraph 4.20, that "a company that was responsible (or a connected party of which was responsible) for planting JK will not qualify for relief". Paragraph 2.10 of the note also states that "relief is not available where the Japanese Knotweed was planted by the claimant (or a connected party) or where it spread to the site during the period of ownership, for instance by fly-tipping".

While we have no objection to this in principle, it should be noted that current methods of remediating JK infestations continue to run the risk of spreading the infestation, through no fault or negligence of the owner or contractor. It is essential that provisions which seek to exclude relief either explicitly anticipate and provide for such a circumstance or otherwise ensure that, where fair efforts are made to remediate a site, which inadvertently result in continued or further infestation, these efforts do not result in that owner/occupier being unable to claim LRR.

We would suggest that the most effective way of limiting the right to LRR would be to exclude LRR only in specific circumstances where the owner/occupier has taken active steps to introduce JK onto the property or, at most, where JK migrates to or around a property as a result of the gross negligence of the owner/occupier (e.g. by fly-tipping waste known to contain JK). As such, the general rule of "polluter-pays" which, as set out at paragraph 4.18, precludes the party responsible for the pollution from claiming the relief, will also need to be revisited for the purposes of applying the LRR regime to land contaminated with JK.

Evidentiary difficulties in determining when contamination has occurred

Notwithstanding the points raised above, there is a wider issue in respect of the difficulty of accurately determining the point at which land becomes contaminated with JK.

It is common knowledge that JK can be very difficult to eradicate, lying dormant for up to 20 years before rapidly growing and pushing through topsoil, concrete or tarmac. As noted at paragraph 2.1, JK is "capable of regenerating from a small piece of rhizome" and as such may lie entirely undetected for years. Where JK rhizomes migrate from neighbouring land, there is no certainty as to when those rhizomes will sprout and the plant will grow. Where attempts have been made to remove JK from a site, the possibility remains that JK may be lying dormant at other parts of the site.

On this basis, were JK to suddenly begin to flourish on a site, it would often be very difficult to determine exactly when the rhizomes of the JK migrated to the site, notwithstanding for example an obvious instance of fly-tipping. It may therefore be impossible to determine whether contamination of the land by JK occurred pre- or post-acquisition. Any aspects of the intended tests should avoid simplistic distinctions between infestation occurring pre- and post-acquisition and should instead narrowly define specific circumstances where relief is to be excluded.

Exclusion of removal to a landfill site as a method of "qualifying remediation"

There are a number of circumstances where it may not be appropriate for a JK infestation to be remediated by on-site or off-site treatment. In addition, on-site treatment and re-use runs the additional risk of the JK infestation spreading further on that site. Therefore, we do not believe that it is appropriate for a blanket exclusion

to apply in respect of waste removed to landfill. Any test which is to apply should consider the most appropriate method of remediation, given the particular factual circumstances which exist, on a site by site basis. On this basis, disposal to landfill should not be excluded *prima facie*.

The related issue (discussed at paragraph 6 above) under this heading is the importance of avoiding a situation whereby a landowner takes steps to remediate the JK infestation by treatment and re-use of the soil onsite, the JK then reappears, and the landowner is excluded from claiming LRR due to his having indirectly contributed to its spread. Quite apart from this being unfair, it would, in a number of circumstances, be very difficult evidentially to determine whether the reappearance of JK was as a result of the failed remediation, or previously untouched rhizomes sprouting, or a fresh infestation from a neighbouring property. As discussed above, if disposal to landfill is to be excluded at all, there need to be very clear provisions protecting an owner's right to claim LRR given the risks of treating and re-using JK-infested soil on site. Under no circumstances should it be possible for a landowner, which through fair attempts to remediate land contaminated with JK, inadvertently permits JK to continue to grow, to be classed as a "polluter" for the purposes of the LRR regime.

Extension of LRR to other invasive plant species

We would note that the rationale given for including the remediation of JK within the LRR regime, namely that it is "sufficiently invasive and destructive that it satisfies the 'harm' test" (paragraph 2.6), would apply equally to other invasive species, such as New Zealand Pygmy Weed, Giant Hogweed, Himalayan Balsam, Australian Swamp Stonecrop, Parrot's Feather and Floating Pennywort. Further details on the harm caused by these species are detailed on the Environment Agency's website.

We would consider that the imminent changes to the LRR regime provide a good opportunity to extend the LRR regime to include other invasive species, whose debilitating effects on land can equal or exceed those of JK.

Draft Legislation

Section 1149 of the Corporation Tax Bill 2009 ("CTB 2009")

Section 1149 of the CTB 2009 relates to a company's entitlement to an additional deduction for qualifying land remediation expenditure.

The existing Section 1149(3) states that a company's entitlement to such a deduction is conditional on, amongst other things, all or part of the land being in a contaminated state at the time of the acquisition.

At paragraph 46 of Annex B to the technical note, which provides explanatory notes to the proposed amendments to the CTB 2009, it is stated that the new Section 1149(3A)(a) will amend the existing Section 1149(3), by giving "the Treasury a power to specify, by order, circumstances in which work may be qualifying expenditure for the purposes of Part 14 of CTA 2009 even though the contamination occurred during the claimant's period of ownership."

The insertion of new Section 1149(3A)(a) appears to reflect HMRC's revised position, as set out in paragraph 3 above, that given the unique peculiarities associated with the migration of JK, as distinct from other forms of contamination, the general rule

that the land must be contaminated at the time of acquisition to qualify for relief should not apply in the case of JK.

Section 1147 of the CTB 2009

Section 1147 of the CTB 2009 is similar in substance to Section 1149, but relates to a company's entitlement to treat capital expenditure incurred in connection with the remediation of contaminated land as a deduction in calculating profits of the trade or UK property business. Like Section 1149, a company is only entitled to such a deduction if certain conditions are met and these conditions are set out at paragraphs (2) to (4) of Section 1147.

One of these conditions, at paragraph 3 of Section 1147, states that "at the time of the acquisition all or part of the land is or was in a contaminated state". This condition would preclude a company being entitled to a deduction for capital expenditure where contamination has occurred post-acquisition.

Unlike Section 1149 (as above), the draft legislation set out in the technical note does not appear to provide for the conditions set out at Section 1147 to be varied so as to allow the Treasury to order that, in certain circumstances, a company may be able to claim a deduction for capital expenditure in computing the profits of a trade or UK property business, notwithstanding that the contamination occurred post-acquisition.

We would expect to see the insertion of a new Section 1147(3A), with similar wording to the draft Section 1149(3A) (as above), to provide the Treasury with the power to specify, by order, circumstances in which a deduction may be obtained in respect of capital expenditure, which is qualifying land remediation expenditure, even though the contamination occurred during the claimant's period of ownership.

The insertion of a draft Section 1147(3A) such as this would be consistent with the planned amendment to Section 1149 of the CTB 2009 and with HMRC's stated intention to allow relief to be claimed for the remediation of land contaminated by JK, in circumstances where that contamination occurred post-acquisition.

25 February 2009