u.k. environmental law association e-journal

e - law

www.ukela.org *issue 15 – September 2003*

Contents

EDITOR'S MESSAGE

I thought I would take this opportunity of thanking the many contributors who have helped make E-Law into such a successful on-line journal over the course of the past two years. It is an indicator of the quality of the contributions that we receive increasing numbers of requests for copies of articles and back numbers from members and non-members alike. With this in mind can I plead with all members to retain copies either in hard copy or on their systems and for those of you who work in firms where you have library resources to please pass a hard copy of E-Law to your Librarian?

For those of you who have not yet contributed – I am sure that there is an article in each and every one of you. If you have an idea for an article do please give me a ring or email me with an outline and I will respond as quickly as possible to let you know whether or not we can publish it.

The members of the Nature and Conservation Working Party very kindly agreed to produce articles for an October/November edition. The edition produced by the Contaminated Land Working Group Party was very well received and if any other group would like to volunteer to produce articles for a future edition again do please contact me.

Comments – positive or negative – are always welcome. My contact details will be found on the back page of this edition.

I hope you like UKELA's new logo. I should have it on the masthead for future edition's!

Catherine Davey – Stevens & Bolton

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STRATEGIC PLAN – PROGRESS REPORT
Vicki Elcoate- Executive Officer- UKELA
vicki.elcoate@ntlworld.com

The results of the members' questionnaire have now been analysed and shared with UKELA's Council. A big thank you to all who took the time and trouble to reply. The chairman will reply on what action Council will take on the findings in a future edition of e-law. However the headline results of the questionnaire are below.

Council has also now adopted the strategic plan for 2003 – 2006. This will be circulated to all members once the final details are complete. It includes the development of a major project idea – setting up an electronic library on environmental law. This would be of major public benefit and be a clear demonstration of UKELA's commitment to share its expertise widely in the interest of working for a better quality environment. However it is a major undertaking and much work needs to be done in scoping out the idea and securing funding to take it forward.

UKELA has also developed a new logo which will appear on all publications (see the front page for its first appearance in e-law). I hope you like it and that it will help UKELA develop its profile.

Questionnaire results:

97 people responded to the questionnaire by the deadline, nearly 14% of the total membership.

Most respondents seemed to support the questionnaire format, although some tried to change the questions, or add in new possibilities, which made standardisation difficult. However there were some clear results, most notably:

1. e-law is popular and well used – the format could be made easier to read on screen. Not enough people supported a paper format to make it worth the substantial expense involved, although any individual member can request a paper copy
2. the web-site is not well used and many members do not know about it (so the questionnaire helped bring it to their attention). Improvements to the site are already being considered and members may want to check it more often as it is updated regularly
3. the conference is popular but the overall events programme should cater more for the regional nature of the membership and non lawyer members
4. A quarter of respondents wanted to get more involved in UKELA activities and they will be contacted or can contact the regional and working party convenors (details on the web-site)
5. A subs rise for individuals, students and corporate members was supported by the majority of respondents, but many argued for a concessionary rate for individuals. Naturally members wanted to see value for money and various plans are in hand to improve the service to members.
6. A special NGO rate received overwhelming support
7. About half of the respondents were happy and eligible to sign up for Gift Aid and/or Direct Debit and UKELA is now taking the appropriate steps to introduce these methods of more efficient giving.

STOP PRESS

Make a note in your diaries NOW!

The 2004 Conference will be held in Manchester on 2nd-4th July.

WATCH THIS SPACE!

Hatton v UK (Grand Chamber of the European Court of Human Rights, 8th July 2003) and Dennis v Ministry of Defence (Queens Bench, 16th April 2003) – balancing the demands of the general interest of the community and the requirements of the individual's fundamental rights?

By Martha Grekos, Pupil Barrister, Hailsham Chambers

In *Hatton and Others -v- United Kingdom* the European Court of Human Rights, Third Section, 2nd October 2001, dealt with breaches of human rights in relation to noise levels generated from Heathrow Airport and found that there had been breaches of both Article 8 and Article 13 of the European Convention on Human Rights. The facts of that matter related to the increase in the level of noise caused by aircraft using Heathrow Airport since 1993 at night time, and the applicants' alleged violation of Article 8 (respect for private and family life).

The Government had sought a referral to the Grand Chamber of the European Court of Human Rights. The Government argued that a) the ECtHR departed from the approach adopted in earlier cases under Article 8 where questions of social and economic policy arose in the context of a claim for environmental protection; and b) that if the Government had failed to carry out a sufficient evaluation, this may have explained why the UK failed to strike the right balance (if it did), but it did not follow from such a failure that the UK struck the wrong balance. The Court failed to go on to balance the economic benefit to the general community of night flights against the complaints of the applicants, and so failed to carry out the exercise which would have enabled it to decide whether the balance struck by the Government was right or wrong.

On 8th July 2003, the Grand Chamber delivered its judgement. It held that there had been no violation of Article 8 of the ECHR (12:5 votes); that there had been a violation of Article 13 of the ECHR (16:1); and that the finding of a violation of Article 13 of the ECHR constituted in itself sufficient just satisfaction for any damages sustained by the applicant.

The Grand Chamber decided that there were two aspects of the inquiry which had to be carried out: 1) assessing the substantive merits of the Government's decision, to ensure that it is compatible with Article 8; and 2) to scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual, bearing in mind that the State must be allowed a wide margin of appreciation. The Grand Chamber's focuses was therefore on whether, in the implementation of the 1993 policy on night flights at Heathrow airport, a fair balance was struck between the competing interests of the individuals affected by the night noise and the community as a whole.

The Grand Chamber held that it was legitimate for the Government to have taken the economic interests (of the operators of the airlines and other enterprises as well as their clients and those of the country as a whole) into consideration in the shaping of its policy. It seems that the Grand Chamber gave precedence to economic considerations over basic health conditions (of noise and disturbance of sleep) when it qualified the applicants' 'sensitivity to noise' as that of a small minority of people. As to whether the Government had struck a fair balance between the economic interests and the conflicting interests of the person affected by noise disturbance, the Grand Chamber held that:

Environmental protection should be taken into consideration by Governments in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights, In this context the Court must revert to the question of the scope of the margin of appreciation available to the State when taking policy decisions of the kind at issue… Whilst the State is required to give due consideration to the particular interests the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing .

whether or not the particular solution adopted can be regarded as striking a fair balance.[1]

The Grand Chamber held that the State had not overstepped its margin of appreciation by failing to strike a balance between the right of the individuals affected by those regulations and the conflicting interests of others and the community as a whole. It was reasonable to assume that the flights contributed at least to a certain extent to the general economy[2] and that "[w]here a limited number of people in an area… are particularly affected by a general measure, the fact that they can, if they choose, move elsewhere without financial loss must be significant to the overall reasonableness of the general measure"[3]. There was therefore no violation of Article 8.

As to Article 13, the Grand Chamber agreed with the Third Chamber that there had been a violation. The Grand Chamber addressed the question whether the applicants had a remedy at national level to "enforce the substance of the Convention rights…in whatever form they may have happen to be secured in the domestic legal order". The Grand Chamber said that:

…judicial review proceedings were capable of establishing that the 1993 Scheme was unlawful because the gap between Government policy and practice was too wide. However, it is clear, as noted by the Chamber, that the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not at the time (that is, prior to the entry into force of the Human Rights Act 1998) allow consideration of whether the claimed increase in night flights under the 1993 Scheme represented a justifiable limitation on the right to respect for the private and family lives or the homes of those who live in the vicinity of Heathrow airport.[4]

The Grand Chamber went on to hold that:

…the violation of Article 13 derived, not from the applicants' lack of any access to the British courts to challenge the impact on them of the Government's policy on night flights at Heathrow Airport, but rather from the overly narrow scope of judicial review at the time, which mean that the remedy available under British law was not an "effective" one enabling them to ventilate fully the substance of their complaint under Article 8 of the Convention. This being so, the Court considers that, having regard to the nature of the violation found, the finding in itself constitutes adequate just satisfaction in respect of any non-pecuniary damage.[5]

It is very interesting to note the joint dissenting opinion of the 5 judges. The dissenting opinion stressed the development of the case-law in "environmental human rights" where the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on. In addition, the Court has often underlined that "the Convention is a living instrument, to be interpreted in the light of present-day conditions." The dissenting judges felt that the Grand Chamber's judgement deviated from these developments in the case-law and "even to take a step backwards" by giving precedence to economic considerations over basic health conditions[6]. The dissenting judges felt that the "…the general reference to the economic well-being of the country is not sufficient to justify the failure of the State to safeguard an applicant's rights under Article 8… [T]he… fair balance between the rights of the applicants and the interests of the broader community must be maintained. The margin of appreciation of the State is narrowed down because of the fundamental nature of the right to sleep, which may be outweighed only by the real pressing (if not urgent needs) of the State."[7] Courts should

[1] Paragraphs 122 and 123.
[2] Paragraph 126.
[3] Paragraph 127.
[4] Paragraph 141.
[5] Paragraph 148.
[6] Paragraph 5 of the dissenting opinion.
[7] Paragraph 17 of the dissenting opinion.

become involved to address the competing claims of individuals against the wider public interest.

What is of great importance in this dissenting opinion is the argument based on a) privacy and b) the protection of small minorities. The dissenting judges felt that when "it comes to such intimate personal situations as the constant disturbance of sleep at night by aircraft noise there is a positive duty on the State to ensure as far as possible that ordinary people enjoy normal sleeping conditions."[8] Hence, *Dudgeon v UK* (22nd October 1981) could not be distinguished from the present case:

It is logical that there be an inverse relationship between the importance of the right to privacy in question on the one hand and the permissible intensity of the State's interference on the other hand. It is also true that sexual intimacy epitomises the innermost concentric circle of private life where the individual should be left in peace unless he interferes with the rights of others. However, it is not logical to infer from this that the proportionality doctrine of inverse relationship between the importance of the right to privacy and the permissible interference should be limited to sexual intimacy. Other aspects of privacy, such as health, may be just as 'intimate' albeit much more vital.

Privacy is a heterogeneous prerogative. The specific contours of privacy can be clearly distinguished and perceived only when it is being defended against different kinds of encroachments. Moreover, privacy is an aspect of the person's general well-being and not necessarily only an end in itself. The intensity of the State's permissible interference with the privacy of the individual and his or her family should therefore be seen as being in inverse relationship with the damage the interference is likely to cause to his or her mental ands physical health. The point, in other words, is not that the sexual life of the couple whose home reverberates with the noise of aircraft engines may be seriously affected. The thrust of our argument is that "health as a state of complete physical, mental and social well-being" is, in the specific circumstances of this case, a precondition to any meaningful privacy, intimacy etc and cannot be unnaturally separated from it. TO maintain otherwise, amounts to a wholly artificial severance of privacy and of general personal well-being.[9]

The dissenting judges also made the connection that human rights have moved away from a focus on the assertion of individual rights towards the protection of the rights of the most disadvantaged groups in society. This is the way in which European environmental lawyers have not only sought to make use of economic and social human rights standards, but also civil and political rights. As the dissenting judges stated:

We do not find it persuasive to engage in the balancing exercise employing the proportionality doctrine in order to show that the abstract majority's interest outweighs the concrete "subjective element of the small minority of people… Indeed, one of the important functions of human-rights' protection is to protect 'small minorities' whose 'subjective element' makes them different from the majority.[10]

This is a development of human rights law by pressing institutions to think more deeply about the positive side or rights obligations. In a complex society, it is not enough for States to see such rights as purely rights to be left alone by the State; States will frequently have the knowledge and resources to reduce the risks to their citizens' health/well-being. In this "risk society" (Ulrick Beck), it can be argued that a State that closes its eyes to risks is failing to respect the rights of <u>all</u> its citizens.

It therefore seems that the Grand Chamber in *Hatton* has turned away from the Third Chamber's and dissenting judges' resounding endorsement of an aggressive, highly interventionist version of the margin of appreciation doctrine within Convention jurisprudence.

However, even though the Grand Chamber overturned the decision of the Third Chamber regarding Article 8, it is worth noting that the English courts are becoming involved to address the competing claims of individuals against the

[8] Paragraph 12 of the dissenting opinion.

[9] Paragraphs 10 and 11 of the dissenting opinion.

[10] Paragraph 14 of the dissenting opinion.

wider public interest: the potential need for compensation to balance out community and individual co-existence. This was first seen in the Court of Appeal case of *Marcic v Thames Water* [2001] 3 AII ER 698, where an activity of social utility produced compensatable harm when the excessive effects on the individual were not justified. Recently, this has been seen in *Dennis & anr v Ministry of Defence* [2003] EWHC 793 (QB), where the public interest clearly dictated that RAF Wittering should continue to train pilots despite the noise disturbance. However, the claimants should not be required to bear the cost of the public benefit and so even though the claimants' declaration was refused they were awarded damages. Mr Justice Buckley held that "selected individuals should not bear the cost of the public benefit". He awarded damages based on nuisance, and infringement with human rights, for risk of loss of capital value, loss of business opportunities, and loss of amenity.

In *Dennis & anr v Ministry of Defence,* the claimants brought an action for a declaration and damages in relation to a nuisance and/or interference with their human rights said to be constituted by noise emanating from RAF Harrier jets based at the nearby RAF Wittering airforce base. The claimants were the owners of Walton Hall, a Carolean Grade I listed mansion, and its surrounding estate, which comprised nearly 1,400 acres of agricultural and other land. RAF Wittering was the operational and training base for Harrier jump jets, having assumed that role in 1969. Its main runway was 2 miles from the Hall. It was common ground that the main instances of noise disturbance to the claimants arose when pilots were engaged in "training circuits" and that the number of noise "incidents" in any one day might range from 12 to 138, with a daily average of over 70. The Ministry of Defence admitted that disturbance and annoyance were caused to the claimants by operations at RAF Wittering, but denied that: (a) such noise gave rise to any cause of action at common law or under the European Convention on Human Rights; and (b) the extent of that interference was as severe as the claimants contended. The Ministry of Defence argued that: (i) training pilots for the defence of the realm was, in the modern era, one of the "ordinary usages of mankind"; (ii) defence of the realm was a public interest which gave the Ministry of Defence a defence to the action; and (iii) the claimants had "come to the nuisance", in that RAF Wittering was an established feature of the area when the claimants acquired their property. The claimants contended that the consequence of the noise disturbance was that they had been denied the opportunity of exploiting the Hall and the Estate for commercial entertaining and other income-generating activities. It was common ground that the noise from the jets had substantially blighted the Hall and the Estate in terms of their capital value, but the Ministry of Defence denied that either was capable of commercial exploitation of the kind envisaged by the claimants.

The court was satisfied that the noise generated by the jets had accurately been described by the claimants as "deafening", "highly intrusive" and "frightening". As such, it "manifestly" constituted a very serious interference with the claimants' enjoyment of their property, which was aggravated by its persistence and unpredictability. The flying of Harrier jets could not, even in this day and age, be regarded as an "ordinary use of land" within the legal meaning of that phrase. The fact that such flying might be capable of justification on other grounds did not make it "ordinary". In any event, the court was by no means satisfied that, even if such flying was "ordinary", it had to be conducted in such a way as appeared (albeit not deliberately) to maximise the disturbance to the claimants. In addition, the level of noise had increased substantially since 1969, and was so extreme that it could not be regarded as a feature of the area. Public interest might excuse what would otherwise constitute an actionable nuisance, provided that no more damage was done than reasonably necessary. However, such a defence should not to be allowed to succeed where a human rights claim on the same facts would also succeed. In this case, public interest clearly dictated that RAF Wittering should continue to train pilots. However, the claimants should not be required to bear the cost of the public benefit. In the circumstances, the appropriate course was to refuse the claimants the declaration which they sought, but to award them damages. The court then calculated the claimants damages at £950,000, representing loss of capital value, past and future loss of use and past and future loss of amenity. In conclusion, common law nuisance had been sufficient to

dispose of this case. If necessary, the court would have held that the claimants' rights under both Art 8 and Art 1 of the First Protocol of the European Convention on Human Rights had been infringed.

Dennis & anr v Ministry of Defence and *Marcic*, though, are not as interventionist as the views expressed by the dissenting judges in *Hatton*. The availability of compensation is an important factor in the balance between the demands of the general interest of the community and the requirements of the individual's fundamental rights. The requirements, for example under Article 1, Protocol 1 and Article 8, can therefore be satisfied by the payment of monetary compensation. The dissenting judges in *Hatton* went further as the United Kingdom Government had not only to strike a balance between competing interests, having regard to the State margin of appreciation, but had to also minimise as far as possible the interference with these rights by trying to find alternative solutions and seeking to achieve their aims in the least onerous way as regards human rights. Monetary compensation was not enough.

Participants sought for study project:

"Ta jeunesse imagine ton droit –

Young lawyers take a fresh look at European Law "

At the initiative of the French Prime Minister, the French Minister of Justice has developed a study/policy development project entitled "Europe, ta jeunesse imagine ton droit". The aim of this project is to involve young legal professionals of several EU and EU accession countries with the work currently carried out by the students (Auditeurs de Justice) of the Ecole Nationale de la Magistrature (ENM – Training College for the Judiciary) on four topics chosen by the Minister of Justice:

- **Environmental law** (notably in relation to natural disasters);
- **Road safety;**
- **Company law** (notably workers' rights in the event of a transfer of production facilities across international borders);
- **Ethics and new technology** (notably in relation to child protection against online child pornography).

The ENM students have just finished reports that analyse current French law in the different chosen topics. Based on this they will formulate legal principles to provide the starting point for discussions among the different European countries taking part in the project, suggesting areas of convergence and formulating proposals that may be useful for future EU harmonisation proposals.

The Minister of Justice has chosen to five countries as partners for this project: Spain, Germany, the United Kingdom, Hungary and Turkey.

In each country, the Judicial Studies Board or its equivalent (Training institutes, universities) has been asked to adopt an approach similar to the one adopted by the ENM: to ask young professionals to reflect on the four themes mentioned above, in order to write a report of about 15 pages on each subject and to formulate their proposals on how the matter may be treated on an EU-wide basis. The written reports will be submitted to the French *auditeurs de justice* and translated into French in order to serve as the basis of their further work.

As the UK does not have a career judiciary, its judges are considerably older by the time they are appointed to the Bench. In order to avoid a "generational mismatch" the French Ministry of Justice has therefore approached the Bar Council and the Law Society, asking them to nominate suitable young barristers and solicitors. (Some candidates will also be selected by the British Institute for International and Comparative Law.)

The Minister of Justice wishes to visit all the participating countries, in order to launch the working groups of young lawyers. His first trip will be to Spain in July, then to Germany in September and the third is planned to in London in the second half of October. The Minister of Justice wishes to organise a seminar in Paris in March 2004, during which the conclusions of the work will be presented and discussed. To this seminar the

Ministers of Justice of the different European countries involved will be invited, along with the representatives of the different judicial training institutions and the young lawyers.

The Minister of Justice is intending, with the agreement of the participating countries, to communicate the conclusions and proposals submitted by the young lawyers to the EU Justice and Home Affairs Council.

The Bar Council and the Law Society are now inviting candidates to submit their applications to take part in this study/policy development project. Five young lawyers will be selected per topic. The UK Working Groups will begin their work with the formal launch in October and need to submit their papers by **31 December.**

The work will not be remunerated but **all contributors will be invited to the seminar in Paris and travel and accommodation costs associated with this visit will be borne by the French government.**

Interested young barristers/advocates should send a CV and covering letter by e-mail to: cwisskirchen@barcouncil.org.uk.

Interested young solicitors should apply to: Mickael.Laurans@lawsociety.org.uk

The covering letter should clearly indicate for which of the four working groups the applicant wishes to apply.

The deadline for submission of the application is: 26 September 2003 and candidates will be notified the week beginning 6 October 2003.

Washington in dock over climate change as three states sue

Dr Paul K Hatchwell

Three New England states are making legal history in the USA and internationally with a lawsuit against the Federal Environmental Protection Agency (EPA) for failure to address the serious threat of climate change under the *Clean Air Act.*

In the first case of its kind anywhere, the Attorney Generals of the Commonwealth of Massachusetts, Connecticut and Maine, Tom Reilly, Richard Blumenthal and Steven Rowe launched the joint action against EPA in Federal district court of Hartford, Connecticut, alleging failure to adhere to the provisions of the *Clean Air Act*.

Speaking on behalf of the three states, Massachusetts Attorney General Tom Reilly said that: “having recognised the dangers that global warming poses to public health, our environment and our economy, the federal government not only has a clear responsibility to address the problem, but a legal obligation as well under the provisions of the *Clean Air Act*”.

Maine Attorney General Steven Rowe said: "We believe the plain language of the *Clean Air Act* requires EPA to regulate emissions of carbon dioxide."

Weapon of last resort

The case, reported in the latest issue of *Climate Change Management*, has obvious geopolitical implications given the refusal of the Bush Administration to ratify the *Kyoto Protocol*, and its implacable opposition to precautionary measures on global warming under the *UN Framework Climate Change Convention*. Its stance is leaving it increasingly isolated internationally as even the Russian Federation edges reluctantly towards acceptance.

It is also likely the case may have influenced the EPA’s controversial decision to remove all references to human-induced climate change impacts from its draft *Report on the Environment 2003*, published at the end of June. The glaring omission from the report, described by outgoing EPA Administrator Christine Todd Whitman as “an unprecedented effort by the Agency to present the first-ever national picture of U.S. environmental quality and human health” has already alarmed scientific opinion within the Agency.

In their lawsuit against EPA, the three states demand that carbon dioxide be reclassified as a “criteria pollutant”, joining sulphur dioxide, particulate matter, carbon monoxide and lead. If successful, this would force the government to both set and enforce strict standards for permissible atmospheric concentrations of the commonest greenhouse gas.

In Connecticut, Attorney General Richard Blumenthal said: "Our lawsuit is a last resort. Even after abundant opportunity and public urging, the EPA steadfastly refused to enforce the law and protect the public. It has repeatedly acknowledged

its authority, but it has persistently failed its obligation to use that authority. Now the courts must compel it."
Blumenthal pointed out that ""EPA's inaction on carbon dioxide is intolerable – a dangerous disservice to the nation", adding that "by the Administration's own admission, on the public record, greenhouse gas emissions cause global warming, in turn causing disease, environmental damage, and weather-related disasters such as drought and flooding".
The basis of the current lawsuit is a 1976 Court of Appeals decision that compelled EPA to set air quality standards for lead. The decision resulted from an action by the Natural Resources Defense Council (NRDC) arguing that EPA had accepted there were serious risks from lead emissions, but had nevertheless declined to list it as a criteria pollutant and address it as such.
In the current action, under the notice provisions of the *Clean Air Act*, the Attorneys General point out that "the EPA has acknowledged in a legal memorandum and testimony presented to Congress in 1998 and 1999 that carbon dioxide is an air pollutant subject to regulation under the *Clean Air Act*".
The action was prepared following failure of the Administration to act on a letter sent to President Bush on July 17 last year drawing their attention to the *US Climate Action Report 2002* issued last May and urging "a strong national approach" to climate change as the "most pressing environmental challenge of the 21st century".
The report confirmed the dangers of global climate change, and projected a 43% increase in CO_2 by 2020.
The trigger for the current lawsuit, known as a *mandamus suit*, came when a statement of their intent to sue issued to Whitman on January 30th this year went unheeded. There has been no official reaction from EPA as yet.

Local action overcomes Federal indifference

The New England states are not the only ones to take unilateral measures to reduce climate change threats. Several states, including Massachusetts, New Hampshire and California, have been very resourceful in tackling global warming through local initiatives and legislation, including regulations respectively requiring reduced power plant emissions, 'cap and trade' measures, and 'maximum feasible reductions' in CO_2 emissions from motor vehicles in California. The latter stands to lose most as temperatures rise and mountain water supplies dry up.
The unspoken threat of future litigation over climate change impacts is already beginning to be felt within major US and European company boardrooms through shareholder pressure, while criticism over perceived lack of action on the issue has already put the State Department on the defensive.
Whatever the outcome of the current case, it is bound to raise awareness of the issues in a country where, contrary to popular belief, concern over global warming is high, even if some of the solutions are seen as unpalatable. Litigation over liability for enhanced climate change is also likely, indirectly, to concentrate minds and sharpen resolve to address the problem in Europe, and not least in the UK, where pioneer voluntary approaches have been preferred, but have had limited success so far.

Dr Paul K Hatchwell is a writer and researcher on climate and environment issues, and is Editor of the monthly *Climate Change Management*, published by NewzEye Ltd (020 8969 1008). This news feature, developed from a news report in the current edition, is reproduced with their permission. Email: paul@hatchwell.net

THE UKELA PRIZE MOOTING COMPETITIONS HELD IN ASSOCIATION WITH THE CHAMBERS OF ROBIN PURCHAS QC,

2 HARCOURT BUILDINGS

Rules

1. There are two mooting competitions:

    a. *The Lord Slynn of Hadley Mooting Trophy Competition* is open to all those who as of 1 June 2003 are in pupillage, a trainee solicitor, on the bar vocational course or law society finals, or who are on taking the CPE. In essence this competition is for those on vocational courses

b. *The UKELA Student Prize Moot* is open to those who as of 1 June 2003 do not qualify for the Lord Slynn Trophy Competition but who are studying for a degree (including graduate degrees, e.g. LLM's or non law degrees). In essence this competition is for those who are students not yet on vocational courses.

2. Teams consist of two members. An institution may enter more than one team. Subject to obtaining the permission of the Master of the Moot, teams may comprise of competitors from different institutions.

3. Each team should submit two skeleton arguments, one on behalf of the Appellant and one on behalf of the Respondent. No more than five authorities may be cited in addition to those referred to in the Moot problem. The skeleton arguments should be no more than six pages of A4 paper. [The font should be Times New Roman, size 12, with 1.5 line spacing]. Paragraphs and pages should be numbered. The skeleton arguments should be accompanied by a contact name, address and day and evening telephone number. They should be submitted to **Jeremy Pike, Secretary to the Moot, 2 Harcourt Buildings, Temple. London EC4Y 9DB no later than 17:30hrs 31 October 2003. Tel: 0207 353 8415; fax:0207 353 7622.** Martha Grekos, Pupil barrister at Halisham Chambers is the UKELA Council Moot Co-ordinator

3. The finalists will be selected on the basis of the written skeleton arguments. All competitors will be notified of the outcome but finalists will be notified by 7 November 2003. The finals will be held at Lincoln's Inn at a date to be announced in November or December 2003. The finals will be judge by the President of UKELA, Lord Sylnn of Hadley.

4. The winners of both competitions will receive a cash prize. The winners of the Senior competition will receive the Lord Slynn of Hadley Mooting Trophy. **All finalists will receive subscriptions to the Weekly Law Reports courtesy of the Association of Incorporated Law Reports and Prizes from Sweet & Maxwell**

4. The Master of the Moot reserves the right to change the rules of the competition without notice as he thinks fit. All correspondence should be addressed to the Secretary of the Moot (see details at paragraph 3 above).

Gregory Jones
Master of the Moot
2 Harcourt Buildings
Temple

UKELA
MOOT PROBLEM

Facts

[1] The Egout Water Company ("EWC") is the water sewage operator for the combined regions of Middle England and Mercia. In common with other operators it has found that tomato seeds being indigestible, tomato plants flourish in many of its larger sewers.

[2] Many years ago, the white bleached coloured tomatoes produced in the sewers were given as treats to the children of the workhouse in reward for the children clearing away the tomato plants from the narrow sewers. The tomatoes are now regarded as unfit for human consumption and the plants themselves inhibit the sewage flow. They must be cleared on a regular basis. Child labour being presently unlawful in the UK, the costs are high. The plants are collected and landfilled.

[3] EWC discovered that the tomato plant could be put to productive use. The process involves the separation of the plant from the fruit. The plant is burnt in an incinerator where a limited amount of energy is produced. The resultant powder is then compressed on the same site as the incinerator, to form biodegradable flower-pots and building blocks for garden walls. No special handling is required in respect of the pots or bricks. Also on site

the fruit is washed. During the washing process nose pegs are issued to the washer because of the smell. The fruit is then mixed with ordinary soil to produce a high-yield compost which EWC has named "Tomarty Grow"

[4] Market research has indicted that there would be a big market for Tomarty Grow and for the flower-pots and building blocks.

[5] Before embarking upon large scale production in 1998 Tomarty grow sought the advice of the EA. EWC explained to the environment Agency that the production costs would be £4 million and although it predicted a string market estimated that it would only start going into profit by year 5 and then recoup its initial outlay by year 8. Mercia was the first company to develop a product but other similar products were likely to come forward form other sewage operators in the near future The EA issued a guidance note in which its stated that that in its view there neither the products made form the compressed powder nor the Tomarty grow constituted waste. The secretary of state also issued a press statement welcoming the developments as a major benefit to the government's desire for recycling.

[6] EWC moved into production in 2000. However, in 2001 the environment agency announced that in the light of recent case authority, it took the view that all the products remained waste until actually used. In the case of the flower pots they remained waste until used for the planting of flowers by the end user, in the case of the garden bricks at the time that the brick was placed in the wall and in the case of Tomarty Grow when the compost was spread onto the ground. Accordingly those handling any of the products required waste management licences. The market for all the products collapsed over night.

[7] EWC sought judicial review of the EA's announcement on the grounds that the products ceased to be waste once processed the Environment agency was in breach of a legitimate expectation in which the EWC had relied to its detriment. EWC also sought damages in respect of the breach of legitimate expectation.

Mr Justice Harcourt (at first instance)

Mr. Justice Harcourt considered that no ECJ authority directly covered the point. One must look to the purpose and context of the legislation of the waste directive as whole, and within EC environment law. None of these products caused any safety risk or harm to the environment. One could not tell the difference between a flower pot produced in this way and a flower pot produced in the conventional way, expect that this type of flower pot had the benefit of being biodegradable. He held that none of the products were waste. It was accordingly unnecessary to address the arguments on legitimate expectations.

The Environmental Agency appealed with the permission of Harcourt J.

The Court of Appeal (Sir John Evelyn MR, Labouchere LJ and Brightpin J)

Held (Labouchere LJ dissenting in part) that whilst they had great sympathy for the approach adopted by Harcourt J they could not agree with his judgment. Whilst common sense may be attractive, the court must seek to apply the case law of the ECJ, whilst recognising that there was a market for these products (a possible point of distinction with *Palin Granite Oy and Vehmassalon Kansanterveystön Kuntsyhtymän Hallitus v. Lounais Suomen Ympäristökeskus*[11]) nonetheless by virtue

[11] Case C-9/00, [2002] 2 CMLR 560.

of the processing it considered that the products remained waste until applied or used by the end user (see *Attorney General's Reference (No 5 of 2000)* [2001] EWCA Civ. [2001] CMLR 1025).

The court confessed that it had the greatest difficulty in respect of the flowerpot in deciding when it ceased to be waste but considered that once a flower had been planted would be the crucial point. In respect of the Tomarty Grow and the garden bricks the matter was clearer, they ceased to be waste only when spread on the ground or used in a construction.

In terms of legitimate expectation, the court held that whilst it could understand EWC's position it was important that public authorities should not be hampered in the exercise of their public functions by any past statements. Whilst it was clear on the facts that the statement was unambiguous and EWC had relied upon the statement to its detriment, the Court considered that it was not reasonable for them to have done so. EWC had the benefit of legal advice throughout. If a mistake was made it should look to the advice given by its professional advisers.

Labouchere LJ I agreed save that in terms of legitimate expectation. He considered that there was a tension between public policy requirements that public authorities act for the benefit the public at all times and not be bound into private arrangements with individuals, and the discipline necessary to ensure that public bodies behave in a conscientious manner. In this respect, fairness would dictate that EWC is entitled to have its products produced prior to the date of the change in policy treated as if it were not waste. That, however, would put the UK in breach of its treaty obligations. However, the remedy was in damages and an appropriate award could be made against the EA.

The Appeals committee granted EWC leave to appeal to the House of Lords on both grounds.

E – LAW

The editorial team want letters, news and views from you for the next edition due to go out in October/November 2003.

All e-law contributions, be they letters, articles, book reviews, case reports etc should be dispatched to Catherine Davey as soon as possible by email at:

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Letters to the editor will be published, space permitting

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