AVOSETTA MEETING 2014

RECENT DEVELOPMENTS IN THE UNITED KINGDOM

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Important LEGAL Cases

1. Air pollution and breach of EU Air Quality Framework Directive

ClientEarth brought a case against the UK Government in failing to comply with NO_x and PM_{10} limits in the 2008 Air Quality Directive in 16 cities due to road traffic. Art 13 of the Directive specified January Ist 2010 as the deadline for meeting the required limit values, but Art 22 provides that where a Member State cannot achieve the target by 2010, it "may postpone those deadlines for a maximum of five years", provided an air quality management plan is sent to the Commission to assess the plan and object if necessary.

Many urban areas in Europe failed the 2010 deadline, and the majority of Member States applied for extensions (see http://ec.europa.eu/environment/air/quality/legislation/time_extensions.htm). There is doubt whether all these plans are really achievable. In the UK, 40 zones were planned for compliance by 2015, but in a number of cases, the United Kingdom refused to apply for an extension and simply notified the Commission that the standards would not be met in 16 areas until between 2015 and 2020, and in London until 2025. They argued they were at least being realistic in the time-scales, and did not apply for 5-year extensions in these cases as they were essentially of no use.

Client Earth argued that a true reading of the Directive meant that, if a Member State could not apply with the 2010 Directive, they were obliged to apply for an extension under Art 22. In *R (on application of ClientEarth v Secretary of State for Environment Food and Rural Affairs [2013] UKSC 25*, the Supreme Court referred this issue to the CJEU. The Government admitted that there were breaches of the Directive since 2010 but argued that it would add nothing for the Court to make a formal declaration to that effect. Nevertheless, the Court made such a declaration:

"The court is satisfied that it should grant the declaration sought, the relevant breach of article 13 having been clearly established. The fact that the breach has been conceded is not, in the court's view, a sufficient reason for declining to grant a declaration, where there are no other discretionary bars to the grant of relief.
Such an order is appropriate both as a formal statement of the legal position, and also to make clear that, regardless of arguments about the effect of articles 22 and 23, the way is open to immediate enforcement action at national or European level"

The significance of such a declaration is not fully yet understood. It appears to have strengthened the political will of the Commission to continue its enforcement action against the UK, commenced in February 2013, leading to a possible fine by the CJEU. Equally it could lay the Government open to *Frankovitch* claims for damages.

2. Civil actions for nuisance against a backdrop of regulation: liability and remedies

In the UK, private civil claims by neighbours and others affected by disturbances caused by others are mostly covered by legal principles developed by the courts rather than legislation. The Supreme Court has recently re-evaluated core principles concerning liability and remedies in the law of private nuisance. In terms of remedies, claimants normally seek compensatory damage for past losses plus a court injunction to prevent the nuisance continuing. The courts have always had a discretionary power to allow the nuisance to continue on condition the defendant pays compensation for future losses/disturbance but since the late 19th century, the higher courts have been very reluctant to exercise such discretion except in the most minor cases on the grounds that it feels like the polluter buying a right to pollute. The courts general approach to grant an injunction 'as of right' has made the private nuisance action very powerful, and it has often been used where public authorities are reluctant to exercise their own statutory powers to curb environmental pollution (or where their statutory powers do not have a huge impact in curbing pollution since one defence to statutory nuisance is that the polluter is using 'best practicable means' in their operation).

Now in *Coventry v Lawrence (Supreme Court [2012] UKSC 13, 26 February 2014*, a case concerning noise from a motor racing stadium which disturbed one householder who occupied an isolated residence in the mainly rural vicinity of the stadium, the Supreme Court has called for a new approach, both to the determination of nuisance liability where the defendant is acting within the scope of a regulatory permission, and in relation to remedies. The answer to Question 9 of this year's questionnaire comments on the issue of liability – the Court defends the rights of property owners to bring nuisance claims, even in relation to actions permitted under planning law, although acknowledges that the terms of any planning permission may be useful evidence for determining whether there is liability in nuisance ('unreasonable user') in the first place. As for remedies, the Court indicated that injunctions will no longer be granted 'as of right' for continuing nuisances, and future courts should be more willing to require defendants to pay compensatory future damages where it is the public interest that the disturbing activity continues. The courts should weigh up the conflicting interests involved, although the precise detail of this doctrinal development is left to be determined in future cases. This shift in approach can be seen as one way to accommodate the lawful planning permission that allowed the impugned activity in this case – the activity can still be pursued, so long as its external impacts are compensated for. This is more in line with the approach of US and Canadian courts when it comes to remedies, and allows for what economists would say is often the most economically efficient solution. Each case will depend on its own facts – as one of the lead judgments noted, "*The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood, although in many cases that may well not be sufficient to justify the refusal of an injunction. Equally, I do not see why the court should not be entitled to have regard to the fact that many other neighbours in addition to the claimant are badly affected by the nuisance as a factor in favour of granting an injunction.'*

Nuisance Liability and Environmental Regulation: Permit defence not applicable in civil actions for nuisance law

In an earlier case concerning principles of nuisance law and their interaction with environmental regulation, the Court of Appeal in 2012 also reaffirmed traditional nuisance principles. *Barr v Biffa Waste Services Ltd* [2013] QB 455 concerned a licenced waste disposal site which complied with relevant permit conditions. A group of local residents brought a private nuisance action in relation to smells from the site. The general approach in the past in such cases is that any compliance with regulatory controls may be useful evidence as to the standards of behaviour that are reasonable, etc. but are not compelling since there are essentially separate legal regimes with different purposes. In the High Court in this case, the judge held that modern environmental regulatory controls on a waste

Kommentar [ES1]: This might be overstating it – it was more that there was conflicting authority and a lack of clarity about how to reconcile overlapping legal regimes/principles that are both concerned with lawful land use.

site were now so dense and detailed that the two systems of land use control (environmental permitting and private nuisance) should be aligned, and that compliance with the regulatory controls should provide a good defence in any civil action in nuisance.

The Court of Appeal overturned this decision. As the lead judgment of Carnwath LJ noted, "*The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should "march with" a statutory scheme covering similar subject-matter ..... there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights.*[1] It is however noteworthy that Carnwath JSC (now on the UK Supreme Court) seemed to question the vigour of his judgment in *Barr v Biffa* in the later Supreme Court decision of *Coventry v Lawrence* (emphasis added):

> *In Barr v Biffa Waste Services Ltd [2013] QB 455, para 46, a case relating to waste disposal under an environmental licence,… I pointed out that the common law of nuisance had co-existed with statutory controls since the 19th century without the latter being treated as a reason for cutting down private law rights However, the context is important I was speaking about environmental regulation rather than planning control, which was not in issue.*
> *Further, while my statement was an accurate reflection of the historical position,* ***it is open to the criticism that as a blueprint for the future development of the law it was unduly simplistic****.*
> *In a perceptive article on the decisions of the Court of Appeal in the present case and in Barr v Biffa Waste Services Ltd, Maria Lee concludes:*
> *"It is not realistic to look for a single, across the board response to the complicated relationship between tort and regulation, or even just nuisance and planning permission… Courts are not generally in a position to assess the substantive quality of regulation…" (Nuisance and Regulation in the Court of Appeal [2013] JPEL 277, 284).*

3. Criminal sentencing for environmental crimes

Corporate offenders

In the United Kingdom, companies as well as individual directors and other employees can be found guilty of criminal offences, and fined accordingly. In a decision earlier this year, the Court of Appeal under a dynamic new Lord Chief Justice indicated that in future a much tougher approach should be taken with large companies found guilty of regulatory offences such as environmental or health and safety. *R v Sellafield Ltd ([2014] EWCA Crim 49)* concerned low level radioactive leaks from a nuclear reprocessing plant due to negligent management rather than deliberate or reckless behaviour. The court concluded that the £700,000 fine (€850,000) imposed by the trial judge was perfectly reasonable – it represented little more than a week's profit for the company. The Court stated that if it didn't have the desired deterrent effect, future sentences could reflect that. In a parallel case concerning breach of health and safety law by Network Rail at a railway crossing, the court upheld a £500,000 fine was reasonable. For the first time in sentencing guidance, it held that courts should be prepared to examine a company's bonus policy for directors to see if they had been adjusted downwards in light of the offence.

Confiscation orders

[1] *Interestingly this judgment was given by Lord Justice Carnwath, a leading judicial figure in environmental law, who was later promoted to the Supreme Court and gave a key judgment in the Coventry case above.*

In *R v Morgan (Christopher Lynn)* [2013] EWCA Crim 1307, the Court of Appeal developed the law in relation to confiscation orders as a sanction for environmental crime. The Court decided that a confiscation order of £156,500 imposed on Morgan, the operator of an unlicensed landfill site, was proportionate and did not amount to a breach of the private property protection through Article 1, Protocol 1 of the European Convention of Human Rights. In determining the amount of money to be recovered through the confiscation order, the defendant's savings arising from non-payment of landfill tax, licence fees as well as survey fees and engineering costs associated with a lawful, licenced landfill site can be taken into account. Note that £ 156,500 was actually the lower figure from a range of £ 156,500 to £ 207,000 which experts had calculated constituted the savings Morgan had obtained by running an unlicensed scrap vehicle recovery site.

4. Strategic environmental assessment

Opponents to a proposed new High Speed railway between London and Birmingham ('HS2') challenged Government's decision to promote the project on grounds there should have been a prior SEA under the SEA Directive. The question was whether the Government's published Policy Paper (White Paper) on the HS2 project was a 'plan or programme' within the meaning of the Directive. Consent for the railway itself would be granted by special primary legislation promoted through Parliament. In *R (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3,* the Supreme Court held that the White Paper, though detailed and supportive, merely influenced but did not constrain the subsequent decision-making by Parliament in the authorization legislation, and therefore was not a relevant plan or programme that '*set the framework* for future development consent of projects'.

A second argument was whether the special legislative procedures proposed would be compatible with the EIA Directive (referring to CJEU in *Boxus* (C-135/09 [2011] ECR 1-9711) that the Art 1(4) exemption for specific legislation can only be relied upon if the objectives of Directive fulfilled by legislative process). The Court held the core objectives of the Directive would be fulfilled and there was no requirement that Members of Parliament had to have a free vote on approving the HS2 project – in this case they were likely to be required to vote along party lines.

The Supreme Court noted that any review by the courts of the substance of Parliamentary procedures on the basis of EU law requirements raised deep constitutional problems, probably offending core provisions of the Bill of Rights 1688 (the closest the UK has to a Written Constitution) – "*That the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." (Art 9).* The Court felt that the Directive did not require access to courts to challenge the EIA process in the case of a legislative procedure.

On this latter point, the Supreme Court considered whether the doctrine of the supremacy of EU should apply, but argued that *"if there was a conflict between a constitutional principle such as that embodied in article 9 of the Bill of Rights the Bill of Rights and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom".* This appears to be the first time a senior UK judge has so clearly articulated the Kompetenz-Komptenze dilemma as applying within the UK, despite the absence of a written constitution.

POLICY AND LEGISLATIVE DEVELOPMENTS

Energy

Energy policy continues to be one of the most challenging areas of policy and is increasingly becoming a political issue. 40% of current electricity is powered by UK coal plants but 1/3 will close down at the end of 2015 because they are unable to comply with Large Combustion Plant Directive. It is uncertain whether the remaining will survive new standards under the Industrial Emissions Directive for 2023. (Notably the now English Environment Agency reported that SO_x emissions increased by 19% in 2012, NO_x emissions by 13% and PM_{10} rose by 14%. This is mainly due to an increase in coal burning by the power generation sector, which, in turn, was partly caused by falling prices for coal, with more exports from the US now that it has developed its own gas reserves through fracking) About 50% of UK gas is imported (mainly from Norway and Quatar) with the proportion set to rise over next few years. The current 16 nuclear power stations (18% electricity) are coming to the end of their life. One new nuclear power station has been proposed by EDF (but European Commission is investigating possible state aid breaches) though the Government plans for at least 12 new reactors amounting to 19 GWe (almost double current capacity). The potential for gas extraction on-shore from fracking is supported by the Conservative majority partners in Government, but surveys suggest about 2/3 of the public is opposed to fracking, though the political uncertainties for gas imports generally in Europe caused by Russia and the Ukraine might change the dynamics. The Conservative Party are also changing its policy concerning on-shore wind farms, and will call for freeze on on-shore wind farm development in next election (mainly on aesthetic grounds), putting its faith in more expensive (but higher generating) off-shore wind farm projects. The Government has recently given support for two demonstration carbon capture and storage projects, one concerning carbon capture from a gas fired power station – it now remains almost the only country in Europe to be investing in the technology.

Depressingly, the cost of energy to consumers (rather than climate change issues) is likely to dominate politics for the time being. In 2013, under new energy legislation, the Government introduced a 'carbon price floor' to artificially raise the price of carbon following the continuing collapse of European market in order to secure investment in clean energy. The costs involved are eventually passed on to the electricity consumer, and in the 2014 Budget, the Government announced a freeze on the carbon price floor rather than a gradually planned increase. Analysts suggest this will deter longer-term investment in clean energy.

Climate Change

In the UK, mandatory GHG emissions reporting by directors of listed companies (under the Companies Act 2006) came into force from 1 October 2013. Directors' reports must now disclose 'material' GHG emissions in tonnes of CO2 equivalent from the operation of facilities (including from waste produced), use of fuel and transport, and the purchase of electricity, heat and cooling. The amending Regulations contain a 'comply or explain' requirement, which mean that emissions data must be obtained and reported only where this is practicable.

Waste

WEEE 2 has arrived in the UK. After considerable operational problems with the UK's first effort to implement the WEEE Directive, a revised set of WEEE Regulations 2013 was adopted as SI 2013/3113, taking force from 1 January 2014. The key feature of the new WEEE system is that it employs a fixed target system for returning electrical and electronic waste, so that operators cannot trade excess WEEE. The overall cost to industry of the new system is lower, but it contains less incentive to recover more WEEE than absolutely required. There is also an option for operators to pay a compliance fee

rather than collecting and recovering WEEE, although this can be a gamble as the cost of the fee is not know until the end of the 'WEEE year'.

GMOs

The current UK government is in favour of the greater use of GM technology for the production of food. The Secretary of State told the House of Commons Committee for the Environment, Food and Rural Affairs that GM technology was 'well established', contributed to the production of 'safe, nutritious food' and could open up commercial opportunities for UK agricultural technology businesses. These claims are contested. The House of Commons Committee for the Environment, Food and Rural Affairs has launched a call for evidence in relation to a new inquiry into food security that will explore GM and other new food production technologies. (http://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/news/food-security/).

Europe, Scotland etc.

The Scottish Referendum will be held on September 18 2014 with simple question: "*Should Scotland be an independent country?*". Support for independence is growing with latest Opinion Polls showing around 45% and the momentum currently with the yes vote. Scotland wishes to remain a member of the EU but there remain doubts as to the exact legal position and procedures for achieving this. There are no direct precedents for part of a State seceding. Supporters of Scottish independence currently say it could be achieved by treaty amendment under Art 48 TEU; opponents say a new application under Art 49 TEU would be required requiring ratification by each Member State.

The Conservatives have committed themselves to a referendum on the UK's continued EU membership in 2017 if they win the next general election, but proposed legislation to hold the referendum was blocked by Labour and the Liberal Democrats (the minority party in the current coalition Government). The Liberals are opposed to a referendum (they have always been the most pro-EU party), while currently Labour says they will only have one in the event of there being a further transfer of powers to the EU.

All this has to be seen against increasing support for the UK Independence Party (UKIP), which is committed to leaving the EU. Leading up to the May European elections, UKIP was topping polls at around 38% (Labour 27%, Conservatives 18%, and Liberals 8%). We will have the results by the time we meet in Maribor. They are very unlikely to do so well in the next national election but equally support for UKIP reflects a Euro-sceptic mood which cannot be ignored by the mainstream political parties.