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Environmental Law

Law and Practice – UK

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UK

Contributed by Six Pump Court ***Authors:*** Stephen Hockman QC, Charles Morgan, Gordon Wignall, Christopher Badger

Law and Practice

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Six Pump Court is acknowledged to be at the forefront of environmental law with a team of leading practitioners who advise across all areas. The combined experience of our barristers covers every aspect of this highly specialist, complex and ever-changing area of practice, at all levels of seniority and experience. Members act in leading cases in the Supreme Court, Court of Appeal and the High Court, whilst also representing industry and regulators at public inquiries and statutory appeals. Members appear regularly in the criminal courts and are involved in the more complex cases, acting for major developers, the waste industry and regulators.

Authors

Stephen Hockman QC has specialised in environmental work for over 30 years, both as junior counsel and subsequently for the last 20 years as Queen's Counsel. His practice encompasses all kinds of environmental work including making and resisting public law challenges to environmental decisions, appearing for claimants/defendants in environmental cases in the common law courts eg nuisance, and prosecuting and defending in major pollution cases. He is a co-convenor of the Climate Change working party of UKELA and is also Chairman of the International Court for the Environment (ICE) Coalition. He is a former Chairman of the Environmental Law Foundation and a Trustee of ClientEarth.

Charles Morgan has for the past 30 years practised in environmental law, with a particular emphasis on both public and private law aspects of water and water industry law. He has appeared in this context before courts and tribunals, up to and including the House of Lords and Supreme Court. Having previously served as Treasury Counsel on the Environment Agency panel, he now acts principally for water and sewerage undertakers, water-level management organisations, commercial enterprises, property developers and landowners. His geographically widespread practice also covers contaminated land, statutory nuisance and waste (including WEEE, in which field he has appeared in both of the only two reported cases).

Gordon Wignall has a special interest in matters connected with waste, pollution and also environmental permitting. His early training was unusual, undertaken mainly in international trade, shipping and also crime. This gave him a working understanding of both arbitration and jurisdictional principles as well as early experience of advocacy. He is familiar with EU and competition (economic) arguments. He has been involved in a number of leading cases on the law of nuisance, and is fully familiar with group litigation procedures in many areas. He is also a published authority on litigation funding and costs. His current practice encompasses all procedural areas in which environmental work is undertaken, ie, criminal courts, tribunals, administrative law and the civil courts. He has practised at every level from cases before magistrates to the Privy Council.

Christopher Badger has an established practice in commercial regulatory investigations and prosecutions, specialising in environmental enforcement, acting for both corporate and individual defendants and on behalf of the Environment Agency. High-profile cases in which he has recently been instructed include Environment Agency v Walker & Son (Hauliers) Ltd, the defining case on liability of landowners in environmental disputes; R v Rogers, Beaman and Tapecrown Ltd, the leading authority on the use of fresh evidence in appeals against sentence to the Court of Appeal; Environment Agency v WB Ltd, the largest environmental prosecution of its kind for the illegal export of waste abroad, amongst many others.

1. Regulatory Framework

1.1 Key Policies, Principles and Laws Governing Environmental Protection

This guide addresses English law applicable to England and Wales. It should be noted (i) that Scotland and Northern Ireland are separate and distinct legal jurisdictions with significantly different legal systems and laws (not addressed in this guide), and (ii) that, whilst England and Wales are a single jurisdiction, the political process of devolution has resulted in the statutory law of environmental protection becoming gradually different between England and Wales.

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There are two principal sources of environmental protection in English law. They are the common law and legislation. The common law is the law as stated and decided in judicial decisions, which are binding upon lower courts by the law of precedent. Legislation consists of Acts of Parliament, also known as primary legislation or statutes, and subordinate legislation, known as secondary legislation, statutory instruments or regulations. Much UK legislation is driven by the requirements of EU legislation.

The Common Law

The common law has long provided an element of protection for the environment, principally through the law of nuisance. Nuisance is a tort, or civil wrong, consisting of interference with a person's reasonable enjoyment of land. A nuisance may be a "private nuisance," which affects only a few particular individuals, or a "public nuisance," the effect of which is more widespread. Examples of nuisances are noises, smells and discharges of water. A legal action in nuisance can be brought by an individual or a group of individuals against the person responsible for the nuisance. If the nuisance is continuing, the usual remedy sought is an injunction to force the defendant to cease or limit the activity causing the nuisance. Damages can also be awarded in respect of injury to the value of the affected property and the loss of amenity suffered by its owner and occupiers. In the case of a public nuisance, damages can also be recovered for personal injury (in the case of a private nuisance, damages for personal injury can only be recovered if negligence can be proved).

Actions in nuisance are often brought by groups of neighbours suffering from the activities of local industry, such as a landfill site, a waste reception site, a sewage treatment works or a motor sports venue. The claimants must share the legal costs of making the claim or use lawyers who are prepared to conduct the litigation on a conditional fee basis (a "no win, no fee" or "no win, low fee" basis). If an action fails, the unsuccessful claimants will also usually have to pay all or part of the legal costs of the defendant. It is possible in certain circumstances to obtain insurance against this possible liability.

Actions in nuisance provide a practical means of control of specific polluting activities but are dependent upon the individuals who are affected having the means and determination to pursue private litigation.

Local authorities also have some specific statutory powers and duties to 'abate' (ie, to require the cessation of) nuisances.

Legislation

Legislation is made by Parliament and implemented by the government (national or local). There is a great deal of complex legislation concerning activities that may affect the environment. It is the method by which the State imposes general control over polluting activities, typically by provisions that an activity may only lawfully be carried out by, and in accordance with, the provisions of a permit, in the absence of which a criminal offence is committed. Often, there will be a primary statute setting out the main principles of control and a number of subordinate or secondary statutory instruments containing the detailed system of control.

During the UK's period of EU membership a large amount of environmental legislation has been imposed upon Member States by the EU, mainly through the medium of Directives, that are binding upon Member States as to the result to be achieved, but allow each Member State to adopt its own local method of so doing. This requires each Member State to make its own legislation on the subject. In the UK this has mostly been done through detailed statutory instruments made under general primary legislation.

For this reason, the fundamental principles governing environmental protection are those of the EU legal system. The most important of these are:

- "the precautionary principle," ie, that if there is any doubt over the environmental safety of a proposed cause of action then it should not take place;
- "the polluter pays," ie, that the ultimate burden of the cost of environmental protection and clean-up should be borne by the persons responsible for the underlying activities; and
- "sustainable development," by which is meant development that satisfies the needs of the present generation without compromising the satisfaction of the needs of future generations, the underlying principle being that only development that is "sustainable" should occur.

The EU has also imposed upon Member States, including the UK, the concept of environmental impact assessment (EIA), which requires significant proposed development that has the capacity to harm the environment to undergo a process of scrutiny. The UK has implemented this through its town and country planning legislation, in a manner that makes the process of assessment part of the application for planning permission for the development. The protection of species and habitats is also largely addressed through the planning process.

1.2 Notable Developments, Regulatory Changes, Government/Regulatory Investigations

The volume and variety of environmental legislation have meant that many businesses required multiple permits in order to operate lawfully. The UK government has been anxious to reduce the burden on industry and many of the controlled activities have been made the subject of a single permitting regime administered by the Environment

Agency (in England) (EA) and National Resources Wales (NRW), and are now contained in the Environmental Permitting (England and Wales) Regulations 2016 (EPR 2016). However, the process of consolidation is not complete and in every case it is still necessary to identify individually every form of regulation that is engaged by the proposed activities.

The Water Act 2014 is in the process of introducing measures intended to increase regional competition within the privatised water industry by requiring water and sewerage undertakers to make bulk supplies and grant access to infrastructure to other licensed operators within their areas of operation.

1.3 Developments in Environmental Policy and Law

There is a degree of uncertainty over the course of environmental law and policy in the UK due to the imminence of the UK's withdrawal from the EU, from which most of the impetus for improvement has come over the last 40 years. Whilst it is perhaps unlikely that the UK will seek comprehensively to remove or relax any of the existing environmental controls, it is probable that there will be no further tightening of regulatory standards save in so far as that is a pre-condition of reciprocal economic arrangements. Further, post-Brexit, the extent to which environmental standards are in practice enforced will become an entirely domestic matter with no continuing supervisory control by the EU through the EC. The EA and NRW are already the subject of extremely tight budget constraints and their capacity to 'police' and enforce compliance with environmental regulation is limited.

1.4 Environmental NGOs or Other Environmental Organisations/Groups

As described above, legislation is implemented by the UK government; in the case of environmental regulation, often acting through national agencies such as the EA and NRW or local authorities, particularly in relation to the town and country planning legislation. Decisions of local and central government and the agencies can be the subject of judicial review through the courts in certain circumstances, mainly confined to challenges to their procedural propriety but including in some instances a review of their substantive merits if particular questions of EU or European human rights law arise. In this context, environmental NGOs such as Greenpeace and ClientEarth have been active. Similar bodies have also funded or participated in claims based upon the tort of nuisance.

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, to which the UK is a party, requires signatory states to guarantee citizens' rights of access to information, public participation in decision-making and access to justice in environmental matters. The UK has responded in relation to environmental litigation by provisions that impose limits upon liability to pay the costs of other parties in judicial review proceedings concerning the environment. The Aarhus Compliance Committee has recently determined that the UK is in breach of its duties under the Convention by its failure to extend equivalent protection to claims in privately brought nuisance proceedings.

2. Enforcement

2.1 Key Regulatory Authorities and Bodies

In England, environmental policy is now developed by Defra and the Department of Business, Energy and Industrial Strategy, which subsumed the Department for Energy and Climate Change in July 2016.

The regulator in England is the EA for the majority of environmental enforcement action. Other bodies that can take enforcement decisions include local authorities and other regulators such as the Forestry Commission or Natural England.

There are specialist regulators for certain areas, such as the Office of Nuclear Regulation (ONR) and the Office of Rail and Road (ORR). Memorandums of Understanding and General Agreements exist between the ONR, ORR and the EA, which encourage co-operation and the sharing of information.

2.2 Investigative and Access Powers

The EA derives its investigative and access powers from Section 108 of the Environment Act 1995. The Section 108 powers are wide-ranging and include powers to enter premises, to require premises or anything in them to be left undisturbed, to take measurements or photographs and to make recordings, to take samples, to require provision of information or production of records and to require facilities and assistance as necessary to enable the EA to exercise its powers.

The EA exercises a supervisory and regulatory function over environmental permits, leading to site inspections and, in appropriate cases, audits. Local authorities also have the power to issue types of permit, for which they too have a regulatory function in supervising.

2.3 Approach to Enforcement

Bodies exercising a regulatory function should follow the Macrory Penalty Principles when approaching enforcement. The purpose of the Principles is to:

- aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from non-compliance;

- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter non-compliance.

It will be apparent that applying the Principles allows regulators a great deal of flexibility in approaching enforcement. Numerous bodies, including the EA, also publish enforcement and sanctions policy documents that set out their expected enforcement responses and the approach that should be taken to enforcement.

Regulators expect voluntary compliance with all legislative and permit requirements, and will, as a rule, attempt to recover costs of any successful enforcement.

3. Environmental Impact Assessment and Permitting

3.1 Requirement for an Environmental Permit

The EPR 2016 requires a permit to be held for the operation of a "regulated facility" or the carrying out of certain water-related activities. Regulated activities currently include most industrial processes, waste operations, mining waste operations, a radioactive substances activity, a water discharge activity, a groundwater activity, a small waste incineration plant, a solvent emission activity and a flood risk activity. Certain aspects of these activities are exempt from the need for a permit in circumstances specified in the Regulations. Applications for permits are made to the EA or NRW, or, in the case of some minor activities, to the local authority. Permits are bespoke or in the form of "standard rules," depending upon the subject matter of the permit.

The new EU Integrated Pollution Prevention and Control Directive (2010) applies an additional layer of control to more complex installations but is now implemented in the UK through the system of environmental permitting.

3.2 Requirement for an Environmental Impact Assessment

In England and Wales the process of an EIA is separate from the activities of the environmental regulators. It is part of the system of town and country planning whereby the consent of the local planning authority ("planning permission") is required for any significant development or change of use of land. An EIA is mandatory in the case of certain major infrastructure works with obvious impact upon the environment (Schedule 1 development) and many other works if they are likely to have significant effects on the environment (Schedule 2 development). Where there is a possibility of the regime being engaged, an applicant can request the planning authority for a "screening opinion" on that question.

3.3 Obtaining Permits and Rights to Appeal

Permits are obtained by application to the EA or NRW. In many instances the regulator will issue a "standard terms" permit, but the operator can request, or the regulator may insist upon, a bespoke permit in the case of a complex or unusual activity. An appeal against the refusal of a permit or the content of the conditions attached to a permit may be made to the Secretary of State, whose decision can only be challenged by the process of judicial review on the basis of an error in procedure, including error of law.

3.4 Integrated Permitting Regimes

The intention of the environmental permitting regime is, so far as possible, to create an integrated system for the obtaining from the EA/NRW of all necessary permission relating to environmental protection in the form of one comprehensive permit for one or more "regulated facilities." However, certain separate regimes still exist, in which case the need for multiple permits may arise, notably for certain waste activities. Further, most industrial activities will require the grant of planning permission and there can in some cases be an overlap of control between the planning authority and the environmental regulator, although English law leans against the notion of "dual regulation."

3.5 Transferring Environmental Permits

An environmental permit can be transferred with the permission of the EA/NRW on the joint application of the transferrer and the proposed transferee. In some cases, mere notification suffices.

3.6 Time Limits and Onerous Conditions

Environmental permits issued under the EPR 2016 continue in force indefinitely until revoked or surrendered; however, the EA and NRW also have powers of variation and suspension.

3.7 Penalties/Sanctions for Breach

A breach of an environmental permit is a criminal offence punishable by a fine and/or imprisonment. The EA/NRW now also has the power to impose "civil sanctions" including fixed or variable monetary penalties and the service of compliance notices, restoration notices and stop notices. There is also a system for the offering and acceptance of "enforcement undertakings" whereby the offender may, for example, undertake to make a payment to an environmental cause to avoid prosecution or other sanctions.

A serious breach of permit may result in its revocation or suspension.

The EA and NRW also have certain limited powers to seek an injunction to restrain the repetition or continuation of permit breaches.

4. Environmental Liability

4.1 Key Types of Liability

Environmental liability in England is largely based on the "polluter pays" principle and finds its basis in the Environmental Liability Directive 2004/35/EC. The regulations made under the Directive came into force in the UK on 1 March 2009 but were substantially replaced by the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (EDR 2015).

The Directive contains two distinct strains of liability. Firstly, operators of certain activities, as set out in Annex III of the Directive, may be held liable for damage (or future damage) to protected species, natural habitats, water and land.

The second strain of liability concerns damage caused (or future damage) to protected species and natural habitats by occupational activities not covered by Annex III when the operator is at fault or has been negligent.

It should be noted that the Directive does not apply to nuclear activities, those connected to national or international defence, or activities solely to protect from natural disasters.

Criminal sanctions for breaches of environmental law include penalties of imprisonment and/or financial penalties.

5. Environmental Incidents and Damage

5.1 Liability for Historic Environmental Incidents or Damage

Section 78F of the Environmental Protection Act 1990 (EPA 1990) deals with responsibility for remediation in the context of the contaminated land regime:

"(2) … any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person.

(3) A person shall only be an appropriate person by virtue of subsection (2) above in relation to things which are to be done by way of remediation which are to any extent referable to substances which he caused or knowingly permitted to be present in, on or under the contaminated land in question.

(4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of remediation, the owner or occupier for the time being of the contaminated land in question is an appropriate person."

Consequently, the legislation expressly provides for residual liability to be attributed to a current or purchasing operator or landowner in circumstances where they did not cause or knowingly permit the contamination in question.

Note that a purchaser of land can assume the liability of the seller by agreement.

5.2 Types of Liability for Environmental Incidents or Damage

In the civil sphere, environmental law primarily engages the law of tort. Actions in tort are brought under private and/or public nuisance, negligence, trespass and "the rule in Rylands v Fletcher" (a subspecies of nuisance). The key defences in tort are that the claimant voluntarily undertook the risk of harm, contributed to the harm or that the claimant acted illegally.

As discussed below, most environmental civil cases concern interests in land. A claimant will normally have to have an interest in the affected land to bring a claim.

Regulatory or administrative liability is defined and limited by the statutory instruments that empower the EA and other regulators, although powers of enforcement are wide-ranging for identifiable breaches of environmental law. Key issues will often include whether an operator has "caused" or "knowingly permitted" the breach in question, often within the context of strict liability for environmental damage.

One key difference that should be borne in mind between the civil sphere and the regulatory sphere is that in the former a claimant needs to prove a case to a lesser standard of proof (the balance of probabilities), whilst in the latter the prosecution must make a tribunal or jury sure (beyond reasonable doubt) of what is alleged.

5.3 Landmark/Significant Cases

In relation to civil liability, see **9.4 Landmark Cases**.

Regarding criminal liability, recent significant cases include:

- R v Thames Water Utilities Ltd [2015] EWCA Crim 960: Thames Water appealed against a fine of £250,000 for discharging untreated sewage into a river. The Court of Appeal dismissed the appeal and stated that fines meted out for environmental offences "had to bring home the appropriate message to the directors and shareholders of the company."

The court further stated that this could mean fines of up to 100% of a company's pre-tax profits.
- R v Thames Water Utilities Ltd (Aylesbury Crown Court, 22 March 2017): Thames Water was ordered to pay a financial penalty of over £20 million in fines and costs for a series of significant pollution incidents on the River Thames. Repeated illegal discharges of sewage resulted in visible pollution along 14 kilometres of river and the death of birds, fish and invertebrates.
- Civil penalty for Northumbrian Water: in February 2017 the EA accepted a record enforcement undertaking (a form of civil sanction whereby the fine is agreed between the offender and the EA, and criminal proceedings are not instituted) of £375,000 from Northumbrian Water. This occurred after Northumbrian Water discharged raw sewage into Park Burn, a tributary of the River Tyne.

6. Corporate Liability

6.1 Liability of a Corporate Entity
The laws governing environmental offences apply equally to individuals and corporate entities, although there are differences in the approach to sentencing. A company is just as much of a legal person as an individual.

6.2 Shareholder or Parent Company Liability
The Court of Appeal in the case of Chandler v Cape plc [2012] EWCA Civ 525 created a test for circumstances in which a parent company might be held liable for the actions of a subsidiary. The test for determining the extent of such liability included consideration of the following circumstances:

- Do the companies share the same business?
- Did the parent company have or should it have had "superior knowledge" of the aspect of the subsidiary's business that resulted in the risk?
- Did the parent company know or ought it to have known that the subsidiary was undertaking unsafe practice?
- Did the parent company know or ought it to have foreseen that the subsidiary would rely on the parent company's "superior knowledge" in addressing the risk posed?

If this test is satisfied then a parent company could be found liable for environmental damage caused by its subsidiary. The issue of liability for a parent company is a developing concept in English law and one that is likely to attract the interest of the courts for some time to come.

Shareholders as such have no liability.

7. Personal Liability

7.1 Liability of Directors or Other Officers
It is possible for directors or officers to be held liable for environmental damage committed by a company if it can be shown that the offence was committed with their consent or connivance, or was attributable to their neglect.

The penalties that may be imposed range from a fine to a prison sentence. The maximum prison sentence is six months if the matter is tried in the Magistrates' Court or five years if tried in the Crown Court for a single offence contrary to Regulation 38 of the Environmental Permitting (England and Wales) Regulation 2016.

7.2 Insuring Against Liability
Environmental liability insurance may be taken out to protect against the financial impact of proceedings. Director or officer insurance may assist in meeting the costs of defending a prosecution and potentially in meeting any fine imposed, although the practice of insuring against a financial sanction for a criminal offence is likely to meet strong public policy opposition. Insurance will not assist in the event that a prison sentence is imposed.

8. Lender Liability

8.1 Financial Institution/Lender Liability
Beyond the liability that may be imposed for remediation of contaminated land (see section 5.1 above and section 11 below), financial institutions/lenders are only subject to the same offences as other corporate bodies.

Those offences for which "knowing" or "permitting" environmental damage is an element of liability could, theoretically, lead a lender to be liable if it is found to have acted as a "shadow director" of a company (for the definition, see Section 741(2) of the Companies Act 1985) but this proposition has not been tested by the English courts.

There are no distinct offences for financial institutions/lenders in lending to individuals/businesses who then cause environmental damage.

8.2 Lender Protection
There is no special class of liability risk for financial institutions/lenders. Lenders should be aware of the risks of becoming so involved in clients' business that they constitute a directing mind and/or of taking any form of control over assets that may require remediation.

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9. Civil Liability

9.1 Civil Claims for Compensation

To the extent that environmental law strays from the public law domain, civil liability (or private law) claims are mainly concerned with torts (civil wrongs), which are private and public nuisance, negligence, trespass and the rule in Rylands v Fletcher. The feature that underpins most private law environmental disputes is interference with some interest(s) in land.

An example of private nuisance, probably the most common of the environmental torts, might be one landowner asserting that their neighbour's wind turbine is affecting the enjoyment of their property.

Claims are usually made for damages or injunctive relief. So, taking the example above, the claimant may receive damages for the reduction in their enjoyment of their property or an injunction to have the wind turbine moved.

9.2 Exemplary or Punitive Damages

The seminal English case of Rookes v Barnard (1965) 1 QB 176 established three circumstances in which exemplary or punitive damages may be awarded, as follows:

- oppressive, arbitrary or unconstitutional acts by servants of the government;
- where the defendant's conduct was calculated to make a profit for himself beyond that recoverable by the claimant; and
- where statute expressly permits.

Exemplary damages are available in environmental cases. As the Court of Appeal confirmed in the environmental case of Scutt v Lomax (2000) 79 P & CR D31, it is for the claimant to prove that he is entitled to exemplary damages.

9.3 Class or Group Actions

The Civil Procedure Rules (CPR) allow for group litigation (or class or group actions) under CPR r19.10-r19.15. When such cases arise, they are governed by a Group Litigation Order (GLO) granted under CPR Part 19.

A common usage of group litigation in environmental matters is for instances of pollution affecting a number of residents within a geographical area. For the purposes of obtaining a GLO it must be shown that each case gives rise to "common or related issues of fact or law" under CPR r19.10.

GLOs may be applied for by a claimant, defendant or the court. Aside from the latter (by which the court makes a GLO of its own initiative), written evidence should be given in support.

What constitutes a group was considered in Austin v Miller Argent (South Wales) Ltd [2014] EWCA Civ 1012, where the court held that where only two claimants had after the event (ATE) insurance, "far more than two claimants are necessary to constitute a viable group action."

9.4 Landmark Cases

Coventry v Lawrence [2014] UKSC 13

This Supreme Court case reviewed the approach of the courts to the law of private nuisance. The key rulings were:

- a right to commit a noise nuisance may be acquired by prescription (20 years' uninterrupted use);
- where a claimant does not change their use of their property from that which their predecessor used it for, a defendant may not raise a defence that the claimant "came to the nuisance," but where a claimant changes the use of the property after the defendant's action has begun, such a defence may be raised;
- if the actions of a defendant necessarily cause a nuisance to the claimant, such actions cannot be taken into account when assessing the nature of the location;
- the fact that planning permission has been granted does not authorise a nuisance but where a planning permission applies conditions to an activity (for example, level of noise or duration) that may be relevant in assessing an action; and
- where a claimant is successful, he or she is generally entitled to an injunction restraining the defendant from continuing with the nuisance and to damages for the past nuisance. The burden falls on the defendant to show why an injunction should not be granted but the court does retain discretion in this respect.

Austin v Miller Argent (South Wales) Ltd [2014] EWCA Civ 1012

Beyond the ruling on Group Litigation Orders (above), Austin v Miller Argent also provides that for a claimant to succeed in obtaining a Protective Costs Order (PCO) under Article 9(3) of the Aarhus Convention (which limits the amount of costs a claimant must pay to the defendant in the event that he or she is unsuccessful in environmental cases), the substance of the claim must not be principally to protect private property rights but rather for wider, public benefits.

The approach of the English courts to costs-capping under the Aarhus Convention has been under review and may be subject to revision in the future.

Manchester Ship Canal Company Ltd v United Utilities Water plc [2014] UKSC 40

The Supreme Court considered whether the right of discharge onto third-party property had been transferred to private water companies during privatisation. The Court ruled that the companies do have an implied right in rela-

tion to pre-privatisation outfalls under the Water Industry Act 1991 but not in respect of any outfalls created thereafter.

10. Contractual

10.1 Transferring or Apportioning Liability

There is no reason why the parties to a contract cannot agree the manner in which civil liabilities falling upon one or both of them, including environmental liabilities, are to be apportioned between them. This cannot generally affect the position of third parties, including regulators. Agreements to indemnify another person against liability to pay criminal penalties (including terms in insurance policies to that effect) are usually unenforceable on the grounds of public policy.

The statutory regime in EPA 1990 concerning the remediation of contaminated land contains complex rules for attribution and apportionment of liability that in some respects do require the enforcing authority administering the regime, in attributing or apportioning responsibility, to have regard to the terms of agreements between relevant persons.

10.2 Environmental Insurance

Environmental insurance is widely available. Cover is obtainable against the consequences of both sudden and cumulative pollution, including clean-up costs, third-party civil liabilities and legal costs.

11. Contaminated Land

11.1 Key Laws Governing Contaminated Land

In many cases, a requirement for the remediation of contaminated land will be made a condition of the grant of planning permission for its redevelopment, which is the most common method of achieving remediation to proposed-use standard. There is, however, also a specific statutory regime in the EPA 1990 for the identification and remediation of contaminated land, also administered by local authorities (unless the authority is itself the owner of the land, in which case regulation passes to the EA/NRW). There is a complex statutory code for attributing and apportioning responsibility for the clean-up to "appropriate persons," with primary liability attaching to those who caused or knowingly permitted the contamination, in the absence of whom an innocent current owner or occupier may be rendered liable.

The EDR 2015 may also impose a parallel remediation obligation upon an operator responsible for the contamination of land.

11.2 Definition of Contaminated Land

Contaminated land is defined in the EPA 1990 as land that is in such a condition — by reason of substances in, on or under the land — that significant harm to the environment or property, or significant water pollution is being caused or there is a significant possibility of it.

11.3 Legal Requirements for Remediation

Once contaminated land has been identified, the enforcing authority is required to serve a remediation notice upon those identified as "appropriate persons." The notice must only specify remediation that is reasonable having regard to cost and the seriousness of the harm or pollution that is or may be caused. Government guidance requires that the standard of remediation should result in the land being suitable for its current or likely use.

11.4 Liability for Remediating Contaminated Land

The persons upon whom liability for remediation is imposed are called "appropriate persons." There are two classes of appropriate person: Class A for persons who caused or knowingly permitted the contamination and Class B for an innocent current owner or occupier. Unless no Class A person can now be found, a Class B person will be under no liability.

11.5 Apportioning Liability

More than one person can be liable for remediation of contaminated land. Liability may be apportioned between them by reference to such considerations as the degree of pollution for which each is responsible, determined in turn by such things as the relative spatial extent, intensity and duration of polluting activities, and the character of the resulting pollution.

11.6 Ability to Seek Recourse from a Former Owner

If one person has been held liable for the cost of remediation of contaminated land then they may seek contribution from any other person also responsible for the relevant pollution.

11.7 Ability to Transfer Liability to a Purchaser

English property law is still based upon the proposition caveat emptor (let the buyer beware). Thus a prospective buyer must satisfy itself, by survey or enquiries of the seller, as to the condition of the land that it wishes to buy and can protect itself against liability in private law by seeking indemnities from the seller. The enforcing authority under the public law contaminated land regime must give effect to such agreements between buyers and sellers.

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12. Climate Change and Emissions Trading

12.1 Key Policies, Principles and Laws Relating to Climate Change

The Climate Change Levy

There are two rates within the Climate Change Levy: a main rate is paid on usage of electricity, gas and solid fuels, and a carbon price support (CPS) rate is paid on gas, LPG and coal, and other fossil fuels.

The main rate is paid by those in the industrial, commercial, agricultural and public service sectors, whilst the CPS rate is paid by the owners of electricity generating stations and combined heat and power stations.

The Climate Change Act 2008

The Climate Change Act includes the following:

- a commitment to reduce greenhouse gas emissions by 34% by 2020 and by at least 80% by 2050 against a 1990 baseline, a target that includes emissions from devolved administrations in the United Kingdom;
- a requirement for the government to set legally binding carbon budgets, which limits the emissions of greenhouse gases over any five-year period;
- facilitation of the foundation of the Committee on Climate Change, whose role is to advise the government on emissions targets and to produce reports on the progress towards said targets; and
- inception of the National Adaption Programme that requires the government continually to assess the risks to the UK from climate change and to prepare strategies to combat them.

The Paris Agreement

The UK is also a signatory to the 2016 Paris Agreement, following on from the Kyoto Protocol. As with the other nations that are signatories, this commits the UK to an aim to keep global temperature rise this century below 2 degrees Celsius and to pursue an increase of no more than 1.5 degrees Celsius (against pre-industrial levels).

To meet the aims of the Paris Agreement, signatories submit Nationally Determined Contributions (NDCs). The UK has not submitted its own NDC but was included in the NDC deposited by Latvia on behalf of the EU and its Member States. Post-Brexit, the EU will presumably have to revise its NDC, whilst the UK will have to submit one of its own.

12.2 Targets to Reduce Greenhouse Gas Emissions

See **12.1 Key Policies, Principles and Laws Relating to Climate Change**.

12.3 Energy Efficiency

There is a Carbon Reduction Commitment Energy Efficiency Scheme (the "Scheme"), which applies to large, non-energy-intensive organisations including supermarkets, hotels, water companies, banks, local authorities and all government departments.

Certain public organisations are mandatorily enrolled in the Scheme. Other organisations are assessed on a group level, rather than as individual companies. The criteria for registration are that an organisation, within a year-long period, used at least one settled half-hour electricity meter (sHHM) and 6,000 megawatt hours or more of qualifying electricity through its sHHM.

Enrolment in the scheme is mandatory if the above criteria are met. A failure to register or late registration may result in a fine of £5,000 with a further fine of £500 per working day up to a maximum of 80 working days.

The Scheme runs in phases (the current phase runs from 1 April 2014 to 31 March 2019). Organisations registered with the Scheme must:

- collate and retain information, and submit a report about their energy supplies;
- buy and surrender allowances equal to any CO^2 emissions generated; and
- tell the Environment Agency about any changes to their organisation that could affect registration with the Scheme.

The Scheme exists in isolation from the commitments under the Climate Change Act and the EU Emissions Trading Scheme (ETS). In England the Scheme is administered by the EA.

12.4 Emissions Trading Schemes

The UK is, at present, a member of the EU ETS, which covers over 1,000 power plants, factories and other facilities in the UK.

The EU ETS operates on a "cap and trade" basis. Tradable emissions allowance (each worth one tonne of CO^2 or equivalent) is allocated to participants on a free allocation and an auction basis. Participants in the EU ETS must monitor and report annually on their emissions and have sufficient emission allowances to cover their CO^2 output.

Whether the UK will remain a member of the EU ETS after Brexit remains to be seen.

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13. Asbestos

13.1 Key Policies, Principles and Laws Relating to Asbestos

Responsibility for asbestos as an environmental issue reflects the profound consequences of the special risks to human health that it poses. As to land remediation, the principles relevant to the contaminated land regime apply. Claims for environmental damage are claims for damage to land and the relevant principles are set out in the section of this guide that concerns that regulatory framework. Claims that seek a remedy for any damage to the impairment of a person's physical condition are classed as personal injury claims and special court rules apply (see below within this section).

The key duties concerning the maintenance of non-domestic premises and work to be done on land that may contain asbestos are found in Part 2 of the Control of Asbestos Regulations 2012, which transposes a series of EU Directives. The relevant duty-holder has a duty to assess the presence of asbestos in premises and a duty not to undertake demolition, maintenance or other work unless satisfied that asbestos is not present. Where the presence of asbestos cannot be excluded then further detailed provisions apply, including the requirement to hold a licence from the regulator (the Health and Safety Executive) and the duty to ensure that employees must receive adequate information, instruction and training. The means of enforcement under these regulations is the criminal courts under the Health and Safety at Work Act 1974. There are overlapping regulatory provisions contained within the Management of Health and Safety at Work Regulations 1999 that are also overseen by the 1974 Act. In respect of construction (including demolition) sites, the general health and safety provisions of the Construction (Design and Management) Regulations 2015 must also be observed.

13.2 Responsibilities Landowner or Occupier

The duty to manage asbestos (see previous section) does not apply to domestic premises, except the common parts of houses in multiple occupancy. The identity of the duty-holder and the extent of its responsibilities under the Control of Asbestos Regulations 2012 can be complex. It does not necessarily follow that asbestos must be removed from premises; indeed, the unnecessary removal of asbestos may itself be a breach of the regulations. At the time of writing, the HSE publishes two Codes of Practice and guidance, approved by the Secretary of State, which give detailed practical advice on how to comply with the law. These assist with the extent of any regulatory obligation depending on the nature and characteristics of the asbestos and the potential risk. They also help to identify when an appropriately licensed contractor should be engaged.

13.3 Asbestos Litigation

In 2017 the HSE reported that asbestos found in buildings before 2000 causes about 5,000 deaths every year in Great Britain. A sophisticated system of statutory and procedural rules has been developed to aid the special difficulties faced by claimants in these cases.

By Section 3, Compensation Act 2006, where a victim has suffered mesothelioma as a result of exposure to asbestos, the victim is entitled to recover damages for the whole of the injury from any "responsible person" who has negligently or in breach of statutory duty exposed the victim to asbestos. The principle of joint and several liability applies, leaving it to the defendant undertaking to claim a contribution from another responsible undertaking. The principles set out in the 2006 Act do not apply to other asbestos-related diseases, such as asbestosis or pleural plaques. In such cases a defendant is liable according to the proportion of overall exposure attributable to its acts and omissions (see Heneghan v Manchester Dry Docks Ltd [2016] EWCA Civ 86).

A parent company may owe a direct duty of care to the employees of its subsidiaries (see above). The ordinary rules of limitation apply, making it difficult in certain circumstances for a claimant to establish liability, for instance in persuading a court to extend the usual three-year period in which to bring a claim where the victim has constructive knowledge of the claim.

The Mesothelioma Act 2014 set up a scheme for the payment of compensation to victims of diffuse mesothelioma and their dependants, funded by a levy on insurers.

In May 2002 a special list for mesothelioma claims was established.

Substantial litigation has developed between insurers' undertakings as to their liability, notably as to the questions when mesothelioma has been 'caused' (either when the exposure took place or when the disease became manifest) and as to the nature and extent of their proportionate liability. See Durham v BAI (Run Off) Ltd [2012] UKSC 14 and International Energy Group v Zurich Insurance plc [2015] UKSC 33.

13.4 Establishing a Claim for Damages

A victim has to demonstrate an actual physical injury as a result of an asbestosis-related illness in order to recover compensation. Rothwell v Chemical & Insulating Co Ltd [2007] UKHL 39 established that the mere existence of pleural plaques in the lungs does not give rise to a personal injury claim, even though this is proof of penetration of the lungs by asbestos fibres. In Scotland, the development of pleural plaques does constitute personal injury by reason of the Damages (Asbestos-related Conditions) (Scotland) Act

2009; likewise see the Damages (Asbestos-related Conditions) (Northern Ireland) Act 2011.

13.5 Significant Cases on Asbestos Liability

See sections 13.3 and 13.4.

14. Waste

14.1 Key Laws and Regulatory Controls Governing Waste

The legislative framework for the management of waste is governed by the EU Waste Framework Directive 2008/98/EC. The Directive requires that waste be managed without endangering human health or causing harm to the environment and in particular without risk to water, air, soil, plants or animals, without causing a nuisance through noise or odours and without adversely affecting the countryside or places of special interest. The Waste Framework Directive sets out a waste hierarchy to be applied in the effective management of waste.

Under the Directive the recovery and disposal of waste requires a permit, which is given effect by the EPR 2016 (see above for the scope of those regulations).

Special rules exist for hazardous waste: the Hazardous Waste (England and Wales) Regulations 2005.

14.2 Retention of Liability After Disposal by a Third Party

There is a duty of care to dispose of controlled waste (household, industrial or commercial) in a proper manner. The duty is, according to Defra's Waste Duty of Care Code of Practice 2016, to "take all reasonable steps to ensure that when you transfer waste to another waste holder that the waste is managed correctly throughout its complete journey to disposal or recovery."

The Code of Practice also sets out how long documentation in relation to waste should be retained for.

As outlined above, specific requirements exist for the consignment of hazardous waste.

14.3 Requirements to Design, Take-Back, Recover, Recycle or Dispose of Goods

There are producer responsibility regulations governing the end-of-life disposal of packaging, electrical and electronic equipment, batteries and accumulators, and vehicles.

The UK charity Waste and Resources Action Programme (WRAP) supports the idea of a circular economy and has set out a plan for the UK to become a circular economy by 2020. The theory behind this idea is supported by the EC and it published a paper entitled Towards a Circular Economy: A zero waste programme for Europe on 25 September 2014.

15. Environmental Disclosure and Information

15.1 Requirement to Self-Report Environmental Incidents or Damage

There is no general duty outside any legislative provision to self-report an environmental incident or damage. Provisions of the Environmental Damage (Prevention and Remediation) Regulations for the time being in force in a nation state within the UK, however, anticipate or require that an operator of an activity will inform the appropriate regulator in the case of environmental damage, with a view to the prevention or remediation of damage. Self-reporting provisions are also common in the case of site-specific regulation, even on a "standard rules" basis. For instance, where there is a risk that environmental damage may be caused by an operator's acts or omissions under a permit granted under the EPR 2016, notification of exceedances of permit limits is required. The usual regulatory requirements of the relevant industry sector must be considered with care.

15.2 Public Access to Environmental Information

The United Kingdom is a signatory of the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters), which contains extensive provisions providing for a right of access to environmental information. Since the Convention has not been ratified into domestic law, it is at best an interpretive guide as to the scope of legislative provisions providing for access to environmental information. In the EPR 2016, for instance, these are extensive and apply on the grant of an environmental permit and on its variation. There are restrictions in the case of confidential information. The relevant regulator, which may be the EA or a local authority, is required to hold a register of information relevant to the environment. The EA operates a What's In Your Backyard? website identifying aspects of the local environment by reference to a map and 21 categories of data.

The Environmental Information Regulations 2004 contain detailed provisions providing for access to environmental information held by public authorities, the definition of which is wide. The Information Commissioner's Office has also issued detailed guidance to help organisations to decide whether they constitute public authorities.

The 2004 Regulations are made under the Freedom of Information Act 2000, Part IV of which provides for means of enforcement. Whether an application for information should be answered can be referred under the Act to the

Information Commissioner, with a further opportunity to appeal to the First-tier Tribunal.

15.3 Disclose Environmental Information in Their Annual Reports

A quoted company must include in its strategic report information about environmental matters, including the impact of the company's business on the environment. The Climate Disclosure Standards Board (CDS) explains that the purpose of the provision is to allow investors to incorporate risk into analyses, to meet the government's emission reporting objectives and to increase the number of companies reporting greenhouse gas emissions. The CDS Framework sets out guidance to ensure compliance with government requirements (Defra's reporting guidelines), making it clear that global emissions must be reported, extending, however, to all direct emissions and indirect emissions from purchased electricity and gas. The failure on the part of a director to take reasonable steps to ensure compliance is punishable in the criminal courts by way of an unlimited fine.

16. Transactions

16.1 Environmental Due Diligence on M&A, Finance and Property Transactions

Environmental due diligence is an established industry throughout the UK, advising on all aspects of M&A, finance and property transactions. Typically this will extend to potential liabilities under the contaminated land regime and under the Environmental Damage (Prevention and Remediation) Regulations that are in force for the constituent national state of the UK. This is in particular by reason of the successor liabilities that can pertain to each regime. Environmental due diligence is particularly important because there is no general mandatory requirement on a successor entity to insure environmental risks. Transactional documents should be studied with care to determine the specification of any particular baseline requirements by which environmental damage is to be assessed, for instance on the end of the term of a lease. In April 2016 the Law Society of England and Wales updated its Contaminated Land Practice Note, recommending the use of environmental consultants. In the case of contaminated land, a desktop report is the usual starting point. A Phase 1 report is likely to require a site visit and particular contaminated land issues. A Phase 2 report will include the results of relevant intrusive investigations.

16.2 Environmental Liability for Historic Environmental Damage

The question of the liability on the part of a buyer of shares or assets for historic environmental damage or breaches of environmental law is a developing one. In particular it should be noted that whilst the UK has traditionally had a strong respect for the principle of corporate responsibility, the courts are thought to be increasingly less likely to allow company personalities to reorder/reconstitute themselves. Where, for instance, a holding company has taken an active part in the management or operation of a subsidiary company and that subsidiary company has ceased trading then the courts may find a basis on which to hold the holding company liable for the acts and omissions causative of historic environmental damage. Environmental torts include torts of strict liability that provide vehicles that make it more difficult for corporate undertakings to evade liability. An intention to purchase assets that have a potential for environmental liability, whether by regulators under the relevant statutory schemes or by virtue of non-legislative forms of action by aggrieved claimants, should be considered with care. For this reason, and because insurance provision may not be robust, strict due diligence must be carried out. There is a particular difficulty in the case of a company (A) that acquires a company (B) that holds an environmental permit, because the EA is likely to seek to hold company A liable for the baseline condition of the site on the initial grant of the permit. In the absence of an express transfer of liability for historic breaches of the permit, the unsatisfactory position may be reached whereby company A is considered liable for a contravention of the permit (such as excessive deposits of waste), but outside the EA's enforcement policy.

16.3 Retention of Environmental Liability by Seller

A seller responsible for the pollution of land would remain primarily liable for its remediation under the contaminated land regime (unless otherwise agreed) and also liable in private law in respect of damage caused to other land. Pre-existing criminal liability for regulatory breaches would not be affected by disposal of a regulated site.

16.4 Environmental Due Diligence by a Purchaser of Shares/Assets

The nature of the due diligence that should be carried out by a purchaser of shares or other assets will vary according to the nature of the purchase and its potential liabilities in the context of the legislative regime. Ultimately the most satisfactory protection for any purchaser will be the positive requirement that the vendor answers specific queries, together with any suitable and satisfactory warranties or indemnities that can be obtained to ensure compliance.

16.5 Requirement for Seller to Disclose Environmental Information to the Purchaser

In the usual course, an appropriate disclosure bundle will consist of an exchange of letters concerning specific and general disclosures (prepared initially by the vendor), pertaining to known and unknown issues connected with the asset. The answers to general requests, in particular, may throw up further specific issues that require further questions to be raised. Purchasers should note that contractual arrangements — at least in England, Wales and Northern Ireland

— do not generally recognise a duty to speak or carry an implied obligation of good faith. Neither is an implied term to act "reasonably" in the context of an asset sale and purchase agreement likely to be readily inferred. Where a purchaser wishes to obtain disclosure of environmental information then specific issues of concern should be raised and a full answer should be demanded. See **16.6 Environmental Warranties, Indemnities or Similar Provisions**.

16.6 Environmental Warranties, Indemnities or Similar Provisions

Warranties in the documentation effecting a sale of a share or asset will be utilised to ensure the recovery of loss in the event of breach. In an environmental context they are likely to be linked with the requirement to indemnify the purchaser in respect of any environmental issues that may arise after purchase. During the disclosure process (as to which see above), the purchaser will want to be reassured, for instance, that there are no potential environmental claims and there is no environmental litigation under way. An indemnity is the most satisfactory means for ensuring full recovery in the event of breach. The environmental warranties are likely to be closely connected with any warranties provided in the context of health and safety issues. EU legislative instruments regularly render an impact on human health a risk connected with environmental obligations. Core warranties should identify the scope of their application (human health, damage to land, etc) and cover the risks of pollution as well as non-compliance with relevant regulatory instruments. Purchasers will need to beware of any limitations of liability on which sellers may seek to insist, whether as to time or materiality (such as de minimis exemptions).

16.7 Insolvency Rules

No specific insolvency rules are concerned with environmental matters. However, an issue that has come before the courts in previous years has concerned the right of a liquidator to disclaim (disown) an environmental permit and the consequences of such a disclaimer. It became settled that a liquidator was entitled to disclaim the equivalent of a permit on the grounds that it constituted onerous property under the Insolvency Rules in re Celtic Extraction Ltd [2001] Ch 475. In Environment Agency v Hillridge [2003] EWHC 3023 (Ch) the operator of a quarry had placed money in trust in compliance with a planning obligation intended to ensure that necessary land remediation. The High Court held that on disclaimer the trust became ineffective and placed the money out of the reach of the liquidator and the EA.

17. Taxes

17.1 Green Taxes

Green taxes include the Climate Change Levy (CCL), CRC Energy Efficiency Scheme, emissions trading, capital allowances on energy, landfill tax and aggregates levy. CCL is payable by most businesses, including agricultural and public services. There are exemptions, in particular for small use, certain forms of fuel and renewable firms of energy. The CRC Energy Efficiency Scheme applies to large, non-energy-intensive organisations, which affects larger businesses that do not fall within the EU ETS. It requires them to monitor and report CO^2 emissions, and to buy allowances. The Emissions Trading System affects businesses from energy-intensive sectors and allows them to buy and sell the right to make greenhouse gas emissions. Capital allowances are available to an undertaking that buys energy-efficient or low or zero-carbon technology.

Landfill taxes are paid where waste is deposited in a landfill. There is a lower rate (for inert or inactive waste) and a much higher standard rate, with certain exemptions. Tax credits may be available to an undertaking that sends waste on from a landfill for recycling, incineration or reuse.

The aggregates levy is payable on aggregates dug from the ground, dredged from the site or imported. For the larger part (but not altogether), most of these taxes are to provide for green issues stemming from EU legislation, including promotion of the waste hierarchy and a reduction in the use of fossil fuels. A more detailed understanding of the relevant rules can be found via the Gov.UK website.

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