PRINCIPLES INTO PRACTICE - UNITED KINGDOM PAPER

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Introduction

This paper identifies the most important cases where the core Treaty environmental principles have been raised in argument and considered by judges. The research is confined to cases which have been reported in key sets of law reports including those on computer data bases, and free-word searches covering the key phrases or equivalent terminology were conducted. Reported cases in the United Kingdom do not encompass every single judicial decision, particularly those of the lower courts (such as magistrates), but are confined to those which both the courts and the various legal publishers consider to be more important, either because of the level of the court or because of the principles that are being raised. We are not aware of this exercise being done before in relation to UK case-law.

1. Polluter Pays Principle

There have been few cases, before the UK courts, where the polluter pays principle has been considered at any length or in any great detail. The case law that exists within this select group is both diverse and broad in its scope, encompassing areas of the law that would not thought of as typically environmental .

1.1 Designation of Nitrate Vulnerable Zones

The most noteworthy case to date remains the cases of **ex parte H.A. Standley and Others and D.G.D. Metson and Others**[1], which , following the judicial review hearing discussed here, was referred to the ECJ for a preliminary ruling under Art. 177.[2] Two farmers and others, who sought to challenge the Secretary of State's implementation of the Nitrates Directive[3], brought the application for judicial review. The farmers argued that the Government had failed to apply the polluter pays principle when they had identified waters under Art 3(1) of the Directive because they could not prove that all the nitrate pollution in the areas derived from agricultural operations (other sources included traffic emissions) , with the result that farmers would bear the cost of removing nitrates which were not all due to them. In the alternative, they argued that if the Government were permitted to do so under Art.3, the directive itself was in breach of the polluters pay principle. The farmers raised the principle as an aid to the interpretation of the Directive's provisions, and, in addition the court was asked to consider the principle as '*an obligation under the Treaty with effect from July 1987*'[4].

The case was referred to the ECJ. Essentially the ECJ held that the Directive did not infringe the polluters pay principle in that while the process of designation of waters

[1] R. v Secretary of State for the Environment and Another ex parte H.A. Standley and Others and D.G.D. Metson and Others, Queens Bench Division (Crown Office List), CO/2057/96.
[2] Case C-293/97, 29 April 1999
[3] Directive 91/676.
[4] Judgement of Potts J, Official Transcript, 7th May 1997.

depended on nitrate concentrates and did not require sources of nitrates to be identified, the Directive did not require that farmers bear all the costs of removing the nitrates. The principle of proportionality was invoked and held to reflected in the polluters pay principle, and Member States were therefore required "not to impose on farmers costs of eliminated pollution that are unnecessary." Formally, the farmers lost the case they brought, but in fact won the tactical victory they were seeking.

1.2 Insolvency Law and Waste Sites

The polluter pays principle has twice been raised in cases discussing apparent conflicts between insolvency and environmental law, where companies operating waste sites have become insolvent. Modern waste management law under the Environmental Protection Act 1990 (EPA 1990) tries to prevent waste management companies running away from their obligations to complete or restore a site after operations have ceased by requiring, for example, that a licence cannot be given up until the environmental regulator, the Environment Agency, is satisfied that all obligations have been fulfilled. Financial bonds and the equivalent are also used. Once a company has become formally insolvent, however, insolvency law gives extensive discretion and obligations to liquidators to 'disclaim' existing responsibilities in order to maximize assets for creditors. The general principle is that unless the legislation is absolutely clear on obligations than cannot be disclaimed in this manner (which it is on certain matters such as tax debts) then future obligations can all be disclaimed. Unfortunately, the waste management legislation never made explicit the position on liquidation of a waste management company - probably a legislative oversight.

In **Re Mineral Resources Ltd**[5] the High Court examined the ability of a liquidator of a company to disclaim a waste management licence and 'the consequences of such a licence being capable or incapable, as the case may be, of disclaimer'[6]. It was acknowledged by Mr Justice Neuberger J, in his judgement, that there was a conflict between the EPA 1990 and the Insolvency Act 1986. In discussing why the EPA 1990 should prevail over the IA 1986, the judge raised the polluter pays principle saying; "*it appears to me that there is considerable public interest in the maintenance of a healthy environment, and in the principle pithily expressed as the polluter must pay. It is the view which prevails both in the popular perception and in the legislative system in this country and indeed, in most of the developed world."*[7]

The judgement went further, however, stating that the importance of the principle was not only reflected in the EPA 1990, but also in the terms of the Council's Directive on Waste.[8] The emphasis placed upon the principle of EC law is reflected in Neuberger J's final statement on the point; "*at least in the absence of strong factors the other way, that the interest in the protection of the environment should prevail over the fair and orderly winding up of companies.*"[9] It seems clear from the judgement that the principle is to hold an elevated status in these circumstances, thus prevailing over the provisions of the Insolvency Act 1986. In addition, it appears that the High Court was

[5] Re: Mineral Resources Ltd, Environment Agency v. Stout [1999] 1 All ER 746, [1999] 2 BCLC 516.
[6] Judgement of Neuberger J, 30th April 1998.
[7] Ibid.
[8] Council Directive 75/442, as amended by Council Directive 91/156.
[9] Judgement of Neuberger J, 30th April 1998.

suggesting that this principle is well established in domestic law as well as EC law. Further reasoning behind the application of the principle in this case is to be found later in his judgement where he states; "*by virtue of the conditions imposed in the licence for the benefit of the environment, the loser as a result of the disclaimer of the licence would not so much be the [Environment] Agency as the general public*."[10]

Re Celtic Extraction (in liquidation) and Re Bluestone Chemicals Ltd (in liquidation)[11] was a similar case on the facts, and initially heard by Mr Justice Neuberger who came to a similar conclusions. But in this case the liquidator appealed to the Court of Appeal which overruled his decision, thus allowing a liquidator to disclaim a waste management licence.

The appeal court judges analysed the judgement of Neuberger J and held that there was no inconsistency between the 1990 Act and the 1986 Act. In his judgement Morrit LJ too considered the principle and held that the European Directive on Waste; "*enunciated a principle of 'polluter pays' and required member states to take the necessary measures*."[12] This stated, however, he noted that the Directive did not go into any detail as to the consequences if the polluter was insolvent; "*there is nothing in the directive to suggest that the polluter pays principle is to be applied to cases where the polluter cannot pay so as to require that the unsecured creditors of the polluter should pay."*[13]

Essentially the Court reverted back to earlier general principles that legislation must be absolutely explicit if it is prevent a liquidator from disclaiming obligations, and held that it was a matter for the legislature if provisions were to made. The result of the case caused considerable concern to the Environment Agency who are now pressing Government to make the necessary legislative changes.

1.3 Interpretation of Landfill Tax legislation

In 1996 the British Government introduced special taxes on landfill of wastes in order to bias the costs of waste disposal in favour of recycling and incineration. The 2002 **Parkwood Landfill**[14] was the first decision of the High Court interpretation the tax provisions, and the argument concerned whether landfill operators should be taxed on waste sent to sites but used there for recycling operations such as foundations for roads. There was little discussion within the case as to the principle itself, but, the Court of Appeal acknowledged the existence of the principle within UK environmental policy regarding landfill. Reference was made to a policy White Paper of 1995 that preceded the imposition of landfill tax in the UK, where an indirect reference was made to the principle.

The case primarily concerned the definition of waste and who would in fact be liable for the relevant duties, but the eventual decision made by the Court of Appeal may be

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[10] Ibid.
[11] Official Receiver (as liquidator of Celtic Extraction Ltd and Bluestone Chemicals Ltd) v. Environment Agency [1999] 2 BCLC 555.
[12] Judgement of Morritt LJ, para. 10, 14th July 1999.
[13] Judgement of Morritt LJ, para. 39, 14th July 1999.
[14] Customs and Excise Commissioners v. Parkwood Landfill Ltd [2002] EWCA Civ 1707.

said to adopt the principle. Lord Justice Aldous stated; *"The tax bites upon the person who discards not who recycles*."[15] Significantly, the Court seems to have accepted that the principle was now part of national policy and law, and it should be noted that the landfill tax was a purely national initiative and not one derived from EC law.

2. The Precautionary Principle

The precautionary principle has been raised in a greater number of cases before the UK courts and, it appears that it exists as an important feature of environmental legislation and policy. The principle does, however, have the reputation of being, 'the fuzziest of environmental principles'[16]and it has been suggested that, '*while courts in the UK and other common law jurisdictions have been willing to recognise the principle and uphold precautionary decisions they have not, in most cases, been willing to accept it as a justification for substantive and intensive review*.'[17]Much of the case law is to be found within the traditional areas encompassed by environmental law, typically planning law, conservation and issues involving public health.

2.1 Government duties to protect public from low level magnetic fields

The leading case in domestic law, where the principle was considered in great detail is the 1995 decision of **ex parte Duddridge and Others**[18]. The case was an application for judicial review, which claimed that the Secretary of State for Trade and Industry was obliged to protect residents from possible effects of low level magnetic fields living in the vicinity of high-voltage power lines. The Secretary of State had the power to lay down regulations specifying thresholds of exposure from power lines, but had not done since the scientific evidence for exposure and effects was still highly contested.

The applicants' argument centred upon the contention that the Secretary of State was obliged to make regulations , because he was legally bound by the precautionary principle under both EC law and the government's policy reflected in the White Paper of 1990[19]. The evidence from the expert scientific panel suggested that there was a 'possibility' of an increased risk to human health from the exposure to the large electrical forces and thus the precautionary principle was relevant here.

The presiding judge, Mr Justice Smith J, stated; *" I am prepared to accept that, if the Secretary of State is shown to be under a legal obligation to apply the precautionary principle to legislation concerned with health and the environment, the possibility of harm raised by the existing state of scientific knowledge is such as would oblige him to apply it in considering whether to issue regulations to restrict exposure to EMFs."*[20]

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[15] Judgement of Aldous LJ, para. 30, 28th November 2002.
[16] D. Hughes, Journal of Environmental Law, Vol 7(2), 1995, at page 238.
[17] E. Fisher, Journal of Environmental Law, Vol 13(3), 2001, at page 315.
[18] R v. Secretary of State for Trade and Industry ex parte Duddridge and Others, Journal of Environmental Law, Vol 7(2), 1995, at page 224. [Court of Appeal decision, The Times, 26th October 1995]
[19] 'This Common Inheritance', Cm 1200.
[20] Judgement of Smith J, Journal of Environmental Law, Vol. 7(2), 1995, at page 230.

He then considered the basis upon which the applicants' submissions were made and, concluded that the application would only succeed if the court was satisfied there was a duty imposed upon the Secretary of State by EC law. Counsel for both sides discussed the obligations raised under EC law by Article 130, in particular Article 130r. Smith J accepted the submissions for the Secretary of State that, when considered in conjunction with Articles 130s and 130t, Article 130r merely "*lays down the principles upon which Community policy on the environment shall be based.*"[21] Here, there was no Community policy or law governing threshold emissions for power cables, and the regulations were purely a matter of national law. He held that Article 130r did not create an obligation upon a member State to take specific action and that; *"in accepting the provisions of Article 130r, a Member State has done no more than to indicate in advance its consent in principle to the formulation of a policy governed by the objectives there stated."*[22] Although the Government had endorsed the precautionary principle in a Government policy paper, this was not considered sufficient to impose any legal obligations on him.

The views of Smith J were upheld in the Court of Appeal, where leave to appeal against the decision was dismissed. Smith J acknowledged the existence of the principle in International, Community and domestic policy, but was unable to find it possessing more status than as a guide to policy objectives.

2.2 Transfrontier waste legislation

The case of **ex parte Dockgrange Limited**[23] considered the precautionary principle, two years after the decision in Duddridge. The case was an expedited application for judicial review with respect to the interpretation of a European regulation concerning the shipment of waste.[24] Essentially wastes on the 'green' list were considered non-hazardous, while those on 'amber' and 'red' lists were treated as hazardous required much more extensive controls. The regulations provided that if a waste category did not appear on any list, it was to be treated as a 'red' list waste, a provision which itself reflects the precautionary principle.

The applicant was a recycling firm who imported mixed consignments of green waste categories (mainly crushed cars and white goods). All the constituent parts of the waste were green listed wastes, but because a mixture of these categories was not listed in the Regulation lists, the Environment Agency treated it as a Red List, the 'red list' procedures, causing considerable potential harm to the applicants' business.

The Environment Agency raised the precautionary principle as grounds for the adjustment to the procedure stating that; 'the Regulation must be interpreted in accordance with the governing 'precautionary principle' laid down by the treaty.'[25] Carnwath J, however, dismissed the issue of the principle here, and clearly felt that the result of the Agency's approach was a bureaucratic nonsense; "*where there is legitimate room for uncertainty, then the precautionary principle argues in favour of a more restrictive approach until the facts are known. However, that is no*

[21] Ibid, at page 233.
[22] Ibid, at page 234.
[23] R v. Environment Agency, ex parte Dockgrange Limited and Another, The Times, 21st June 1997.
[24] Regulation No.259/93.
[25] Judgement of Carnwath J, 22nd May 1997.

justification for applying a restrictive approach, where, as here, the facts are known."[26]It is clear from judgement that; Carnwath J accepts the existence of the principle as an aid to the interpretation of the disputed regulation. The judgement only rejects the principle on the basis that it cannot be applied in the circumstances surrounding that particular case.

2.3 Land Use Planning Decisions

The principle has also been raised in planning cases; the case of **R v. Derbyshire County Council**[27] provides an example of how it has been handled by the courts. This case was an application for judicial review in the High Court by a local resident of the decision by the local authority, to grant planning permission for the extension of a landfill site known. The third ground sited by the applicant in his application was the failure of the council to 'give effect to the precautionary principle'. Counsel for the applicant suggested it was 'incumbent' upon the Council to give effect to the Community principles under Article 174 of the EC Treaty and sited the precautionary principle as being of particular relevance here.

Mr Justice Kay held that the precautionary principle was reflected in both the Waste Framework Directive and the regulations that transposed the directive into domestic law. He stated; "*although it is said to illuminate the waste Framework directive and the implementing provisions of the 1994 Regulations, it does not in my view take any further the arguments already considered in relation to those matters*." [28] He refused to consider the principle as one that was justiciable in isolation, but saw it as an integral part of national and EC legislation. Thus, it was held that by following the procedure in both the Waste Framework Directive and the implementing legislation, the inspector in the case had complied with the requirements of Article 174.

2.4 Pesticide Regulation

In a recent case, **Amvac Chemical UK Ltd**[29], the High Court considered the significance of the principle in relation to a regulatory procedure concerning pesticides. The action brought by a pesticide manufacturer sought to challenge the Government decision to suspend regulatory approvals for a chemical used in pesticides known as 'dichlorvos'. One of the grounds, upon which permission for judicial review was granted was that the Government had purported to follow the precautionary principle, but in fact had failed to do so.

Mr Justice Crane considered the legislative and political background to the precautionary principle and its relevance to the UK legal system. Crane J considered the decision in R v. Derbyshire County Council discussed in 2.3 and states; *"I am prepared to accept that on a substantive challenge to a regulatory decision, it may in some cases be relevant to take into account the precautionary principle and, more*

[26] Ibid.
[27] R (on the application of Murray) v. Derbyshire County Council, CO/1493/2000, 6th October 2000, The Times 8th November 2000.
[28] Judgement of Kay J, para. 17, 6th October 2000.
[29] R (on the application of Amvac Chemical UK Ltd) v. Secretary of State for Environment, Food and Rural Affairs and Others [2001] EWHC Admin 1011, CO/3087/2001.

important its limitations."[30] This decision suggested that the judiciary might now be encouraged to consider, to a greater extent, the principle in relation to particular regulatory challenges. There is, however, no further reference in the judgement to situations where such an investigation may occur. Furthermore, the applicants' submission was rejected by Crane J on the basis that; *"there is – at least so far – no settled, specific or identifiable mechanism of risk assessment in the field of pesticide approval that the Claimant is entitled to rely on as part of the precautionary principle, viewed as a separate basis for challenging a decision.*"[31]

3. Prevention at Source

We have not been able to find any reported cases where this principle, or words equivalent to it, are referred to expressly in judgments.

4. Producer or Extended Responsibility

The concept of producer or extended responsibility is not strictly part of the provisions of the EC Treaty, though , it may be seen as an elaboration of both the polluter pays principle and rectification at source. There is at present very little case law to be found upon this notion, but it has been considered to some extent within the UK courts.

4.1 Packaging Regulations

There have to date been two leading cases concerning the interpretation of the 1997 Producer Responsibility Obligations (Packaging Waste) Regulations[32] which implemented 1994 EC Directive on the subject. Both turn on the interpretation of specific provisions in the Regulation and Directive, but against the underling policy background.

Davies and Hillier Nurseries[33] was a dispute between the Environment Agency and the operator of a number of garden centres selling plants in plastic pots. The Agency argued that the pots were packaging within the meaning of the legislation and therefore the operators were subject to producer obligations. The Court held that it was quite possible for such containers to have dual purposes - both as a growing medium and a form of sales unit - and therefore such pots could be considered as packaging within the meaning of the law.
A similar case was **R on the application of Valpak v. Environment Agency**[34] which was concerned whether drink sold in bottles to be consumed on the premises of pubs or restaurants fell within the concept of packaging, and whether the operators of the pubs could be considered as producers, rather than the wholesalers who supplied them. The case was brought by one of the packaging recovery facilitators who wished to test the Agency's contention that suppliers to pubs and restaurants were still responsible producers. The Agency argued that the bottles were opened and drinks poured before supply, thus making the operators of the pubs no longer producers

[30] Judgement of Crane J, para 84, 3rdDecember 2001.
[31] Ibid.
[32] Producer Responsibility Obligations (Packaging Waste) Regulations 1997.
[33] Davies v. Hillier Nurseries [2001] EWHC Admin 28, CO/3149/00.
[34] R. (on the application of Valpak) v. Environment Agency [2002] Env L.R 36.

within the meaning of the legislation. The High disagreed, arguing that a more generous interpretation was more consistent with the basic aims of the Directive to improve collection and recovery, with the result that responsibility was pushed onto the owners and operators of pubs and restaurants.

4.2 Extending the notion of producer responsibility

The concept of *'producer responsibility'* in its wider application implies place legal responsibility on parties 'further up the chain' than might be traditionally thought liable. In the field of pollution control we have identified two fields where this concept has been developed though the terminology, 'producer responsibility' was not used as such.

- *Supermarket prosecuted for abandoned shopping trolleys dumped in local river.*

The background to this 2001 case was a joint clean up operation by the Environment Agency and a local council of a river running through the town of Chelmsford in Essex. During this operation, the authorities recovered 237 shopping trolleys of which 197 were found to belong to a local supermarket branch of Tesco's. No-one knows who actually dumped the abandoned trolleys there, but presumably it was local vandals who could not be identified.

Tesco's had no deposit, lock-up system for their trolleys, and the Environment Agency decided to prosecute them under the water pollution law which makes it an offence to *"knowingly permit*" the deposit of pollutants or substances in a river without a licence. Previous court decisions on the meaning of this phrase have tended to be concerned with industrial pollution where the company failed to prevent pollution with actual knowledge. What was unusual here was that Tesco's clearly had no actual control or knowledge over the vandals who dumped trolleys in the river which was not even on their land. but the Environment Agency decided that that failure to implement any sort of preventative system to discourage dumping was sufficient to impose liability.

In the event Tesco's decided to plead guilty before local magistrates, who sent the case for sentencing to a higher court where the company was fined £30,000 plus legal costs. Shortly before the case was heard, the local store management fitted 'coin in the slot' locks on trolleys. The case received considerable publicity in the media, and can be expected to encourage other stores to fit similar preventative systems.

- *Responsibility for noise nuisance on owners of buildings with poor sound insulation*

Legislation gives power to local authorities to serve "statutory nuisance" orders to stop or prevent particular sources of pollution, especially noise levels. The legislation requires the notice to be served on the person *'responsible*' for the nuisance, a term not defined in the legislation. In relation to domestic noise nuisances, notices are generally served on the individual directly causing the noise (hosting a party, etc.), but some local authorities have argued in cases where those disturbed are immediate neighbours in blocks of flats that the person really ‘responsible’ was not necessarily the immediate individuals causing the noise but the landlord or the owner of the building who failed to provide adequate sound insulation. There have been isolated

successful cases brought by local authorities against landlords in local magistrates but the point has never been tested in the higher courts to date.

Only since 1985 have building regulations required standards of sound insulation, and the issue is focussed on older, multi-occupied flats. In a leading case[35], the House of Lords considered the issue in relation to the legal obligations of landlords generally. The case concerned a poorly insulated block of flats let by a local authority, where even the ordinary sounds of people walking about and talking caused disturbance to others living there, so poor was the sound insulation. The tenancy agreement included an obligation on the landlord to take steps to prevent other tenants committing a nuisance, but the House of Lords could not see that it could be invoked here. The landlord had not expressly authorized any nuisance, and could not see that the normal use of a flat could be a nuisance in law. According to Lord Hoffman, *"if the neighbours are not committing a nuisance, the councils cannot be liable for authorizing them to commit one."* The local authority was under no contractual or statutory obligation to insulate the building.

The decision was not directly concerned with the meaning of 'responsible' under the statutory nuisance legislation but with the contractual responsibilities of landlords under their tenancy agreement. But it may well inhibit further use of those provisions. The decision in some respects is a conservative interpretation but one that reflects the courts unease with the social and financial consequences of a court ruling which arguably should really be the responsibility of Parliament and Government. Apparently, within the one London Borough concerned, the costs of bringing up its existing stock of building to modern sound insulation standards would be £1.27 billion, against an annual budget (mainly from Central Government funding) of less than £55 million for major housing schemes.

[35] London Borough of Southwark v Mills and others, 21 October 1999