UK Recent Developments: (Richard Macrory)

Courts should still have national discretion over remedies even where EU law broken

In common with many other jurisdictions national courts have always had some discretion when it came to granting remedies in public law challenges – i.e. even if a planning decision, say, was found to be contrary to law, the courts were not obliged to quash it, if, for example, they felt that compliance would have made no difference to the final result, or the breach was minor. This was very much the approach taken by courts in the early years of EU environmental assessment requirements. But in the 2001 Berkeley decision (a case where the need for a formal Environmental Assessment for a project was never considered) the highest court held that where breach of the EU requirements was involved, courts really retained little or no discretion – the overriding obligation to ensure effective application of EU law trumped national discretion This very strict approach led to numerous challenges to development for the most minor breaches of EU law.

Very recently, Lord Carnwath, the most senior judge specializing in environmental law, has questioned this strict approach in a decision of the Supreme Court, Walton v The Scottish Ministers ([2012] UKSC 44, 17 October 2012). The case concerned a road scheme and whether an SEA was required for revisions. Carnwath's comments were strictly not necessary for the result but important pointer for the future. He re-examined some of the key ECJ cases, and considered the principles of national procedural autonomy, equivalence and effectiveness, and considered that the ECJ gave more discretion to national courts than some had considered: "Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirements arises from a European rather than a domestic source."

No Permit Defence for Private Nuisance Action against waste company

Local residents sought compensation from a waste disposal company for continuing smell problems using the private tort of nuisance. The essence of a nuisance action is what sort of conduct or use of land is reasonable. The company had at all times complied with detailed regulatory requirements under a licence from the Environment Agency. The High Court held that under a modern regulatory system compliance with detailed environmental controls should provide a good defence to any nuisance action for compensation. The Court of Appeal held this went too far – compliance with statutory requirements might be relevant (e.g. where negligence alleged, or where one was asking what sort of damage was foreseeable) but did not provide a statutory defence as such. As Lord Carnwath put it, "An activity which is conducted in contravention of planning or environmental controls, is unlikely to be reasonable. But the converse does not follow. Sticking to the rules is an aspect of good neighbourliness but it is far from the whole story – in law as in life." Barr v Biffa Waste Services Court of Appeal [2012] EWCA Civ 312

Local authorities and others bodies made liable if CJEU fines the UK

The Localism Act 2011 gives power to Ministers public authorities including local government bodies, to pay all or part of any financial sanctions imposed for breach of EU law by the CJEU. It is understood that in relation to devolved governments (Wales, Scotland, Northern Ireland) there was an informal understanding that if the devolved administration were responsible for the breach they would have to reimburse the UK Government. The new legislation makes this all much more transparent and widens the bodies who can be held liable. There is quite a complex procedure of making an Order, giving notices, etc. and a determination "whether any acts of the authority did cause or contribute to the infraction of EU law"

The UK has not to date had a financial sanction imposed by the CJEU but has come close to it. The provisions on liability are argued to be a consequence of greater devolution of powers : "The Government is giving local authorities more powers and freedoms to conduct their

business and deliver services to the public. This includes a major reduction in the ‘oversight’ role of central government. Local authorities must, therefore, accept responsibility for the consequences of their actions or inactions.”
(Regulatory Impact assessment, Localism Act, p 5-6)

Carbon reporting for companies to be introduced from April 2013

Under the Climate Change Act 2008 the Government has a duty to make corporate carbon reporting mandatory by April 2013 or explain to parliament the reasons for not doing so. They have recently announced plans to introduced carbon reporting. Initially the annual duty will apply to just over 1000 of the largest companies on the stock exchange but may well be extended to others. The annual reports by directors must cover all greenhouse gases, all parts of the business owned by the company including overseas, and both direct emissions and indirect emissions from purchased electricity, heating and cooling. Emissions which are a consequence of the organisation□s actions, but which occur at sources which the organisation does not own or control are excluded. The regulations also require that directors that directors include an intensity ratio when reporting on their
Emissions, but the intensity ratio used – whether financial or activity – is not specified and it is left to each company to conclude which is of most interest to its stakeholders.

Enforcement Undertakings as a new Environmental Sanction

The formal sanction for a breach of most environmental regulations in the United Kingdom has long been a strict liability criminal offence. Under Regulatory Enforcement and Sanctions Act 2008 (based on proposals by Richard Macrory), regulators in England and Wales can acquire a wider range of sanctioning powers in addition to the criminal law.. The Environment Agency is now experimenting with these in a limited number of areas including Packaging Regulations implementing the EU Directive.

Where a company has failed to register under the regulations, the Environment Agency can still prosecute the company concerned in the criminal courts. But if they judge the failure was accidental
or negligent at the most, they may decide instead to impose an administrative penalty where the company has made financial savings by non-compliance. But instead of the regulator imposing a penalty, the company itself can come up with a ‘self imposed penalty’ in the form of an Enforceable Undertaking. This can include payments to charities representing any financial gain made plus an uplift agreed by the Agency (currently the Agency is working on around a 30% uplift). Failure to comply with the Undertaking renders the company open to the imposition of a penalty for the original offence.

Since the beginning of 2012 when first introduced around 55 undertakings have been formally accepted, mainly in the field of packaging regulations and some 430000 Euros been paid to local environmental charities. The Undertakings are publicly available documents. The Environment Agency does not require a formal admission of guilt before accepting an Undertaking, and are now finding the companies in breach are voluntarily owning up.

For details see Environment Agency web-site:
http://www.environment-agency.gov.uk/business/regulation/116844.aspx
Extract from web-site:
To view a list of offers accepted and details of the offence and any corrective actions taken, download:
□ Enforcement undertakings accepted by the Environment Agency - January to July 2012 (Excel, 23KB)

At present the suite of new sanctioning powers has not spread to other areas of environmental regulation and hardly beyond environmental law. The new Coalition Government has over the past twelve months mean ambiguous in its support with some senior Ministers concerned that regulators could bully smaller companies which have not the time or expertise to appeal. On November 8 2012 the Government finally announced its new policy saying that in future

Orders granting regulators powers to impose civil sanctions will generally only be permitted if the power to impose financial penalties is restricted to large companies (250 employees plus) . All other new civil sanction powers (compliance notices, enforceable undertakings, stop notices) will be available in respect of any size of business.

Climate Change and Energy Debates

There is currently considerable debate over the future of the UK energy policy. Under the Climate Change Act 2008, the Government has a long term legal duty to achieve an 80% cut in greenhouse gases by 2050 (on 1990) levels, with interim five year carbon budgets also set in law. In May 2011 (after much internal political debate) the Government agreed an ambitious Fourth Carbon Budget 2023 – 2027.

But a number of political drivers are challenging future directions. The general economic climate and whether it will cost the UK too much to be ahead of others, especially the rest of the EU; growing antagonism over the environmental impact of major sources of renewables, especially on shore wind; increasing availability of gas in preference to coal; the current generation of coal fired

generation stations and nuclear coming to the ends of their lives, and a view that the EU Emissions Trading Regime itself is unlikely to provide the long term incentives for substantial investment in lower carbon technologies in a privatized energy generation and supply market. At present sources of electricity are around 35% coal, 42% gas, 13% nuclear and 6% renewables (with a target of 31% renewables by 2020). The Government plans to publish an Energy Bill shortly which may clarify some of the markers, but there are deep internal political conflicts within the Coalition Government on the future direction.