e-law

UKELA Making the law work for a better environment

Issue 48 - December 2008

www.ukela.org

Editorial

Firstly a heartfelt thank you from me to everyone who has contributed articles to e-law in 2008. This on-line journal would be little more than a monthly newsletter without your contributions. We will be producing the fiftieth edition in February 2009 and hope to make it a really special edition- so please start thinking about your contribution now!!

Thanks, too, to all who returned the questionnaires about the future of UKELA (a further copy is attached). If you have yet to do this, it's not too late to send it back to Alison Boyd. We'll let you know the results in the next edition of e-law with more information about UKELA's future planning.

If you are a student, trainee or pupil you might like to take a little time over the Christmas break to look at the UKELA student competitions and bursary scheme. Details have been reprinted in this e-law. Deadlines for entry to the moots and the article competition are in January – there are some fantastic prizes and winning would be a great addition to your CV.

UKELA is preparing an exciting events programme for 2009. Of course the conference in Durham on July 3-5 will be the highlight and bookings will open before Christmas. I do encourage you to book early to be sure of a place. On January 20th UKELA is partnering with IEMA and law firm Denison Till for a one-day conference in York on energy and planning. It's only a couple of hours from London and the speaker programme is excellent. There are events on civil penalties and the Regulatory Enforcement and Sanctions Act in London and Edinburgh. If you have a suggestion for an event you'd like to see in the 2009 programme please contact Vicki Elcoate.

Catherine.Davey@stevens-bolton.co.uk

Thanks to Clare Elcoate for photographs

In this issue

Possible legal issues arising under the Regulatory Enforcement and Sanctions Act 2008:

Lessons to be learnt from the Alphasteel greenhouse gas emissions trading penalty appeal

James Maurici[1] and Richard Turney, Landmark Chambers

Introduction

1. This paper focuses on Part 3 of the Regulatory Enforcement and Sanctions Act 2008 ("RESA 2008") which provides for a system of "civil sanctions" in respect of "relevant offences".

2. The offences concerned are broad in range, covering those matters in which 27 different regulatory bodies have enforcement powers, and applying further to any body which has an enforcement function in respect of offences in some 144 Acts of Parliament.[2]

3. This paper is necessarily constrained by the fact that Part 3 of RESA 2008 depends heavily on provision being made for the penalty regimes by the relevant government departments. It is not expected that any penalty regimes will be in place before October 2009, and it seems more likely that the relevant secondary legislation will not take effect until April 2010.

4. Nonetheless, the provisions for civil sanctions in RESA 2008 raise a series of controversial issues which seem likely to colour the process of creation of the new sanctions regimes and raise legal issues for the regulators and the regulated.

5. One question which is of particular significance is the compatibility of the statutory provisions with Article 6 of the European Convention on Human Rights ("ECHR"), as implemented in the UK by the Human Rights Act 1998 (HRA 1998). This paper analyses that question, in particular in light of the Alphasteel greenhouse gas emissions trading penalty appeal.

Alphasteel

The facts of the case

6. The Greenhouse Gas Emissions Trading Scheme Regulations 2005 (SI 2005/925) ("the ETS Regulations") create a system of allowances for carbon dioxide emissions, and permited the trading of those allowances. The ETS Regulations implement Directive 2003/87/EC ("the Directive") establishing an EU-wide system of greenhouse gas emission allowance trading ("The EU ETS").

7. At the end of each year installations subject to the EU ETS are required to ensure they have enough allowances to account for their emissions and must in due course surrender those allowances. Both the ETS Regulations and the Directive provide for "civil penalties" where an emitter of greenhouse gases fails to surrender sufficient allowances to cover its emissions in any particular year. The penalties consist of a financial charge in respect of each allowance which should have been but was not surrendered. The scheme is administered by the Environment Agency ("EA").

8. Alphasteel Limited, the operator of a steel foundry in Newport in Wales, failed to surrender sufficient allowances to cover its emissions in April 2006. Accordingly, the EA issued a notice requiring the company to pay a civil penalty as provided for under the ETS Regulations. The penalty was calculated by reference to the fixed charge per allowance at £564,559.93. The ETS Regulations provided for an appeal to the Secretary of State or, in the case of Wales, to the Welsh Ministers, against the imposition of a civil penalty. Alphasteel duly appealed, and the Welsh Ministers appointed an inspector to hold a public inquiry and report on the appeal.

Legal issues arising in Alphasteel

9. Although Alphasteel could not challenge either the quantum of the penalty or the bare fact that it had failed to surrender the relevant allowances, it did raise a number of challenges to the legality of the imposition of the penalty. It submitted that the term "civil penalty" in the ETS Regulations was a misnomer, and that "given the magnitude and severity of the penalty

1 James Maurici acted as Counsel for the Environment Agency in the Alphasteel proceedings.

2 Ss 37-38 and Sch 5-6 RESA 2008

imposed… it is properly to be categorised as a criminal rather than as a civil matter".[3] It followed, in Alphasteel's submission, that the penalty scheme was unlawful as there was a failure to provide the protections required by Article 6 ECHR in respect of criminal proceedings. Further, it was submitted that the penalty imposed on Alphasteel for its failure to surrender allowances was, in the circumstances of the case, disproportionate and therefore a violation of the company's Convention rights.

10. The inspector decided that the civil penalty in the ETS Regulations should be considered a civil, rather than criminal, penalty for the purposes of Article 6 ECHR. He identified the criteria from the Strasbourg jurisprudence which were to be taken into account in making that determination:[4]

(a) The classification of the penalty in domestic law;

(b) The essential nature of the liability;

(c) The nature and severity of the potential penalty.

11. It was accepted by all the parties that domestic law classified the penalty as civil, although it was submitted by Alphasteel that such a categorisation did not necessarily flow from the Directive. Nonetheless, the inspector concluded that the ETS Regulations "unambiguously identify the penalty as civil in contradistinction to the criminal sanctions referred to elsewhere" in the Regulations.[5]

12. In respect of the nature of the liability, the EA submitted that the scheme was not concerned with reprehensible or blameworthy conduct, but merely with a failure to surrender. The scheme was not of general application, but only applied to those holding relevant emissions permits under the EU ETS. Alphasteel argued that the penalties were dissuasive in nature. The inspector concluded that a "dissuasive" penalty need not necessarily be criminal in character. The scheme of trading was "quite dissimilar to a typical criminal regime of prohibition or regulation" and the fact that the penalty for failing to surrender an allowance was more than the cost of purchasing an allowance did not render the scheme "purely punitive"[6].

13. So far as the nature and severity of the penalty was concerned, the inspector considered the monetary value of the penalty and its effects on Alphasteel. The penalty was clearly large in financial terms and Alphasteel's case was that the imposition of the penalty would cause its Newport plant to close, with a consequential loss of 400 jobs. However, the inspector found that the automatic nature of the penalty rendered it dissimilar to criminal sanctions, and found that the fact that a penalty was large did not necessarily mean that it was criminal in nature[7]. Accordingly, the penalty was civil in nature and the protections applicable to criminal proceedings did not apply.

14. It was further submitted by Alphasteel that, regardless of the proper characterisation of the proceedings, the burden placed upon it to establish blamelessness and the automatic nature of the penalty rendered the proceedings as a whole unfair. The EA argued that blame was irrelevant and, furthermore, that the EA had to prove its case in the sense that it had to demonstrate that Alphasteel had failed to surrender the relevant allowances. The inspector accepted the EA's case that it was for the EA to prove the failure to surrender, and found that the automatic nature of the penalty was a consequence of the terms the Directive which could not itself be impugned in the context of the appeal.[8]

15. The inspector found that, given that the ETS Regulations accurately transposed the Directive, the Regulations could not be impugned on the basis of a failure to comply with Article 6 ECHR without also impugning the Directive. The Directive was presumed to comply with Article 6, and in any case could not be impugned before the Inspector. Given those conclusions, the inspector declined to consider whether the appeal process lacked the safeguards required by Article 6 in respect of criminal proceedings.[9] In particular, the inspector did not find it necessary to deal with submissions in respect of the correct standard of proof.

16. With respect to the proportionality of the penalty, the inspector effectively declined to determine the matter. He found that the Directive itself prescribed "both the automatic nature and quantification of the penalty". It followed that he had no power "to declare that either of these features renders the penalty disproportionate".[10] It followed that the inspector recommended that

3 See paragraph 75 of the Inspector's Report ("IR75")

4 See IR77. The three criteria are well established in the Strasbourg jurisprudence: see, for example, *Engel v Netherlands* (1979-1980) 1 EHRR 647. The criteria have been recognised and applied by the English courts, for example in *International Transport Roth GmbH v SSHD* [2003] QB 728 (CA), considered below.

5 IR79

6 IR82

7 IR85

8 IR89-90

9 IR100

10 IR104

the appeal be dismissed. The Minister duly accepted the inspector's recommendations and dismissed the appeal.

The civil sanctions scheme in Part 3 of RESA 2008

17. The civil sanctions created by RESA 2008 may reflect to some extent the penalties in the ETS Regulations. However, it is important to identify the range of sanctions which are envisaged by in RESA 2008:

(a) ss 39-41 make provision for the creation of fixed monetary penalties in respect of relevant offences;

(b) ss 42-45 make provision of discretionary requirements which may include variable monetary payments, compliance requirements, and restoration requirements;

(c) ss 46-49 make provision for stop notices, which prohibit a regulated person from carrying on a particular activity;

(d) s 50 provides for enforcement undertakings, whereby regulated persons avoid the effects of other civil sanctions by undertaking to take certain actions.

18. Enforcement undertakings are essentially consensual, and accordingly they are not considered here. As has already been noted, the actual schemes for these civil sanctions will be made by the relevant government departments in respect of the matters falling within their respective competences. RESA 2008 simply provides the statutory basis for such enforcement mechanisms. Civil sanctions can therefore only be understood somewhat in the abstract. However, a number of features of each type of sanction can be identified.

Fixed monetary penalties

19. Firstly, in respect of fixed monetary penalties it is noted that RESA 2008 does not prescribe the level of such penalties, save for a single limitation. In respect of offences which are triable summarily (whether or not they are also triable on indictment) and punishable on summary conviction by a fine, the fixed monetary penalty may not exceed the maximum amount of that fine (s 39(4)). That limitation, of course, does not help to identify the likely level of the fixed monetary penalties. The Guidance to the Act issued by the Department for Business, Enterprise and Regulatory Reform ("BERR") gives examples of fines of £50 and £100, but of course the statute permits far higher fixed penalties.[11] The Guidance suggests that the maximum fixed monetary penalty "will usually be capped at" £5000 but this is only where it is imposed in relation to a relevant offence that is triable summarily. The Explanatory Notes to the RESA2008 are in similar terms, see para. 114.

20. The regulator may only impose a fixed monetary penalty in respect of a relevant offence where it is "satisfied beyond reasonable doubt" that the subject of the penalty has committed the relevant offence (s 39(2)). Fixed monetary penalties are to be imposed by the service of a "notice of intent" to impose a penalty, which affords the subject of the penalty an opportunity to make representations to the regulator. At that stage, provision will be made for a "discharge payment", which will allow the person receiving the notice to escape the imposition of penalty (s 40(2)(b)). If the person neither makes the discharge payment nor convinces the regulator that penalty should not be issued, the regulator will then issue a final notice requiring the payment of a penalty (s 40(2)(d)).

21. Provision must be made for a right of appeal against a fixed penalty. That right of appeal must allow the subject of the penalty to challenge the decision on (at least) the following bases (s 40(6)):

(a) That the decision to impose the penalty was based on an error of fact

(b) That the decision was wrong in law;

(c) That the decision was unreasonable.

22. In common with the other civil sanctions, the appeal is made to the First-tier Tribunal created under the Tribunals, Courts and Enforcement Act 2007. Where there has been an unsuccessful appeal, the enforcement provisions in the 2007 Act can be relied on to recover the fixed monetary penalty. In the absence of an appeal against a fixed monetary penalty, provision can be made either for the recovery of the sum as a civil debt, or for its recovery "as if payable under a court order" (s 52(2)). That would of course allow the regulator to take advantage of the enforcement mechanisms available through a court (such as warrants of execution and third party debt orders) in recovering the penalty.

11 *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act* (BERR, July 2008) p 31

Discretionary requirements

23. As with fixed monetary penalties, discretionary requirements may be imposed where the regulator is satisfied beyond reasonable doubt that the person has committed the relevant offence (s 42(2)). The requirement may be made to pay a sum of money, to do something to ensure compliance with the relevant statutory scheme or to do something to restore the position to how it would have been if the offence was not committed (s 42(3)). The monetary penalty is subject to the limit of £5000 but only in cases where the offence is triable summarily only (s 42(6)). There is no limitation on variable monetary penalties in the case of "either way" or indictable offences.

24. Fines can be high for "either way" or indictable offences. In *R v Cemex Cement Ltd* [2008] 1 Cr. App. R. (S.) 80 where the appellant company pleaded guilty before a magistrates' court to failing to comply with a condition of a permit granted under the Pollution Prevention Control Regulations 2000. The offence consisted of failing to ensure that an external door on a reject clinker silo was maintained in good operating condition. Both the prosecution and defence were content for the matter to be dealt with by the magistrates. But the magistrates decided that their powers of sentence (limited in the case of a fine to £20,000) were inadequate and they committed the case to the Crown Court for sentence. On October 3, 2006 at Warwick Crown Court Mr Recorder Michael Stephens imposed a fine of £400,000 and ordered Cemex to pay the prosecution costs £12,429.14. The Court of Appeal reduced the fine to £50,000.

25. The procedure for the imposition of a discretionary requirement is the same as that for fixed monetary penalties. However, instead of "discharge payments", provision is made for the giving of undertakings to discharge a discretionary requirement (s 43(5)). Such an undertaking may include an undertaking to pay a sum of money to the regulator. Appeal provisions must allow, in addition to the grounds of appeal in the case of fixed monetary payments, appeals on the grounds that (s 43(7)):

(a) In the case of a variable monetary penalty, that the amount of the penalty is unreasonable;

(b) In the case of another discretionary requirement, that the nature of the requirement was unreasonable.

26. Where a person fails to comply with a non-monetary discretionary requirement, the regulator may impose a "non-compliance penalty" which will be a requirement to pay a sum of money (s 45).

Stop notices

27. Stop notices are notices issued by a regulator with the intention of prohibiting a person from carrying on a certain activity until the steps specified in the notice have been taken. There are two circumstances where stop notices might be issued:

(a) Where the regulator reasonably believes that an activity is causing, or presents a significant risk of causing, serious harm to any of the matters referred to in s 46(6) and the regulator reasonably believes that the activity as carried on involves or is likely to involve the commission of a relevant offence (s 46(4));

(b) Where the regulator reasonably believes that a person is likely to carry out an activity which will cause, or will present a significant risk of causing, serious harm to any of the matters referred to in s 46(6) and the activity will involve or will be likely to involve the commission of a relevant offence (s 46(5)).

28. The matters referred to in s 46(6) are human health, the environment (including the health of animals and plants) and the financial interests of consumers. There is no procedure for "notices of intent" in the provisions for stop notices. The appeal provisions must permit appeals on the grounds that the person has not committed the offence and would not have committed the offence if the stop notice was not served, in addition to the grounds of errors of fact, errors of law and unreasonableness. Stop notices are brought to an end by the issuance of a "completion notice" (s 47(2)(c)), and provision is made for appeals against a refusal by a regulator to issue a completion notice. A failure to comply with a stop notice is a criminal offence (s 49).

Are the sanctions "criminal charges" for the purposes of Article 6 ECHR?

29. As in the Alphasteel appeal, a fundamental question in respect of the sanctions regime in Part 3 of RESA 2008 is whether provisions should be considered to be criminal in nature for the purposes of Article 6 ECHR. The three criteria in the ECHR

jurisprudence have been set out above. Each of those criteria will be examined in turn.

The classification in domestic law

30. In the context of a part of an Act headed "Civil Sanctions", it may seem that the classification of the RESA 2008 sanctions in domestic law is beyond doubt. However, it is clear that the sanctions regime only applies in respect of criminal offences established in other statutory regimes. That begs the question as to whether, as a matter of domestic law, it can be said that a sanction becomes "civil" in nature merely because the cross-heading in a statute describes it as such. Although the sanctions regime seeks to "decriminalise" certain offences in certain contexts, it is noted that the Act prevents criminal proceedings from being pursued in respect of the same breach which has led to the imposition of a fixed monetary penalty or a discretionary requirement (ss 41 and 44). The Guidance to the Act explains that these provisions are "for reasons of double jeopardy".[12] Generally, there is no legal bar on concurrent criminal and civil liability for a wrong. Accordingly, the fact that provision has been made to prevent "double jeopardy" suggests that RESA 2008 does, at least to some extent, treat the sanctions as having a criminal element. Furthermore, the provisions expressly rely upon the criminal standard of proof ("beyond reasonable doubt") as the threshold for the decision to require or fixed penalty or a discretionary requirement.

31. In *Secretary of State for the Home Department v MB* [2008] 1 AC 440, the House of Lords considered whether the making of "control orders" under the Prevention of Terrorism Act 2005 amounted to a determination of a criminal charge. Lord Bingham noted that, in classifying proceedings as civil or criminal, "the tendency of the domestic courts… has been to distinguish between measures which are preventative in purpose and those which have a more punitive, retributive or deterrent object".[13] In this regard, it is notable that BERR's Guidance to the Act refers to civil sanctions allowing "regulators to remove the financial benefit gained by business that deliberately seek an advantage through non-compliance with their regulatory obligations".[14] That suggests a clear "retributive" intention behind the sanctions.

32. In *MB*, their lordships held that the imposition of a control order did not amount to a "criminal charge" because the person is not charged with criminal conduct. Lord Bingham held (at [21]):

> *This is not a point which turns on procedural requirements, which will vary from state to state. It is a point which turns on the distinction between suspecting A of doing X ("I suspect but I cannot prove": Hussien v Chong Fook Kam [1970] AC 942 , 948) and asserting that A has done X.*

33. In the case of the RESA 2008 sanctions regime, there is clearly an assertion that the subject of the sanction has committed the relevant criminal offence, rather than merely a suspicion that he has done so. Where there is an assertion of criminal conduct, as opposed to merely a foundation of suspicion, it is likely that the domestic courts will be inclined to find that there has been a "criminal charge" bringing the proceedings within the purview of the criminal arm of Article 6 ECHR.

34. Nonetheless, the civil nature of the sanctions is apparent from the fact that sums due under a monetary penalty are recoverable as either a debt, or as a civil judgment.[15] It is only stop notices which are supported by the force of the criminal law, and a breach of a stop notice would have to be prosecuted a separate offence. There is nothing to suggest that the imposition of RESA 2008 sanctions would lead to a criminal record.

35. In *Ozturk v Germany* (referred to in Hansard debates on the RESA 2008) the European Court said:
"By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions—which are numerous but of minor importance—of road traffic rules. The Convention is not opposed to the moves towards "decriminalisation" which are taking place—in extremely varied forms—in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention".

36. German law allowed minor traffic offences to be treated as 'regulatory' and dealt with by administrative authorities. The

12 p 33
13 pp 472-473, [23]
14 p 7
15 That being said, the sums recovered under the regime are payable into the Consolidated Fund, rather than held by the regulator (s 69 RESA 2008). One might expect a truly civil penalty to compensate the regulator for the costs of enforcement or to address the harm caused by non-compliance.

Court held that thee proceedings were criminal for the purposes of Article 6.

37. It is notable that the system of VAT civil penalties was held by the Court of Appeal in *Han v Customs and Excise Commissioners* [2001] 1 WLR 2253 to give rise to "criminal charges" within Article 6. See also *Her Majesty's Revenue and Customs v Tahir Iqbal Khawaja* [2008] EWHC 1687 (Ch) on the income tax system of civil penalties which were accepted by HMRC to give rise to a criminal charge following a long line of earlier cases.

The essential nature of the liability

38. The nature of the liability carries more weight than its domestic classification in assessing whether the matter should be considered to be a criminal offence for the purposes of the ECHR.[16] There are several factors which might be relevant in determining the nature of the liability.

39. Firstly, one must consider whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character.[17] In Alphasteel, the inspector found that it was relevant that the penalty in the ETS Regulations only applied to EU ETS permit holders. In the case of the sanctions under RESA 2008, the answer to this question will depend on the particular "relevant offence" in respect of which the sanction is being imposed. As noted above, the sanctions may apply to a broad range of offences. Some of those offences relate to specific group of people, such as licensees[18] or the owners of land within Sites of Special Scientific Interest[19]. Other offences may apply to any person, for example the offence of damaging a public highway[20] or of operating a loudspeaker in a street at night[21]. The range of offences captured by the sanctions regime raises the possibility that some sanctions may be considered criminal in nature whereas others may be considered civil in nature.

40. The next relevant factor is whether the proceedings in question are brought under statutory enforcement powers.[22] Clearly the RESA 2008 sanctions are brought under statutory enforcement powers.

41. The function of the legal rule is also relevant: does it have a punitive or deterrent purpose?[23] It appears that, certainly in respect of fixed monetary penalties, there is an element of punishment.

The nature and severity of the penalty

42. In the absence of actual examples, it is not possible to properly analyse the nature and severity of the penalties which would be imposed by way of sanction under Part 3 of RESA 2008. However, it may be that this consideration influences the way in which the relevant government departments decided to fix the penalties in question. Clearly, the smaller the penalty the easier it will be to argue that the sanctions are truly civil in nature.

43. In *International Transport Roth GmbH v SSHD* [2003] QB 728, Simon Brown LJ analysed the second two factors in the Strasbourg case-law (the nature of the liability and the nature and severity of the penalty) together. His lordship held that the considerations arising under those grounds necessarily raise the question as to whether the liability involves blameworthiness. "If it does, then by its very nature it may be thought to include a punitive (in the sense of retributive) element".[24] That case concerned measures taken to combat immigrants entering the country unlawfully by hiding in vehicle. The relevant penalty was a fixed fine of £2000 imposed upon carriers for every clandestine entrant found on their vehicle. Simon Brown LJ held that the penalty was "targeted at those truly regarded as in some degree culpable" and therefore it followed that the scheme was properly to be regarded as criminal in nature. Applying that analysis to the RESA 2008 sanctions, it seems likely that the sanctions should be considered criminal in nature. They arise only when the regulator has come to the conclusion that criminal liability for the relevant offence would be made out.

44. In *R (POW Trust) v Chief Executive and Registrar of Companies* [2004] BCC 268, it was argued that fixed penalties imposed for failing to file company accounts on time amounted to criminal penalties. Lightman J held that the penalties were

16 *Jussila v Finland* (2007) 45 EHRR 39, [38]
17 *Bendenoun v France* (1994) 18 EHRR 54, [47]. The provisions in that case were penalties in relation to the French taxation regime which applied to all French taxpayers.
18 See the Licensing Act 2003
19 See s 28P(1) Wildlife and Countryside Act 1981
20 See s 131 Highways Act 1980
21 See s 62 Control of Pollution Act 1974
22 *Benham v United Kingdom* (1996) 22 EHRR 293, [56]
23 *Öztürk v Germany* (1984) 6 EHRR 409, [53]
24 [38]

civil in nature because, among other things, they were "purely monetary and modest in amount". Although the company in question was only subject to a £100 penalty, it is noteworthy that the scheme which Lightman J was considering included fixed penalties of up to £5,000. The fact a large penalty is not always in and of itself sufficient - see *Krone-Verlag GmbH v Austria* (1997) 23 EHRR CD 152.

Other matters

45. At para. 33 in *International Transport Roth GmbH v SSHD* Simon Brown LJ said:
" ... extensive case-law then establishes that the various procedural safeguards expressly or impliedly provided by Article 6 are not ultimately dependent upon such a classification: the protections are sometimes found unnecessary even though the proceedings are criminal; sometimes essential even though the proceedings are civil. Why, therefore, attempt the classification exercise in the first place? Simpler surely to address the question as to whether the protections are indeed necessary to achieve a fair trial of whatever may be the issue. The contrast, indeed, between the two recent Court of Appeal decisions in Official Receiver -v- Stern [2000] 1 WLR 2230 and Han -v- Customs & Excise Commissioners [2001] 1 WLR 2253 is striking. In Stern, which concerned the use in directors' disqualification proceedings of compelled evidence obtained under the Insolvency Act, the Court held, following the judgment of ECtHR in Albert & LeCompte -v- Belgium (1983) 5 EHRR 533, that the issue of fair trial should be considered in the round, having regard to all relevant factors, those factors including, but not being limited to, the facts that disqualification proceedings were not criminal and were primarily for the protection of the public, albeit they involved serious allegations and almost always carried a degree of stigma. In Albert & LeCompte the ECtHR found it unnecessary to decide whether the disciplinary action there involved a "criminal charge". In Han, on the other hand, this Court by a majority decided as a preliminary issue (Stern not having been cited) that the imposition of civil penalties for dishonest evasion of VAT gave rise to "criminal charges", leaving over for later decision whether in the result such proceedings would or would not involve a breach of Article 6. Given that not merely Sir Martin Nourse, who dissented, but also the other members of the Court (Potter and Mance LJJ), were clearly reluctant to categorise the proceedings as criminal, plainly not regarding them as unfair, it may be doubted whether the classification process will ultimately prove decisive. In short, the classification of proceedings between criminal and civil is secondary to the more directly relevant question of just what protections are required for a fair trial. ...(emphasis added)."

46. Simon Brown LJ thus regarded the key question for the Court not to be whether the scheme was to be regarded as civil or criminal for the purposes of Article 6 but rather: "is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?" (see para. 26 of the judgment).

47. In *Louku v Slovakia* (4/1998/907/1119) cited by the Court of Appeal in *Han* the European Court held that the second and third criteria are alternative rather than cumulative, but that does not appear to be the approach subsequently followed: see further *Bendenoum v France* (1994) 18 EHRR 54 (again cited in *Han* at para. 59).

48. In *Air Canada* (1995) EHRR 150, not referred to in *Han* the European Court declined to classify, as criminal, proceedings (under the Customs & Excise Management Act, 1979) by which Air Canada were required to pay a £50,000 penalty to redeem their forfeited aircraft.

Consequences of classification

49. In summary, it appears at least arguable that for the purposes of the ECHR, the RESA 2008 sanctions should be considered to be criminal in nature. What does this mean for the sanctions scheme?

50. Article 6(2) provides:
"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law."

51. It is at least arguable that the sanctions scheme fails to give effect to the presumption of innocence. If the proceedings are to be regarded as criminal in nature, the issuance of a "notice of intention" would seem to amount to a criminal charge.[25] The imposition of the penalty will follow unless the regulator is persuaded not to impose the penalty. There is no adjudication in any meaningful sense, merely a period of time in which representations could be made. Although there is a right to appeal the decision, by that point the penalty will have been imposed. The fact that the penalty may be accepted to avoid the prospect of a formal criminal prosecution of the relevant offence may also be relevant in assessing whether there has been a breach of Article

25 *Deweer v Belgium* (1979-80) 2 EHRR 439, [46], where "charge" was defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".

6. In *Deweer v Belgium*, the claimant was a butcher who had allegedly sold meat at an illegal profit. Under Belgian law, he had waived his right to a determination of his case in a criminal court by paying a monetary penalty, on fear that otherwise he might be ordered to close his shop. In the circumstances, the European Court of Human Rights held that Mr Deweer's waiver of the fair trial right was "tainted by constraint" and that therefore his rights had been violated.[26] One can envisage a factual situation under the RESA 2008 sanctions where the same points will be made.

52. Turning to the appeal mechanisms, there must be real doubt as to the adequacy of the appeal which is limited to errors of fact, errors of law, unreasonableness and (except in fixed penalties), the nature of the penalty. The first point to note is that the burden appears to be on the subject the sanction to prove a ground of appeal. That is clearly contrary to the presumption of innocence in Article 6(2). The second point, which arguably applies whether or not the sanctions are to be regarded as civil or criminal in nature, is that the grounds do not appear to allow the tribunal to determine for itself whether the relevant offence has been committed "beyond reasonable doubt". In other words, there would appear to remain an area of judgment for the regulator where a decision is not based on an error of law or fact, and not unreasonable (in the *Wednesbury* sense of a decision which no reasonable decision-maker would come to). The regulators decision that the matter was proved beyond reasonable doubt may be difficult to impugn. There must be real concerns as to whether the absence of a full appeal, requiring the tribunal to decide for itself whether the offence has been committed, is compatible with ECHR rights.

53. In my opinion many of these problems could have been avoided if the proposed amendment to the Bill to allow the subject of civil sanction to require the regulator to withdraw the notice and proceed by way of criminal proceedings for the offence had been passed.[27] Such a provision exists in relation to the fixed penalty notice provisions in Part 1 of the Criminal Justice and Police Act 2001, and in the well-known fixed penalty notice provisions in Part III of the Road Traffic Offenders Act 1988.[28] The desire to maintain an absolute discretion for the regulator as to how to pursue breaches of regulatory regimes may come back to haunt the proponents of the Act.

54. Article 6(3) provides:

"Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

55. Perhaps the most significant of these in the contest of RESA 2008 is (c) and the requirement for legal aid. The position as regards CLF for appeals to the new Tribunals remains unclear. In *Benham v UK* (1996) 22 EHRR 293 the European Court held that proceedings which resulted in imprisonment for non-payment of the community charge were criminal for Article 6 purposes and that the absence of a general right to legal aid violated Article 6(3)(c). The obligation to provide legal aid is limited to where the interests of justice so require. The interests of justice allow consideration of issues such as complexity, ability of the individual to represent himself and the severity of the potential sentence.

56. Beyond these specific procedural safeguards in Article 6(2) and (3) it is clear from the case-law (see e.g. *Han* above) that one does not move seamlessly from a determination that proceedings are criminal for the purposes of Article 6 to introducing all the domestic law consequences of proceedings being criminal. Mance LJ made this plain:

"88. The classification of a case as criminal for the purposes of article 6(3) of the Convention on Human Rights, using the tests established by the Strasbourg jurisprudence, is a classification for the purposes of the Convention only. It entitles the defendant to the safeguards provided expressly or by implication by that article. It does not make the case criminal for all domestic purposes. In particular, it does not necessarily engage protections such as those provided by the Police and Criminal Evidence Act 1984. The submissions before us did not address this point or, indeed, the subject of burden[29] of proof (although I note that no objection was even raised to a civil burden in Georgiou's case). As Mr Oliver and Potter LJ have both observed, the precise implications under the Convention of classification of any case as criminal for the purposes of the Convention will have to be worked out on a case by case basis."

26 See above.
27 See Hansard Commons Debates 10 July 2008, col 1586.
28 A fixed penalty notice is defined as "a notice offering the opportunity of the discharge of any liability to conviction of the offence to which the notice relates by payment of a fixed penalty" (s 52(1) RTOA 1988).
29 In *Khawaja* (above) Mann J. suggested that Mance LJ must have meant standard of proof. Of course under RESA 2008 the standard of proof is set by the statute so the *Khawaja* issue of standard of proof does not arise.

57. However, the Strasbourg case-law has considered other fair trial rights in the criminal context including e.g. protection against self-incrimination (see the review of the cases in *R v Hertfordshire CC, ex p Green* [2000] 1 All ER 773 per Lord Hoffmann); entrapment and agents provocateurs; the prosecution's duty of disclosure; media coverage etc.

Proportionality of penalties

58. Turning back to the *International Transport Roth* case mentioned above, both Simon Brown and Jonathan Parker LJJ held the fixed penalty to be incompatible with ECHR rights. Simon Brown LJ held:[30]

> *"The hallowed principle that the punishment must fit the crime is irreconcilable with the notion of a substantial fixed penalty. It is essentially, therefore, on this account rather than because of the reversed burden of proof that I would regard the scheme as incompatible with article 6. What in particular it offends is the carrier's right to have his penalty determined by an independent tribunal. To my mind there surely is such a right… Sentencing is, like all aspects of the criminal trial, a function that must be conducted by an independent tribunal. If, as I would hold, the determination of liability under the scheme is properly to be characterised as criminal, then this fixed penalty cannot stand unless it can be adjudged proportionate in all cases having regard to culpability involved".*

59. Jonathan Parker LJ similarly held:[31]

> *"In considering the penalty in the context of article 6, it seems to me that the degree of severity of the penalty must be a matter which falls within Parliament's "discretionary area of judgment": in other words, it is matter for Parliament and not for the courts. The courts are, however, concerned to ensure that the nature of the penalty is not such as to breach article 6. In this context, the fact that the penalty is not merely severe but fixed seems to me to be of the highest importance. The fact that it is fixed means, by definition, that in imposing the penalty where liability has been determined no account can be taken of the facts of particular cases, or of the circumstances of a particular defendant. Nor is there any scope for mitigation."*

60. Both judges held that the penalty provisions were incompatible with Article 6 ECHR and, further, that they constituted a disproportionate interference with property rights contrary to Article 1 of the First Protocol to the ECHR. Laws LJ dissented on both grounds.

61. In the absence of any concrete proposals for fixed monetary penalties, it cannot be said whether the *International Transport Roth* reasoning would apply to the RESA 2008 sanctions. However, it is clear that in developing fixed penalty schemes, the relevant government departments should be mindful of the restrictions on the imposition of fixed penalties.

Conclusions

62. Although this analysis has been in the abstract in the absence of concrete provisions for "civil sanctions", it seems clear that a number of difficult issues will arise with respect to the compatibility of the sanctions provisions with Article 6 ECHR. It maybe that regulations can work around these problems. I would suggest that those drafting the regulations must carefully consider:

(a) The appropriate level of fixed penalties, given the warning words in *International Transport Roth* and the fact that a higher penalty will more likely be seen as a criminal provision;

(b) The possibility of providing for fuller rights of appeal beyond those anticipated in the Act;

(c) Whether it is appropriate to provide for a suspensory effect of penalties until an appeal has been heard or the time for appealing has passed.

63. These considerations may help in insulating the schemes of civil sanctions from challenge. However, it seems likely that, contrary to the intent of the legislators, these provisions will be before the courts with some frequency. This is particularly so because each scheme will have its own features which will need to be measured against the Article 6 benchmark. With hundreds of relevant offences potentially involved, expect the litigation to be fairly intense

30 [47]
31 [183]

IMPLEMENTING EC ENVIRONMENTAL LAW AFTER DEVOLUTION

Colin Reid and Andrea Ross of the School of Law, University of Dundee with Hazel Nash, now of BRASS Centre, Cardiff

One feature of the devolution settlements for Scotland and Wales is that most environmental matters fall within the competence of the devolved administrations. Yet most new environmental law is based on European Community law. This creates a tension between legislating locally for Scotland and Wales and the need for the UK to comply with Community law, a need reflected in the provisions that allow the UK authorities to legislate to implement EC law, even in areas of devolved competence. How is this tension being resolved in practice? This paper reports the findings of research, funded by the Arts and Humanities Research Council, that investigated who is actually making the legislation to give effect to EC laws and the effects of this choice on the operation of the devolution settlements, the timing of implementation and the scrutiny that the legislation receives. In doing so, it considers the extent to which devolution is producing real differences between the law made by Scottish and Welsh institutions and that made by London for England or for England and Wales.

The environment is an area where any tensions are particularly likely to emerge, making this a very suitable subject area for study. Environmental conditions and pressures are different across the UK and may legitimately require different solutions during the implementation process. Hence, there are likely to be occasions where the various parts of the UK have differing priorities and the power to do things differently from the rest of the UK.

A review of legislation made under Title XIX of the EC Treaty and requiring to be transposed between March 1999 and December 2006 identified 31 Directives to be implemented. For a high number of these, implementation was by regulations made at UK/GB level: 12 for Scotland (plus one dealt with in a mixed way) and 26 for Wales. This response of legislating in London can usually be explained under the devolution settlement as involving reserved matters or issues requiring a wide national approach (e.g. allocating targets within the UK). In 18 instances Scotland produced separate legislation to transpose EC environmental rules and in five Wales acted separately. An important point to note is that the decision to transpose separately is distinct from the decision to transpose differently and the majority of the laws transposing EC measures are identical across GB, regardless of where they are made. Only one of the five Welsh regulations contains provisions substantively different from their English counterparts, whereas a third of the separate Scottish legislation does so. For this purpose “substantive” differences are those that go beyond trivial turns of phrase or the differences necessarily entailed by there being different courts, regulators and government structures in the different jurisdictions.

The review shows that compared to Wales, Scotland is more willing to legislate both separately and differently. This is predictable as Scotland has more legislative power, is better resourced, has a separate legal system and a separate environmental regulator from England and is more used to acting separately. Indeed some of the measures examined might well have led to separate Scottish legislation even before devolution.

Two consequences of the differences in where legislation is made are worth noting. The first is in relation to parliamentary scrutiny. It is notorious that regulations made at Westminster under the negative resolution procedure (as is the case with the vast majority) receive little scrutiny. Where legislation is made in Scotland or Wales the procedures offer greater opportunity for review and debate, as well as a focus on distinct Scottish or Welsh concerns. In two cases (the Water Framework and Strategic Environmental Assessment Directives) the position is even more marked since in Scotland it was decided to implement these by means of primary rather than secondary legislation, invoking the full panoply of scrutiny and multi-stage debate involved in parliamentary legislation.

The second consequence is that differences in who is legislating very often bring differences in when legislation is made. Quite apart from any issues of political priority, the different session dates of the UK and Scottish Parliaments and the National Assembly for Wales (and the need for legislation to be translated into Welsh) make it unlikely that measures will be made and come into effect in each jurisdiction at exactly the same time. Nevertheless this research found that the differences in timing were largely minor and where there was a significant failure to meet the EC deadlines this was either for measures implemented at GB level (e.g. the WEEE Directive) or shared (e.g. in relation to the Environmental Liability Directive, at the time of writing over 20 months late).

Interviews with key personnel in the relevant administrations and agencies explored the reasons behind the legislative pattern observed, in particular the processes involved in deciding who legislates, how and by whom this decision is made and the

factors and presumptions influencing the decision. It was clear that while the devolution settlement provides presumptions as to who should legislate – matters within devolved competence should be dealt with by the devolved bodies - the position is not rigid. Yet the processes that select the legislative route are informal. They rely on co-operation, existing relationships between individuals and the mutual respect arising from the nature of the unified civil service. These informal processes have evolved incrementally since 1999 while the formal mechanisms provided by the devolution settlements have fallen into disuse (these mechanisms are set out in the Memorandum of Understanding and Concordats and include Joint Ministerial Committees). As a result, the process for determining which administration should legislate and the shape of that legislation lacks transparency and accountability. The shared power to implement Community law is a major departure from the essential (though not absolute) division of competence embodied in the devolution settlement and it is striking that fundamental decisions over which authority should exercise power are left to such an informal process.

While the informal and co-operative approach has worked to date this is unlikely to continue. Co-ordination and co-operation will inevitably become more difficult over time. Already, even slight differences in legislation are having cumulative and knock on effects and the laws in England, Wales and Scotland are incrementally drifting apart. There will be areas of policy difference (e.g. the wider application of strategic environmental assessment in Scotland, the different handling of GMOs in the draft regulations for England and for Wales implementing the Environmental Liability Directive), but other decisions will inevitably if unconsciously force ever-wider separation. For example, the adoption of the unified environmental permitting scheme in England and Wales and the integrated approach of the Water Environment (Controlled Activities) (Scotland) Regulations 2005 mean that any legislation relating to waste, pollution prevention and control or water pollution will have to be structured to fit very different legislative frameworks across Great Britain. The whole idea of devolution is to allow such differences to emerge, yet they make life more difficult for all of those who need to work with the law and may give rise to dissatisfaction when different rules are seen to be applying in other parts of the UK (as shown in *Horvath v Secretary of State for the Environment Food and Rural Affairs* [2007] EWCA Civ 620 where the European Court of Justice (C-428/07) is being asked to rule on the acceptability of different rules within the UK implementing the Single Farm Payment Scheme).

Moreover, the devolved administrations are becoming more confident about legislating separately, while differences in political colour between the devolved administrations and London make informal processes more difficult and the likelihood of dispute higher. The formal mechanisms for discussions between administrations need to be revisited and more transparent and formal processes for consultation, representation and dispute resolution either resurrected or introduced both at UK level and within the devolved administrations. The time to test these and to develop good working practices is when things are running fairly smoothly, in preparation for the risk of bumpier times ahead.

More detailed findings from this research are available in:

Nash, Ross & Reid: *Multi-level Governance - a study of the implementation of environmental law in post-devolution Scotland* (2007) 19 ELM 159

Ross, Nash & Reid: *Producing a real difference? The transposition of Community environmental directives in post-devolution Scotland and Wales* 2008 SLT (News) 39

Ross, Nash & Reid: *The Implementation of EU Environmental Law in Scotland* Edin. LR (forthcoming)

UKELA member profile

Catherine Davey is a solicitor specialising in planning and environmental law. She has been a Council member for several years and has edited e-law since it went on-line. She lives in Surrey and is a partner at Stevens & Bolton LLP a leading regional law firm.

The e-law 60 second interview

The questions:

What is your current role?

I lead the environment, planning and health & safety team at S&B.

How did you get into environmental law?

I trained in local government and worked for several Surrey districts and Cambridge City Council before moving across into private practice in 1988. As a local government lawyer in those days(!) you either specialised in planning or in housing law. I had done geography A level and was fascinated by land use issues which led me neatly into planning law. When I started out environmental law was largely confined to prosecutions under public health legislation and under the groundbreaking Control of Pollution Act 1974 and then as the 1980's wore on it became a fascinating specialism in it's own right.

What are the main challenges in your work?

Distilling the technicalities of environmental law to basics so that clients can easily understand the issues that affect their business and/or situation. Educating colleagues in other disciplines so that they know when to call in their environmental colleagues!

What environmental issue keeps you awake at night?

Climate change is the big issue for me. I usually sleep very soundly! However three weeks ago I was in Bristol (a leader in the sustainable city stakes) and woke up with cramp at 4am to see the Cabot Circus car park lights blazing out- that got me so cross I couldn't get back to sleep!

What's the biggest single thing that would make a difference to environmental protection and well-being?

At a recent dinner party a man - in all seriousness - informed me that men couldn't be expected to keep re-useable shopping bags in their car boots- let alone remember to use them. So many people either don't believe in climate change, or don't care or if they do think about it think that there's nothing they can do about it and will party on until the end!

We require a sea change in outlook and I fear it may take a global catastrophe caused by climate change, to make the population of the world sit up and take notice and really start doing something about it.

What's your UKELA working party of choice and why?

Planning- there is a lot happening at the moment and I believe the group had quite an impact this year.

What's the biggest benefit to you of UKELA membership?

For me it is always the fact that I depart from a UKELA event particularly our annual conferences - feeling completely reinvigorated and with renewed enthusiasm for my subject. We are so lucky that so many of the UK's leading practitioners and academics in our field are so willing to share their knowledge and to contribute to this fascinating field of law.

STUDENT CAREERS AND SOCIAL EVENING

About sixty students thronged to Landmark Chambers for a drink and mince pie and to meet environmental law professionals. They were able to ask about careers with DEFRA and the Environment Agency, as commercial (Travers Smith) or claimant solicitors (Richard Buxton) and barristers (Landmark), with NGOs (Friends of the Earth and FIELD) and in the environmental consultancy sector (WSP, Waterman Environmental and Price Waterhouse Cooper).

Student feedback was overwhelmingly positive. There were undergraduates and those on postgraduate courses from all over the country – Nottingham, London, Oxford, Aberystwyth, Bristol, Kent, Cambridge, Sussex, Brighton and Birmingham. BPP and College of Law students featured quite prominently. They said it was really helpful to meet environmental law professionals who were so enthusiastic about their jobs.

UKELA's thanks to all those busy professionals who spent their evening inspiring the next generation and to Landmark Chambers for kindly hosting. We hope to hold a similar event next year.

STUDENT ADVISOR ON COUNCIL

UKELA's Council has appointed Kirsten Griffin to be the student advisor to Council for 2009. Kirsten will be in touch with all student members early in the New Year to canvas views about how UKELA can improve its service to students in future.

Kirsten writes:

> *"I am currently reading science and law at the University of New England, Australia, and have completed the law component of the Bachelor of Science/Bachelor of Law degree with Class II Division I Honours. I expect to graduate in October next year after completion of a final science research paper.*
>
> *I am a new member to UKELA and would very much like to become more involved in the Association's activities. I believe the Student Advisor position would be the perfect opportunity for me to contribute to UKELA's future growth and success. As a student of 5 years I have become knowledgeable of the needs and views of fellow students and through my distance education I have also become familiar with the mechanisms for communicating with a widely distributed student population.*
>
> *I have developed skills and knowledge of corporate communications, public relations and event management through my current role with Commerzbank which would be beneficial to developing schemes for attracting students to the Association. I also possess strong communication, research and organisation skills developed through managing various work and study responsibilities which would assist the efficient reporting of student views and could potentially assist the implementation of programmes for increasing student membership".*

There were some good candidates for the role – thank you for applying. The role is on a one year basis so there will be another opportunity next year.

If you'd like to contact with Kirsten with your ideas her email is:

kirst.g@hotmail.com.

UKELA TREASURER NEEDED

After more than three years UKELA's Treasurer, Jim Drysdale, of Anderson Strathern based in Edinburgh, has reached the end of his term of office on Council. Jim and the accountancy team at his law firm have provided fantastic support to UKELA for which the trustees are enormously grateful. Now a successor is needed. Can you help?

Ideally UKELA would like to find a Treasurer, who has professional in-house accountancy back up, to sit as a trustee on Council.

The overall role of the Treasurer is to maintain an overview of UKELA's affairs, ensuring its financial viability and ensuring that proper financial records and procedures are maintained.

The responsibilities of the Treasurer will include:

1. Receiving income to UKELA, ensuring any dues are paid and keeping a record thereof
2. To make arrangements for any changes in signatories
3. The preparation and presentation of financial reports to Council.
4. Overseeing, approving and presenting budgets, accounts and financial statements and monitoring financial performance against budgets.
5. Being assured that the financial resources of the organisation meet its present and future needs.
6. Ensuring that the charity has an appropriate reserves policy and an appropriate investment policy which does not conflict with the aims of UKELA.
7. Ensuring that appropriate accounting procedures and controls are in place
8. Liaising with paid staff and volunteers about financial matters.
9. Ensuring that the accounts are prepared and disclosed in the form required by funders and the relevant statutory bodies' eg the Charity Commission and/or the Registrar of Companies.
10. If audit is required, providing information to the auditors as required, ensuring that the accounts are audited in the manner required, and any recommendations of the auditors implemented.
11. Keeping the board informed about its financial duties and responsibilities.

The UKELA staff provide administrative support for the role and much of the work is carried out electronically (ie most payments and an increasing amount of income). The annual report is prepared by the accountants, Gotham Erskine, who also provide strategic financial advice to UKELA.

Applications by email please to include reasons why you are interested in the role, your relevant skills and a CV to Vicki elcoate@ntlworld.com. If you would like to discuss the role informally please call Jim Drysdale, 0131 625 7228.

NEW FOR UKELA: WORKING PARTY SUPPORT CONTRACTOR(S)

UKELA's 12 working parties on key areas for environmental law need paid support as their work grows. They and UKELA's Council aim to influence the Government to ensure the law works for a better environment and to provide information to UKELA members and the public on environmental law. You can view their work at www.ukela.org under Environmental Law, as well as under Working Parties.

UKELA's Council wishes to engage one or more self-employed contractors, on an ad hoc basis for a one year trial period, who can support the working parties on UKELA's key priorities. The work involves:

- Working with groups and Council to produce consultation responses and position papers on key environmental law issues and developments
- Tracking key Government initiatives and advising the working parties of key opportunities for influence
- Supporting working party events by advising on and finding speakers and other key participants
- Helping keep the UKELA website up to date

The key working parties to deliver UKELA's priorities in 2009 are Climate Change, Environmental Litigation and Water. You will be working closely with these groups.

The ideal candidate(s) will need to be:

- Qualified in law, with demonstrable expertise in Environmental Law and an understanding of how to influence Government in its development
- Up to date with current Government initiatives in the key areas
- Proven ability to work with groups or committees
- Able to work flexibly and on own initiative to meet the needs of the role
- Able to work remotely and with own office equipment

Terms and conditions:

- Remuneration will be paid for time spent, up to a maximum of £10,000 for the support work in the year. The expectation is that the daily fee is likely to be in the region of £200. Time will need to be planned across the whole year.
- Expenses will be refunded, in line with UKELA's policy on expenses
- Management will be by UKELA's Executive Director, Vicki Elcoate with support from the Chair
- Close working with working party convenors will be required
- As this is a self employed role the successful applicant(s) will be responsible for their own Tax and National Insurance and there will be no holiday entitlement.
- Hours will be worked flexibly by mutual agreement

To apply:

Please send a covering letter of how you are suited for the role and what you can offer to the working parties, and a CV to Vicki Elcoate at Vicki.elcoate@ntlworld.com. Interviews will be held in London in January with the role due to start early in February.

Advisory , Litigation and Prosecution and Lawyers

Up to £46,184 (or more for an exceptional candidate)

Central London (possibly one post based in Reading)

The Department for Environment, Food and Rural Affairs (Defra) has one of the largest legal teams in Government and undertakes work across a wide range of policy areas and legal specialisms. Based in central London and Reading, our lawyers work on issues ranging from pollution control to animal welfare and forestry and nature conservation.

The work is always varied and often exciting and controversial. Much of it is at the forefront of important, high profile government initiatives. We have a team handling animal disease emergencies, including foot and mouth, bluetongue and avian influenza. There are great opportunities to work closely with other professionals including scientists and vets as well as policy makers. We advise a number of delivery agencies and work closely with others such as the Food Standards Agency. These posts provide ample opportunity to gain experience in issues affecting operational delivery as well as policy and to work with colleagues across Whitehall.

The legal skills required are equally wide ranging. We have prosecution and civil litigation lawyers, commercial and employment lawyers as well as lawyers who advise policy makers on use of powers, draft secondary legislation and work on Parliamentary Bills. In Reading, our lawyers advise the Rural Payments Agency.

We now have opportunities to join our team of some 120 lawyers in a range of advisory subject areas as well as openings for both a civil litigation lawyer, and a prosecution lawyer. If you are an enthusiastic lawyer, with good analytical skills and a proven track record in mastering new areas of law quickly and are attracted by the opportunity to make a real difference in people's day-to-day lives we would like to hear from you. Please specify which post(s) you are interested in (ie advisory, litigation or prosecution).

Those with less than three years PQE may be offered a Legal Officer position (current scale £34,336 - £41,851) depending on experience. Depending on amount of PQE, after about one year and subject to satisfactory performance, Legal Officers usually

move up to Grade 7 (current minimum £46,184).

For more information and to apply, please visit www.gls.gov.uk or contact the GLS Recruitment Team on 020 7649 6023 or Minicom 020 7406 5790 quoting ref: 51172. Calls may be recorded for training and quality purposes.

Closing date: 5th January 2009.

DEFRA values the diverse skills of all staff. Promotion/Selection is determined on ability and without regards to colour, race, sex, sexual orientation, disability, marital status, working patterns and, wherever possible, age.

Consultations

Defra Commissions Research on Noise and Environmental Impact Assessment

Defra has recently appointed a team headed by acoustic consultants Rupert Taylor to review the effects of the planning process on the noise environment with regard to human health, flora, fauna and the built environment. The other team members are Bernard Berry, Director of Berry Environmental Ltd, , who has conducted research for both Defra and the World Health Organization, and Dr Graham Wood who is Reader in Environmental Assessment and Management at Oxford Brookes University and Co-Director of their Impact Assessment Unit.

The study will investigate the effectiveness of the Environmental Impact Assessment (EIA) process in dealing with noise impacts[1]. It will consider both the Environmental Statement (ES) itself and the outcome of the process i.e. after the development has been implemented. For the ES stage the project will assess both the technical quality of the noise section and whether the impacts are described sufficiently clearly for the benefit of those who might be affected.

Where developments have been completed the study will review how well the noise impacts were predicted, whether any mitigation offered or imposed has achieved its objective, and whether there are any unexpected noise issues e.g. leading to complaints.

EIA procedures in other EU member states will also be compared to the UK process and any possible transferable benefits identified. Finally, consideration will be given to any effects that noise action planning under the terms of the European Noise Directive might have on the current planning process as regards noise.

Since the study encompasses the outcome (in noise terms) of completed developments, the team would be interested to hear of specific examples where the operating phase with regard to the noise impact has proved to be either successful or problematic. Please contact Stuart Dryden at Rupert Taylor (smd@ruperttaylor.com , 01993 852 347).

1 The study is solely concerned with airborne noise and does not cover vibration-induced effects.

REMINDER - UKELA VOCATIONAL BURSARY FUND

Donald McGillivray – Kent Law School

UKELA is launching a pilot Vocational Bursary Fund in 2009 which is intended to enable students to undertake a period of vocational placement (such as an internship or externship) in the field of environmental law. Placements may be with a public body (e.g. a government department, local authority, regulatory agency), with a non-for-profit organisation such as a non-governmental organisation, with a university department, in private practice (legal or otherwise), or any other vocational placement which would further the charitable objects of UKELA (see note at the end).

The maximum available for 2009 is £5,000.

Criteria

1. Awards may be made to any postgraduate student, or any undergraduate student who has completed at least one year of study. Preference will be given to students in their final year of study. The Fund is open to non-UK nationals.
2. Placements may be undertaken in the UK by any student, or anywhere by students from a UK institution of higher education, so long as the placement contributes to UKELA's objects.
3. Applicants are required to carry out a specific programme of work, agreed in advance with the placement organisation. The Fund does not support mini-pupillages or vacation placements with solicitors' firms.
4. The placement should normally engage the student full-time.
5. It is a condition of the award that successful applicants will make a short report to UKELA when the work has been completed.
6. Applicants from any relevant academic discipline are eligible.
7. The Fund is intended to support students who would otherwise have difficulty supporting themselves financially and is not intended to compete with industrial or labour employment.

Awards

Awards will be made on the basis of a maximum six-week placement. Shorter periods will also be considered.

The support given is not 'pay' and will be given at the following maximum rates:

Living at home:	£90 per week
Living away from home:	£120 per week
Living abroad:	£155 per week

Awards are at the discretion of UKELA, which will in particular take into account UKELA's charitable objectives, the quality of the proposal and the anticipated output from the placement period, the benefit to the student, to the placement organization and to the wider community, and the desirability of maximising the number of awards that can be made in any year.

A decision by UKELA on an application is final.

To apply

Application forms can be found on our website www.ukela.org under the student section or can be obtained on request from Alison Boyd (alisonboyd.ukela@ntlbusiness.com) or by writing to UKELA, PO Box 487, Dorking, Surrey RH4 9BH or by contacting 01306 500090.

Along with the completed application form you must submit:

- Your Internship proposal

This must not exceed 1000 words and must include

- Brief information about the placement organisation.
- The amount of financial support you are seeking.
- A short personal statement addressing:
    a) What you will be doing and/or what project(s) will you be working on during your internship?
    b) Why you want to work in this particular area and/or with this particular organisation?
    c) How your academic studies, work, and personal experiences have prepared you for this placement? And

d) How you expect the placement to relate to your academic, extracurricular, and/or career path?

- A short letter of commitment from the placement organisation (this can be sent by letter or by e-mail to the address given above). (Note: You may submit an application without having received a letter of commitment, but you will not receive funding until you submit one.)

- A CV (max 2 sides A4), including details of university results to date

Completed forms should be submitted to UKELA, PO Box 487, Dorking, Surrey RH4 9BH to be received no later than 20 February 2009. Decisions will be announced by 20 March 2009.

In any year normally only one award per placement organisation will be made.

For 2008/09 this is a pilot scheme.

Note:
The UKELA relevant charitable object is

> *"To promote for the benefit of the public generally the enhancement and conservation of the environment in the United Kingdom and in particular to advance the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment."*

REMINDER- Photos wanted

UKELA's new public information website, "Law and Your Environment", launches early in 2009. We urgently need photos of environmental images to add to the site. If you are a keen amateur photographer please consider donating any suitable images to UKELA (you will need to give UKELA the copyright or license use of the photos to UKELA). Everyone will be credited on the new website (on a special page). All images need to be high quality, electronic and suitable for web use.

In particular we need illustrations of:

- People affected by environmental problems
- Air pollution
- Cleaner communities (litter, graffiti, fly tipping, fly posting, dog fouling, noise)
- Flooding
- Planning issues
- Building works
- Waste (disposal, collection, recycling, processing)
- Water pollution
- British wildlife

If you are also happy for any images to be used on the UKELA website or in other UKELA publications (including fundraising literature for Law and Your Environment) please could you indicate.

Law and Your Environment aims to help ordinary people access information on their rights and responsibilities. UKELA is building the resource with the help of Cardiff University and has received no external funding so far. We're dependent on members to help UKELA deliver this charitable initiative.

We'll shortly be launching a fund which will ensure the website is maintained in years to come. All members will be able to help with this and we'll be in touch about that in the New Year.

Please send your photos (if only one or two) to Vicki.elcoate@ntlworld.com.

If you have several, or the files are very big, please could you burn them onto a disc and mail them to UKELA, PO Box 487, Dorking RH4 9BH. Please remember to include any instructions as to copyright or what we can use them for. Thank you!

Climate Change Competition for Lawyers

Advocates for International Development (A4ID) are promoting an international competition along with the Climate Justice Programme and Oxfam for lawyers, academics and law students to come up with the most innovative legal case for a developing country to take legal action on injuries suffered from climate change. The competition supports Oxfam's new report 'Climate Wrongs and Human Rights'.

The 3500-word complaints will be judged by a panel of eminent lawyers, including A4ID Advisory Council Member Stephen Hockman QC, and the winners will be announced in March 2009 to coincide with the release of the report from the UN OHCHR. The winning submissions will be published on Oxfam's website and the winners will receive a £100 voucher for books or eco-goods from the Centre for Alternative Technology.

Further information on this competition can be found at http://www.oxfam.org/files/make-the-case-climate-law-competition-9Sept08.pdf. Entries should be sent by email to climatechangecompetition@a4id.org by 31st December 2008.

Nick Flynn
Weil, Gotshal & Manges
nick.flynn@weil.com

Annual Competitions – by Richard Kimblin of UKELA's Council and No 5 Chambers

The Andrew Lees Prize

UKELA is pleased to announce its annual article competition - "the Andrew Lees Prize". This competition is open to any student (of any discipline – not only law students), trainee solicitor, pupil or solicitor / barrister with not more than 2 years' post qualification experience.

Andrew Lees was the Campaigns Director for Friends of the Earth and a leading environmental campaigner on a range of issues from water pollution to illegal waste dumping. He died suddenly in 1994 while on a working holiday in Madagascar campaigning against a large opencast mine.

There will be two prizes – a winner and a runner up. Each will receive a free place (including travel expenses) to the 2009 UKELA conference. The winner of the first prize will have their article published in UKELA's journal e-law.

The title of the article is:

> *"The law is useless as a tool to deal with climate change."*
>
> Discuss

The judges have been appointed by UKELA Council and their decision on all matters relating to the competition is final.

All articles should be typed in 12pt script and 1.5 line spacing. Your name should appear on the top right hand corner of each page and the number of words should appear at the end of the article along with your contact details. The word count should relate only to the text of the article and does not include your name, the title, nor your contact details. However, if the article text exceeds 1000 words your entry will be disqualified.

Your article should be sent by email to Richard Kimblin at No5 Chambers (rk@no5.com) by 4pm on 25th January 2009.

UKELA'S MOOTS

UKELA is pleased to announce the opening of entries for the 2009 Mooting Competitions. This year's moot problem can be found at www.ukela.org, under the pages for students.

There are two mooting competitions:

(a) *The Lord Slynn of Hadley Mooting Trophy Competition* (the senior competition) is open to all those who as of 31st October 2008 are in pupillage, a trainee solicitor, on the bar vocational course or legal practice course, or who are on taking the CPE. In essence this competition is for those on vocational courses

(b) *The UKELA Student Prize Moot* (the junior competition) is open to those who as of 31st October 2008 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.

Teams consist of two members. An institution may enter more than one team. Teams may comprise of competitors from different institutions.

Each team should submit two skeleton arguments, one on behalf of the Appellant and one on behalf of the Respondent. No more than two authorities may be cited in each skeleton in addition to those referred to in the Moot problem. Each skeleton argument 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 include a contact name, address and day and evening telephone number. A copy of the skeleton argument should be forwarded electronically, by email to rk@no5.com **no later than 4pm on Monday 26th January 2009**.

The finalists will be selected on the basis of the skeleton arguments. All competitors will be notified of the outcome. The finals will be held at a venue and at a date to be announced during March 2009.

The Master of the Moot (Richard Kimblin) reserves the right to change the rules of the competition without notice as he thinks fit and his decision is final.

The winners of both competitions will receive a cash prize from No5 Chambers. The winners of the Senior competition will receive the Lord Slynn of Hadley Mooting Trophy and the Junior competition winners will receive the Junior Trophy.

UKELA is grateful to the sponsors of the moot, No 5 chambers.

Please could all UKELA members circulate this to anybody who might be interested and not on the UKELA mailing list themselves.

UKELA events

The Way We Live Now – an energy, waste and planning conference for the 21st Century on Tuesday 20 January 2009 at the National Science & Learning Centre, York University, York

This is a collaborative event organised by UKELA, IEMA and Denison Till and further details including how to book can be found at http://www.iema.net/index.php/legal. A fantastic range of speakers will be there including Professors Peter Robert and Stuart Bell; Tom Bainbridge from Nabarro; Richard Harwood from 39 Essex St; Gary Bower from Royal Haskoning and Ripin Kalra from WSP Environmental. Each will give presentations on various aspects of energy, waste and planning for sustainable communities.

York is only 2 hours by train from London and 2 1/5 hours from Edinburgh so don't miss this opportunity to hear the experts speak on a range of key issues.

There are 15 free student places offered on a first-come, first-served basis. To claim your free student place, please contact events@iema.net

Scottish Regional Group

SEMINAR ON DEVELOPMENTS IN ENFORCEMENT on Thursday 22 January 2009 at Turcan Connell in Edinburgh. To book, go to www.ukela.org and follow the link on either the Scottish regional group page or the events page.

Developments in enforcement: The Regulatory Enforcement and Sanctions Act 2008 makes provision for a range of civil penalties and other new enforcement tools which can be extended to apply in Scotland. What potential do they offer for environmental law? These and other developments are the latest stages in a broader move away from the criminal law as the

means of enforcing regulatory provisions, the implications of which are to rarely considered in terms of procedural justice and human rights.

WEST MIDLANDS REGIONAL GROUP on Thursday 15 January 2009 at Pinsent Masons in Birmingham.

UKELA's West Midlands Regional Group is holding an early evening seminar in Birmingham on 15 January 2009 to discuss implementation of the ELD. To book your place, go to www.ukela.org and click on the link on either the West Midlands regional group page or the events page.

NORTH EAST REGIONAL GROUP is hosting a video link-up with the West Midlands event detailed above. More details of how to book your place at this seminar will be posted on the website soon.

SOUTH WEST REGIONAL GROUP on Tuesday 27 January 2009 at Burges Salmon in Bristol.

UKELA's South West Regional Group is holding a seminar on Nuclear Power at the offices of Burges Salmon in Bristol. Further details including how to book will be posted on the website soon.

UKELA'S ENVIRONMENTAL LITIGATION WORKING PARTY invites you to attend a workshop on the Regulatory Enforcement and Sanctions Act 2008 with participation from representatives of the Department of BERR and the Environment Agency. Kindly hosted by Burges Salmon LLP in their London office at Chancery Exchange, 10 Furnival Street, London EC4A 1AB **on Thursday 22 January 2009 from 4.00-5.45pm and afterwards for drinks**.

Please RSVP directly to Paul Kitson at Burges Salmon by email to paul.kitson@burges-salmon.com

BACKGROUND

Civil penalties in regulatory crime have been discussed for some years. On 1 October 2008, the commencement order in respect of Part 3 of the Regulatory Sanctions and Enforcement Act 2008 was made. Part 3 creates a scheme of civil penalties to be available to a range of regulatory agencies. Those penalties include fixed monetary penalties.

The provisions will not be effective until the detail of their application has been settled by secondary legislation and guidance on their application. Hence, this is an interesting time in the evolution of these new regulatory tools.

The purpose of the Environmental Litigation Working Party workshop is to seek to be informed and to influence the next stage of the development of the law in this area.

The workshop is not a seminar. It is intended to be participative as well as informative. If there is a point of view which you wish to represent or a contribution you would like to make, please email **planning@no5.com** in advance of the workshop.

Special Offers for UKELA members

Legislative Changes in Brownfield and Contaminated Land

20 Jan 2009, London

18% discount for UKELA members (£375 + VAT)

Successfully running for the 7th year, respected industry speakers provide an in-depth look at the key changes in brownfield regulation and legislation, providing lawyers, regulators, developers, local authorities, consultants and other professionals in the brownfield industry with all the updates that will affect them over the next twelve months.

Why you should be there:

As development and budgets get squeezed, it's more important than ever to understand how the regulatory regime and the legislative changes affect your business.

- Get all the new developments and changes, all in one place
- Explore key questions and issues: what will the new planning
- regulations mean for you? What are the implications of the
- European Waste Directive, the Marine Bill, and the Water
- Framework Directive?
- Surviving the credit crunch: examine due dilligence for commercial and property transactions

Special Offers for UKELA members

This event will run alongside our Glasgow edition on 28 January 2009.

For more information, please, contact us on conference@newzeye.com, or call 020 8969 1008.

Places to attend the conference cost £215 - £450 (plus VAT), including discounts for UKELA members, Authorities and government, not-for-profits, Brownfield Briefing, Sustainable Building and Property Forecast subscribers. http://www.newzeye.com/conferences_education/conferences.cfm

For enquiries about this event, please contact: Antonia Mitchell, conference@newzeye.com.

E - LAW

The editorial team wants articles, news, views and forthcoming events from you for the next edition due to go out in January 2009.

All contributions should be dispatched to Catherine Davey as soon as possible by email at:
Catherine.Davey@stevens-bolton.co.uk by 16 January 2009.

Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.

Letters to the editor will be published, space permitting

UK ENVIRONMENTAL LAW ASSOCIATION

Registered Charity number: 299498 (Registered in England and Wales), Company limited by guarantee: 2133283 (Registered in England and Wales)

For information about working parties and events, including copies of all recent submissions contact:

UKELA, PO Box 487, Dorking, Surrey RH4 9BH

Vicki Elcoate
Executive Director
The Brambles
Cliftonville
Dorking RH4 2JF
vicki.elcoate@ntlworld.com
01306 501320

MEMBERSHIP ENQUIRIES

Alison Boyd
Email: alisonboyd.ukela@ntlbusiness.com
Tel: 01306 500090