AVOSETTA MEETING BREMEN 2015

NATIONAL REPORT ON SIGNIFICANT UK DEVELOPMENTS

1. Case Law

1.1 National Court Remedies where EU Directive breached

ClientEarth v Secretary of State for the Environment (Supreme Court 29 April 2015)

An important and well-publicized case concerned the remedies a court should provide where government is in clear breach of an Environment Directive, and where the Commission was bringing its own infringement proceedings (as was happening here). The case concerned the continuing failure of the UK to meet NOx levels required to be met by 2010 under Directive 2008/50/EC in a number of zones, and mainly due to road traffic. The Supreme Court had referred a number of questions to the CJEU concerning the Directive and the role of national courts. In its ruling in November last year (Case C-404/13), the CJEU said that while Member States have a certain discretion in producing plans to deal with breaches, it was for the national court "*to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the directive*".

The UK Government accepted that its own air quality plans would have to revised to demonstrate under Art 23 of the Directive that breaches would be kept as 'short as possible' (to use the terms of the Directive). ClientEarth argued that that new plans should be produced within 3 months.

Generally in cases involving Government or public bodies, courts are prepared to accept an undertaking rather than impose a mandatory order but here, because of the General Election on May 7th, the Government was unable to make a formal undertaking as to the time. According to the Supreme Court, "*The new Government , whatever its political complexion should be left in no doubt as to the need for immediate action to address the issue."* The Court therefore made a Mandatory Order requiring the Secretary of State to prepare new air quality plans under Art 23 in accordance with a defined timetable to end with the delivery of final plans to the Commission not later than 31 December 2015. Liberty was granted to apply to the Administrative Court for variation of the timetable. The legal issues involved in the case are by no means settled since, once the content of the proposed revised plans are published, there are likely to be arguments as to precisely what is meant by "*as short as possible*", and the extent to which this may involve practicable or economic considerations.

1.2 Civil Liability for Supporting Direct Action by Environmental NGO

Sea Shepherd (UK) v Fish & Fish Ltd (Supreme Court 4 March 2015)

An interesting case which serves as a warning to groups who indirectly engage in activities supporting direct action. A US Marine Conservation group had mounted a campaign of direct action in the Mediterranean to free what they claimed were illegally caught bluefin tuna. They damaged nets belonging to the respondent company, thereby releasing the tuna it had caught, and the company sought around 700,000 Euros in a civil action for the damage caused. The respondent wished to sue in the British courts, and joined as one of the defendants a UK support body of the US group, Sea Shepherd (UK). The question of law was whether this group could be liable as a jointly on the grounds that they had been engaged in a 'common design' with the US group to commit the civil wrongs of trespass and property damage. The only real evidence was that the UK group had agreed to raise funds for the campaign in the UK and transferring anything raised to the US. Only around £1000 was raised, and the High Court decided there was no 'common design', mainly because the US group had designed and paid for the publicity material, even though it was sent out by the UK group. The Court of Appeal disagreed, but this decision was overturned by the Supreme Court by a bare majority 3-2, mainly because the majority held that so much factual judgment was involved that an appeal court should be very reluctant to interfere with a trial judge's judgment of the facts where he had correctly identified the legal principles. The decision could have been very different had more money been raised or had the UK group had designed and funded the mailshot. In

those circumstances, if the US defendants could not be located, then as someone who had committed the civil wrong (tort) jointly (as 'joint tortfeasor'), the UK group could have found itself liable for all the damage caused.

1.3 Access to Environmental Information – Does it Cover Privatized Utilities?

Fish Legal and Shirley v Information Commissioner, United Utilities, Yorkshire Services Ltd, Southern Water Services Ltd, etc. (Upper Tribunal 19 February 2015).

This case concerned the question whether privatised water authorities fell within the definition of 'public authorities' under the 2003 EU Directive on the grounds that they were either bodies '*performing public administrative functions under national law'* and/or were bodies with public services relating to the environment '*under the control of'* government (Article 2(2) of the Directive).

Access to information legal appeals are handled by the tribunal system with the Upper Tribunal having the same status as the High Court. The Tribunal had referred a number of questions to the CJEU concerning the meaning of the terms in Article 2(2) (Case C-279/12 *Fish Legal v Information Commissioner*). The Tribunal applied the tests laid down by the CJEU and held that, given many specific statutory powers (land acquisition etc.) granted to privatized utilities, they were performing public administrative functions and covered by the Directive. On the other hand, despite the degree of intensive government regulation of privatized utilities, the Tribunal felt they were 'not under the control' of government in that they retained considerable commercial freedom and operational discretion as to how they performed their functions

1.4 Access to Environmental Information – Can Government Prevent disclosure of Letters by Royal Family?

(Evans) v AG [2015] UKSC 21 - see discussion in questionnaire.

2. Environmental Sanctions

2.1 Fines for Criminal Offences

Many have considered that fines by British criminal courts issued for middle sized or larger companies who have committed environmental offences (such as river pollution) have been far too small to have any real deterrent effect. In recent years, the Court of Appeal has indicated that much larger fines are appropriate, and in July 2014 the Sentencing Council (the official judicial body issuing guidance on sentencing) has for the first time published guidance for judges on how to calculate fines for environmental offences. The "Macrory' Review on Sanctions recommended that it should undertake this exercise. https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf

Courts are obliged to follow the Guidelines unless satisfied it would be contrary to the interests of justice in any particular case. The Guidelines contain a matrix referring to the size of company and the nature of the offence, with suggested starting points for the level of fine, and including various mitigating and aggravating factors (such as cooperation by the defendant). For example, for large companies (turnover of £50 million plus), the starting point for a serious offence conducted intentionally is £1 million rising to a possible £3m. The guidelines are already having a dramatic effect on increasing fines issued, particularly to utilities such as privatized water companies. The last six months have seen a number of fines for companies ranging between between £250,000 and £500,000, which is known to be causing serious concern within the industry.

2.2 Enforcement Undertakings

At the same time, the Government is extending the range of offences where administrative sanctions can be used, ideally suited to cases where no real criminal intention or recklessness is involved. Since 2011, the Environment Agency has had power to negotiate undertakings with companies in breach of regulations where the breach is judged not sufficiently serious for a criminal prosecution but requires more than a warning. The undertaking will require the company to take steps to ensure future compliance, restore harm done, and sometimes make payments to charities. The power was limited to a very small number of areas, mainly

packaging regulation, but some 100 undertakings have been agreed with over £1m going to charities. In April this year, the powers have been extended to nearly all areas of environmental regulation including water and waste.

2.3 Scottish Environmental Sanctions

In the environmental field, Scotland has recently introduced a new range of criminal penalties (publicity orders etc.) and administrative penalties. The approach is very much in line with Richard Macrory's report on Regulatory Sanctions – more so than in England and Wales.

3. Legislation – "Resilience Duties"

The concept of "resilience" has entered environmental legislation for the first time. Under the Water Act 2014, the main economic regulator of the priviatized water industry will now have, as one of his overall duties, the duty to "further the resilience objective." This is defined to mean: *"to secure the long-term resilience of water undertakers' supply systems and sewerage undertakers' sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour".* Difficult to know yet what real change this will make.

4. Politics

4.1 General Election 2015

A UK General Election was held on May 7th. The environment as such did not figure high on the agenda, which was dominated by the economy, health and welfare, Europe, and immigration. But smaller parties in Britain are now getting higher support and this gave greater media exposure to the Green Party (which had one seat in Parliament and under 4% support) in television debates.

Against all predictions of another coalition government, the Conservative party secured an overall majority, the minority Liberal party were effectively wiped out (the fate of all minority parties!), and the Scottish National Party took nearly every seat in Scotland from the Labour Party. An astounding result to the surprise of many.

4.2 Europe

The Conservative Party (now the UK Government) is committed to trying to secure Treaty re-negotiations (especially on free movement of labour) and then holding an in-out EU referendum in 2017, or possibly earlier in 2016. Assuming something is secured in negotiations, the Government and most businesses will argue in favour of staying in, but there remains a strong popular anti-EU groundswell in England and Wales (but not Scotland). There are now around 100 Conservative EU-sceptics in Parliament, and the anti-EU UK Independence Party, though with only one seat in Parliament, was the party with the third highest numbers of votes in the Election (12.5%)

Between 2012 and 2014, the Government held an elaborate consultative exercise reviewing EU and national competences, but found (rather to their surprise) that most businesses and other core interests thought the current balance about right. Although the reports on individual subject areas are available on the Internet[1], the Government failed to publish an overall assessment because the results did not fit their expectation, a tactic heavily criticized by a House of Lords Committee in Parliament in a report published in March 2015:

We are disappointed therefore that the Government has gone back on its commitment to publish an analysis, summarising the key points in the 32 reports that make up the review in a single, readable, concise form. The next

[1] The environment and climate change report can been seen at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284500/environment-climate-change-documents-final-report.pdf

Government should get on with this immediately after the election. There is no point spending up to £5m of public money on an excellent Review, and then burying it. People need to know the facts about the UK-EU relationship."[2]

4.3 Scotland

In September 2014, a Scottish referendum on independence was held, giving 55% in favour of retaining the Union and 45% for independence. The independence vote (and turnout) was higher than expected and the Government has promised more devolved powers to Scotland (notably of tax raising and energy policy). Despite that result, the Scottish National Party which dominates the Scottish devolved Parliament (and is committed to independence) has since then attracted ever-growing support, and took nearly all seats in Scotland in the May 2015 General Election (there is now just one Conservative and one labour MP in Scotland). Another referendum on independence can be expected within a decade.

[2] see http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/140/140.pdf