

Biosecurity - 'Polluter Pays' principle

One of the fundamental principles of biosecurity is that the 'polluter pays'. Hence the person/organisation that imports a pest or disease is liable for the resulting costs of eradicating it. However, applying the principle requires proof that the suspected importer is guilty of importing the pest/disease. In some cases such proof is not difficult, eg if an imported pest is found in a nursery that recently imported the affected plants. But in many cases it is not possible to prove with enough certainty to make the suspected organisation liable.

There are many examples where such proof has been inadequate:

- The 2012 outbreak of Asian Longhorn Beetle in Paddock Wood Kent. Fortunately it was detected early enough to enable eradication, but *"More than 4700 potential host trees were surveyed, and 2166 host trees were removed. A total of 66 infested trees were detected, of which only 24 were found by visual inspection, the remaining 42 only being detected after they were felled."* (FC)
The suspected source of the outbreak was untreated timber pallets imported from China to a stone supplier in the outbreak area, but proving it wasn't possible. The significant cost of eradicating the outbreak fell on the tax payer. <https://planthealthportal.defra.gov.uk/pests-and-diseases/high-profile-pests-and-diseases/asian-longhorn-beetle/paddock-wood-2012-outbreak/>
- Similarly the source of the 2006 Oak Processionary Moth outbreak in West London is believed to be the import of oak trees to a residential development in Kew. The total cost of control continues to escalate and now eradication is no longer an option.

The issue of contractor's liability for pests and diseases after planting poses a similar issue of proof. The 6 yr / 12 yr limitation periods for liability for simple contract / deed are for defects in the contractor's work. Hence in the case of pests/diseases of plants it only relates to pests/diseases present but not noticeable at practical completion. The major difficulty is proving that the pest/disease was there then and did not arrive later (which will rarely be possible to prove unless it appears within a few months and if the infection could not have come from a local source). The rectification/defects period has no effect on the issue because it only gives the contractor the right of first refusal to correct the fault in his works, and the right of access to do so. Note that the limitation period is a limit on the period from (in this case) practical completion during which legal action can be taken against the contractor.

Having a 5 year JCLI Maintenance contract back-to-back with the construction contract and using the same contractor, with liability (in specification) for replacing all plants which fail to thrive for whatever reason for the whole 5 years (except vandalism/theft etc), will cover any pests/diseases that appear (and are visible) in the 5 years including any that appear that were there at practical completion but not visible then. See JCLI Practice Note No8 Rev 2 item 6 and JCLI Practice Note No 9 Rev 2 item 18.