

United Kingdom Update Report

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Criminal courts dramatically increase fines for environmental crimes

The sentences for most environmental crimes in the UK is a fine, whether the defendant is a company or an individual – prison sentences remain rare, and normally reserved for small illegal waste operators and the like. Judges have a discretion in the sentence they impose, and most environmental legislation provides an enormous range of financial penalties that may be imposed in the higher criminal courts (usually no upper financial limits).

In the past there have been complaints that judges are often inconsistent, and fines rarely large enough where large companies involved. In 2014 the Sentencing Council (an official body including judges) issued its first Sentencing Guidelines for Environmental Offences : <https://www.sentencingcouncil.org.uk/publications/item/environmental-offences-definitive-guideline/> coming into force July 2014. Legislation provides that judges must follow the Guidelines unless in any particular case the interest of justice demand otherwise – some jurisdictions would find this legislative interference with judicial discretion unacceptable but not so in the UK.

Last year, the Court of Appeal dealt with the case of a very large water utility (annual turn-over £1.9 billion) . Building on the Guidelines (which did not explicitly deal with such very large companies), the Court adopted a robust approach arguing for the first time that fines for environmental offences should be similar to those found in competition law. For serious pollution incidents, for example, : *“..the objectives of punishment, deterrence and the removal of gain (for example by the decision of the management not to expend sufficient resources in modernisation and improvement) must be achieved by the level of penalty imposed. This may well result in a fine equal to a substantial percentage, up to 100%, of the company's pre-tax net profit for the year in question (or an average if there is more than one year involved), even if this results in fines in excess of £100 million. Fines of such magnitude are imposed in the financial services market for breach of regulations”* *R (on behalf of Environment Agency) v Thames Water Utilities Ltd [2015] EWCA Crim 290*

Administrative Penalties

Several years ago Environmental Regulators acquired powers to impose administrative penalties as an alternative to pursuing criminal prosecutions – mainly suitable for less

serious, non-intentional or non-reckless conduct. Until now rather than impose such a penalty, they have found it equally effective to negotiate agreements (Enforcement Undertakings) between the company in question and the regulator. Last year, however, the Environment Agency served its first Financial Variable Penalty of £60,000 on a local authority where poor maintenance of equipment in a swimming pool led to a pollution incident. The Agency did not judge that a criminal prosecution, though possible, was right in the circumstances. The authority offered an Enforcement Undertaking but the Agency felt that a more stigmatic, impose penalty was justified – hence the use of the Variable Penalty.

In Scotland legislation was passed in 2015 giving environmental regulators the power to impose administrative sanctions.

Climate Change and Energy Policy

Annual CO₂ emissions continue to fall in the UK mainly due to fall in domestic energy usage and decline of coal fired power stations - a drop of 9% between 2013-2014 (a 29% total drop since 1990) Recently the Government has announced that following the Paris Agreement they will put into law an obligation to achieve a 100% greenhouse gas reduction by 2050 (the Climate Change Act currently imposes an 80% reduction). But there remain concerns that the direction of current energy policy under the Conservative Administration (and tensions between Finance and Energy Ministries) will inhibit achievement of the scale of long term reductions. Financial cut-back measures imposed by the Treasury has cut-back many existing subsidies for renewables, and government financial support for carbon capture and storage demonstration projects was dropped. At the same time, the Government is encouraging on shore fracking reviving the building of new nuclear power stations (currently around 20% electricity) by offering guaranteed long term electricity purchase prices to companies that invest and build. EDF (France) with Chinese support is currently planning a new nuclear power station but at the time of writing had already run in severe financial issues, requiring support from the French Government.

Cases in the Courts

Fishery Conservation under 2013 EU Fisheries Reforms

Greenpeace v Secretary of State for Environment, Food and Rural Affairs ([2016] EWHC 55 (High Court, 18 January 2016))

Greenpeace argued that in allocating national quotas for fishing the Government had failed to take into account the greater emphasis on environmental issues under the revised EU fisheries regulations, and should have given stronger priority to small, inshore fishing boats. The court held that the EU regulations required the Government to take on board environmental, social and economic criteria, but gave a discretion to

Government as to how much weight to give to each. The environmental considerations weighed in the initial allocation of quotas by the Commission. If the EU regulations had intended to oblige Member States to give preference to certain types of boat in allocations it could have done so explicitly.

Environmental Liability Directive

R on the application of Seiont, Gwyrfai and Llyfni Anglers Society v Natural Resources Wales [2015] EWHC 3578 (High Court).

A lake in Wales severely polluted by discharged from a sewage works, leading to substantial fish loss over several decades. Discharge consent standards had been gradually tightened and there had been no evidence of further decline in fish stock since 30 April 2007 – the date when the directive comes into play.

The claimants argued that there could be much quicker improvements, and that the authority should have taken action under the Environmental Liability Directive. The authority argued there had been no ‘damage’ since 2007 and therefore the Directive did not apply.

The case focussed on the meaning of ‘damage’ under the Directive: ‘*a measurable adverse change in a natural resource, or measurable impairment of a natural resource service*’. There was no adverse change since 2007 but the claimants argued there was still ‘an impairment of the natural resource service’ and more could be done. The court held that in the context of the Directive ‘impairment’ implied a worsening of the situation. The ELD Directive was intended to deal with unregulated practices – improvements and tightening of standards should be made under the powers under the Water Framework Directive.

The Court of Appeal heard the appeal at the end of May and a decision is expected shortly.

Air Pollution

ClientEarth v Secretary of State for Environment, Food and Rural Affairs (continuing)

Last year the UK Supreme Court made a declarations that the UK was in breach of its obligations to achieve air quality standards under the Air Quality Directive (mainly NOx from traffic in key cities including London) The Court ordered the Government to produce a plan by the end of the year to bring back into compliance.

The Government published a plan last December which in some cases will not bring back to legal limits until 9 years. ClientEarth has challenged the adequacy of these plans, and the High Court gave leave for the action at the end of April.

It will be an important case since it will the court to consider precisely what legal criteria to apply to the substance of an improvement plan, and how it should approach dealing

with complex details of fact and policy. The original case last year in contrast was relatively simply from a legal perspective.

EU Referendum

The Referendum will be held 23 June with the question, *“Should the United Kingdom remain a member of the European Union or leave the European Union?”*

At present (early May) the polls suggest the In Campaign is slightly ahead of the Out campaign, but much is likely to depend on how many people actually vote on the day. Most consider the ‘concessions’ the Prime Minister negotiated with other Member States irrelevant. At present neither side have presented very positive visions (the In campaign mainly focussed on economics and uncertainties; the Out campaigns not agreed on the model (Norway, Switzerland, Canada, etc.) the UK might follow if it leaves). Most environmental groups favour staying in, but the environment has not to date featured heavily.