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CHAIRMAN'S MESSAGE

Congratulations to e-law editor, Catherine Davey, for all her hard work as we celebrate the fortieth edition of e-law. The journal now goes to over 1,200 people. Cate has exceeded her target of publishing six editions a year, the journal is always packed full of articles, events and member offers, and we hope you will agree it is an interesting read. If you want to contribute any news or an article please contact Cate at catherine.davey@stevens-bolton.co.uk.

As we near the end of the year UKELA can reflect on the highlights of 2007, while the Council plans ahead for 2008.

The main achievements were:

- A growing membership with more environmental consultants, academics and students joining.
- Working party involvement in developing law on key issues like the Environmental Liability Directive, the Climate Change Bill, the Regulatory Enforcement and Sanctions Bill, the planning reforms, and a range of Scottish legislation.
- UKELA welcomed new patrons and a new President, Lord Justice Carnwath.
- More events for members – nearly all the regional groups, except Wales, have a convenor and have held meetings; more working party events have gone ahead although some topic areas have not been so active.
- The 20th Anniversary conference in Bath was very popular, particularly the gala dinner in the Pump Rooms with Stephen Troman's reflections.
- The Wild Law workshop attracted delegates from 11 countries and inspired a new set of people to discuss these ideas.
- The e-library on environmental law has made great progress with six areas developed so far by the team at Cardiff University and the final phase in sight.
- The student social and 'meet the professionals' evening attracted 90 student bookings.

2008 already looks like having even more highlights for members to look forward to. We have two partnership events in the planning stage for the early part of the year which should be of great interest. Bookings will open in January so keep an eye on the website. The annual conference at Kent University will be offering lower fees to those who would otherwise be unable to attend and the gala dinner and field visits promise to be exceptional. Early booking is advisable and the full programme will be circulated as soon as all the speakers are sorted out.

Please do renew promptly – as you know the members are the bedrock of UKELA and we need your support in joining again and in organising and participating in activities.

I hope you have a good Christmas break and a Happy New Year.

Daniel Lawrence
Chairman

UKELA WATER WORKING PARTY INTRODUCTION

Mothiur Rahman, Julie Adshead and Hilary Drenth

It is a pleasure to take on the role of convenors for the UKELA Water Working Party, and we would like to thank James Montgomery for his work as the previous convenor. As you will realise, we have departed a little from the norm in that there are three of us who will act as co-convenors and divide between us the necessary roles on an ad hoc basis. We hope that this division between three persons in three different regions of the UK will be effective in involving UKELA members across the regions.

Just to introduce ourselves, Mothiur is a solicitor specialising in public, planning and parliamentary law at Bircham Dyson Bell, a firm based in London. His firm has a strong team experienced in water law, of which he is an active member. Julie is a Senior Lecturer in Law at the University of Salford, specialising in Environmental Law and EU Law. Hilary is a solicitor with the Worcestershire firm Parkinson Wright. She assists Peter Scott, the partner responsible for planning and environmental work.

Put simply, the issues surrounding water can be seen as ensuring a proper balance between meeting the needs of humankind against the needs of the environment. Not only do we all need pollution free water to drink to survive, water is also an essential need for many domestic and commercial activities. On a wider and "wilder" view (See the "Wild Law" link on UKELA's website) water is an essential need for this planet to survive. As is being increasingly recognised, there is a cost attached to these wider environmental aspects related directly to the amount of water abstracted, consumed, polluted or wasted.

In terms of the law, there are the regulatory aspects surrounding the abstraction and use of water for public supply, mostly contained in the Water Resources Act 1991, the Water Industry Act 1991 and the Water Act 2003. In relation to ensuring a sustainable and ecologically friendly supply of water, there is the Water Framework Directive which requires all member states to achieve "good ecological and chemical status" in all waterbodies (both groundwater and surface water) by 2015. A first step in implementing the WFD is establishing a river basin district structure (i.e. a structure which accords with the nature of the river rather than the arbitrary human designation of the county or counties within which it falls), within which environmental objectives can be set. The Environment Agency is currently consulting on its Summary of Significant Water Management Issues in each River Basin District in England and Wales, ending on 24 January 2008.

The Marine Bill, once it is published, will hopefully set up a framework for delivering sustainable development and the protection of the marine and coastal environment. The Government has announced that a draft Marine Bill could be expected in early 2008, so watch this space.

The very physical nature of water also needs to be accounted for in legislation. The 2004-2006 drought in the south east of England led to a review of drought legislation and a government proposal to amend legislation to replace existing "hosepipe ban" powers with a "discretionary use" ban. This year we have seen severe flooding in many areas of the UK, bringing to the forefront the need to review how best to manage such risks. Water UK has established a review group chaired by Sir John Baker to review the summer floods from the point of view of the industry and its customers.

The Government's current water strategy is contained in its 2002 document "Directing the Flow" and is out of date, particularly in relation to the climate change concerns that have grown since the recent droughts and floods, and warnings of wetter winters and drier summers. A new Water Strategy is being developed which the Government is hoping to publish in early 2008. The Government anticipates that the new Water Strategy will focus on the management of water resources to balance environmental impacts, water quality, supply and demand, and social and economic effects. This will be an important document that will be worth scrutinising and commenting on.

In relation to the supply and demand of water, we already have relatively new legislation that increases public participation. Prior to 1 April 2007, water companies only had to produce water resource management plans on a voluntary basis. After that date, following the making of regulations in 2007 under the Water Act 2003, such plans became a statutory requirement, with the potential for inquiries to be held in relation to the draft plans. The first set of such water resource management plans are to be consulted on in Spring/Summer 2008 and it will be interesting to see whether as much local interest in these plans is generated as in planning authorities' development plans.

It is the increasing awareness of the need for a balance between human and environmental considerations, both by the public and the government, which makes water law an interesting area to be in at this moment. The Water Working Party would like to focus on the development of law surrounding the Water Framework Directive, the Marine Bill, water resource management plans, and the new Water Strategy once it is published.

On 6 December, the Water Working Party was involved in a most successful event organised by the North West Regional Group (in conjunction with CIWEM and IEMA). The subject for discussion at this evening seminar, hosted by Hammonds, was the Water Framework Directive. The event was organised by Paul Bratt (UKELA North West Region Coordinator) and the speakers were Angelo Papaioannou of Environs Consulting and our co-convenor Julie Adshead.

The Water Working Party will be holding its first meeting on 22 January 2008 at 6pm at the offices of Bircham Dyson Bell (50 Broadway, London SW1H 0BL). An agenda will be circulated to all current members and we would welcome any new members who would wish take part in this and future activities of the Group. If you would like to take part at this meeting, or have any items you would like to put on the agenda, please email Julie Adshead at J.D.Adshead@salford.ac.uk.

UKELA MEMBER PROFILE – MARK POUSTIE

Government linguist 1986-87, qualified as solicitor in Scotland 1992. University of Strathclyde Law School 1992-present (professor since 2003, Head of Department since 2007). UKELA member since 1993, UKELA Council Member from 2007. Regional Group Convenor.

The e-law 60 second interview

The questions:

What is your current role?

Head of Strathclyde University Law School and Regional Group Convenor, UKELA Council

How did you get into environmental law?

As a trainee solicitor in 1991/2 in connection with research work on countryside access issues in Scotland and the potential environmental law liabilities arising out of the disposal of a well known closed steelworks.

What are the main challenges in your work?

Finding sufficient time; particularly to continue environmental law research while managing the Law School.

What environmental issue keeps you awake at night?

I never have difficulty sleeping at night – wish I had more time for sleep! If I did, it is not so much the issues themselves that would keep me awake but rather the half-hearted and inadequate ways in which our governments often seek to address them – not least climate change.

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

Individuals taking more responsibility for their actions.

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

Scots Law Working Party. No choice – it's the only one in Scotland!
However, as Regional Group Convenor I am really committed to ensuring we have active groups across the whole of the UK and that those groups try their hardest to broaden the appeal of UKELA by attracting students, consultants and academics as well as environmental lawyers. It is also very important that UKELA is not seen simply as a London-centric organisation – and in fact it isn't since there is a lot of interesting UKELA activity going on throughout the UK.

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

The opportunity to try to stimulate interest of new generation of members about environmental law issues; providing opportunities to engage with a range of professionals in the field on a variety of environmental law matters which is very exciting and to participate in responding to government consultation exercises as part of a highly-respected organisation.

PACKED HOUSE FOR M.C. MEHTA LECTURE – GARNER LECTURE – 21 NOVEMBER 2007

Choking air pollution in Delhi and acid rain destroying the Taj Mahal were two of the significant cases which changed the face of environmental protection in India – lawyer M.C. Mehta told a packed audience at the joint Garner/Journal of Environmental Law lecture.

His account of his one man battle to get the Indian Supreme Court to take environmental protection seriously, leading to far-reaching environmental laws, was warmly received.

India's leading environmental lawyer's cases over more than twenty years have led to dramatic improvements in India's environment. He told the audience of over 160 at University College London, "The Supreme Court of India has laid down a strong foundation on which a beautiful house can be constructed".

The event was introduced by UCL provost, Professor Malcolm Grant, who paid tribute to the late Lord Nathan, former President of UKELA, who gave the first Garner lecture. Lord Justice Sedley kindly chaired the evening.

M.C. Mehta's environmental work started in 1985 when he was refused permission to list a case against a major industry near Delhi which people feared would cause a gas leak. This was only a year after the devastating chlorine gas leak at Bhopal, which killed between 2,500 and 5,000 people in one of the world's worst industrial disasters. Despite this, it took an actual gas leak from the factory M.C. Mehta was trying to have action taken against to persuade the Supreme Court to act. This was his first landmark case and led to over 100 others being successfully brought.

The air pollution case started in 1985 has resulted in Delhi being the only city in the world where all public transport is required by law to run on Compressed Natural Gas, which is cutting damaging emissions. However with more than 1,000 private vehicles being registered every day, there is a pressing need to persuade more people to use public transport.

He said that the 1989 Taj Mahal case changed his whole life. He brought the case in his own name, using the Indian constitution's clauses which give every citizen a duty to protect and improve the natural environment and which embrace the right to life and a healthy environment. The Taj Mahal was being eroded by acid rain, which was producing a cancer effect on the marble. The Supreme Court ordered a 90% reduction in emissions from oil refineries and led to the closure of more than 500 companies which were causing the pollution, thus preventing the marble being eroded away.

"At one time our courts were as rigid as any in the world but they've had to evolve", said M.C. Mehta. "The judiciary and lawyers have to take more responsibility in seeing that people's health and lives are protected and at the same time that the environment which is under serious threat is protected. This could all happen at great sacrifice and great cost, but lawyers have to play their part", he added. Every Friday for five years was set aside for hearing these environmental cases, with no financial income for M.C. Mehta. His work was supported by his legal practice in the rest of the time.

He brought another case on pollution of the River Ganges when he saw the whole river on fire – caused when someone threw a discarded cigarette end into the river. He said this was an extraordinary sight, produced by the toxic mix of pollutants in the water. The Supreme Court acted to reduce the effluent discharge of the huge pharmaceutical companies. Hundreds of industries were closed down and thirty towns in the Ganges river basin benefited from the improved water quality.

The Supreme Court has also ruled on a world leading programme of public education with compulsory environmental education in schools and colleges, and daily TV and cinema environmental messages.

There are now two hundred laws in India which address environmental issues directly or indirectly, but M.C. Mehta said the problem now was failure to enforce.

M.C. Mehta started a Foundation which has trained 125 lawyers from South Asian countries in environmental law and 400 NGOs, 100s of teachers and has organised ecological camps for young people and children. Apart from being a lawyer, M.C Mehta believes in grass-roots action; among other things he undertakes green marches, persuades children and young people to plant trees or conserve water and helps raise awareness on environmental issues.

The greatest concern now, M.C. Mehta said, is climate change, which was already having a dramatic impact in India – hitting crop production, causing glaciers to melt, serious storms and flooding. He has moved a petition under Article 21 of the Constitution (the duty of every citizen to protect and improve the natural environment) to try to address failures to reduce carbon emissions. "We have to go for the measures that will address it. If the courts ignore these issues it affects the entire humanity. This is about imparting environmental justice – the courts should be more positive in their thinking and judgements".

UKELA and the Journal of Environmental Law are grateful to Brick Court Chambers for sponsoring the drinks reception after the lecture and to Freshfields for sponsoring the speakers' dinner. Thanks also go to Richard Macrory and Daniel Lawrence for organising the event.

Left to right:
Lord Justice Sedley, M.C. Mehta, Daniel Lawrence and Professor Richard Macrory

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ENVIRONMENTAL LAW SEMINAR ARTICLES

We are grateful to David Hart QC, Rachel Marcus and Jeremy Hyam of 1 Crown Office Row who have kindly allowed us to publish the following papers which were delivered at a seminar organised by their chambers, on Environmental Law on 8th November 2007. Details of this on-going programme of seminars are available by emailing Nick Rees at: nick.rees@1cor.com.

WASTE, WASTE WATER AND SMELL: ENVIRONMENTAL CASES SINCE JUNE 2007

Thanks to David Hart and his colleagues at One Crown Office Row for permitting e-law to reproduce papers first delivered at a seminar on 8 November 2007.

U U & ALL THAT: HOW TO INTERPRET A DIRECTIVE

David Hart QC

1. I would like to have a look at one case, say something about the problems of Directives more generally, and then touch on impending reform in the regulation of potentially more polluting businesses.

UU

2. At first sight, ***United Utilities v. Environment Agency***[1] is uncongenial territory for environmental specialists and generalists alike. However, there lurks in the litigation and its denouement some things of general interest – not least how the Courts these days are willing to go some distance to make some sense of words which, when read literally, are barely intelligible.

3. What then was the case about? UU operate sewage works in the North West. Part of any substantial sewage works consists of sludge handling plant, designed to make safe or treatment the solids extracted from the waste waters entering the works. The sludge handling plant variously thickens, centrifuges, or treats biologically the raw sludge extracted from the settlement processes. The works had been regulated by the Urban Waste Water Directive[2] and its domestic regulations which required a minimum treatment standard for sewage works. However, the sludge was not ultimately disposed of at the works; it was pumped or tankered off to another UU works (Shell Green) for further treatment or incineration, depending on whether there was sufficient capacity for the thickened and treated sludge to be used in agriculture.

4. Enter the Integrated Pollution Prevention & Control Directive[3]. This sought to standardise the regulation of the larger and hence more potentially polluting industries throughout the Community. One permit should therefore govern all the emissions from a plant – so that potentially conflicting demands in respect of water pollution, air pollution, smell, solid waste and energy usage can be decided at least at the same time, and having regard to their combined effect. But the key question in the litigation was – did sludge handling plants at sewage works need one of these IPPC permits? In IPPC jargon, were they "installations" fitting within the list to be found in Annex I of the Directive?

5. In the run-up to domestic implementation of the IPPCD, the Environment Agency decided that the sludge handling plants did need such a permit. UU disagreed, and to pre-empt being prosecuted for non-compliance, brought proceedings in the High Court for declaratory relief.

6. The answer depended on the wording to be found in the Directive, as transposed into domestic legislation via the Pollution Prevention and Control Regulations 2000[4], and section 5.3 of Schedule 1, in particular.

7. Did these plants carry out activities which amounted to:

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[1] [2007] UKHL 41, 17th October 2007
[2] 91/271/EEC.
[3] Council Directive 96/61/EC.
[4] SI 2000/1973

"Disposal of non-hazardous waste…by
(i) biological treatment…which results in final compounds or mixtures which are discarded by means of any of the operations numbered D1 to D12 in [Annex IIA to Council Directive 75/442/EEC]; or
(ii) physico-chemical treatment…which results in final compounds or mixtures which are discarded by any of the [same operations]…"?

D1 to D12 of that additional Directive, the Waste Framework Directive, listed various disposal operations, principally forms of landfill or incineration.

8. UU said that the sludge plants did not fall within this definition. After all, the sludge was not disposed of at the sewage works. Hence, they said, there was not a disposal resulting in final compounds which are discarded, occurring at those plants.

9. The House of Lords thought that this argument had *"an attractive simplicity".* However, they, in line with Nelson J and the Court of Appeal, rejected it because, agreeing with the Agency's arguments, such an interpretation would produce "*irrational results*". The Agency said that the words "*which results in final compounds…"* were designed to distinguish between waste which was destined for disposal and which underwent intermediate treatment operations prior to such disposal – wherever that disposal took place , and waste which underwent the same operations but which was destined for recovery. The House of Lords agreed.

10. The key passage is in Lord Walker's speech at paragraph 24. He did not regard the case as one where, as UU argued, the language was perfectly clear. On the contrary, there was an ambiguity which "*has to be resolved by the context and by looking at the scheme and purpose of the Regulations and the Council Directives which they implement."* He divined within that scheme a clear general policy of preferring recovery rather than disposal, and hence a system which made the latter (disposal) more onerously regulated than the former (recovery) was entirely rational. By contrast, there was no obvious policy reason why the Directive should limit its scope to operations where the disposal was completed at the same site – which was UU's argument on the literal meaning.

11. A number of things can be gained from the speeches. The first is that the House of Lords unashamedly let the purpose and scheme of the legislation drive the result – rather than be hung up on what was (or was said to be) the literal meaning of the words. The second is that they were quite willing to look at anything which bore on this purpose or scheme – including the texts of the Directives in other languages. The third is that the Lords were quite content to make the decision themselves, rather than refer the dispute for a preliminary ruling from the European Court of Justice. As is well known, it is the House of Lords' duty under Article 234 of the EC Treaty to refer if there is any reasonable doubt as to the meaning of the provision (*acte clair* in ECJ terminology*)*.

12. Irrespective of the merits of this decision, all of this can only be a good thing for the poor litigants who do not look at the prospect of a 2 year wait for a reference to the ECJ, before receiving an answer which may not itself be decisive of the issue in question[5].

Directives generally

13. The domestic draftsman was not to blame for the opacity of this bit of the regulations, which was – prudently, in this instance – copied out from the IPPCD and Waste Framework Directive. But why is

[5] See, e.g. the ECJ in C-252/05 *R (Thames Water) v. Environment Agency,* 10th May 2007, where issues remain for determination by the Divisional Court

the detail in these Directives so difficult to decipher? I am afraid that there is no simple answer to this, but unlike domestic statutes[6] where the standard of clarity has significantly improved, things European, if anything, seem to be getting worse.

14. In no particular ranking, then (a) the initial Commission proposals often copy out bits of existing directives without properly integrating them with new material; (b) the translation of the texts may be precise in one language, but vague in another; (c) the European Parliament seek to make multitudinous amendments[7], some of which are ill-fitted to the underlying text; (d) political compromise may underlie the deliberate retention of unclear text which is designed to bring an end to long-drawn out negotiations.

15. All of the above makes dredging through the *travaux preparatoires* for the "true meaning" of a given text usually a dispiriting and/or a revealing exercise. It can be dispiriting because the drafts can show a surprising failure to understand the existing law or comprehend the meaning of a related provision. It can be revealing, because you can find a clumsy amendment to a clear underlying text, which unintentionally obscures the true meaning of the provision.

16. The other thing to recall is the existence of the other language versions: all are equally valid as between the members of the EU at the time of the making of the Directive in question. UK lawyers are a little prone to drawing very close and fine distinctions, which can often disappear when one carries out even the most cursory comparison with other versions.

Reform afoot

17. IPPC has been implemented sector by sector over many years, with the deadline for the last activities covered by the Directive expiring on 30th October 2007. Hence, the EA is at the point at which all the activities covered by the IPPCD will have received or will shortly be about to receive a permit, and so consistent regulation over all these sectors is just in place. But a fresh round of regulation is promised, on two fronts.

18. The first is the arrival of the Environmental Permitting Regulations with effect from April 2008. Their purpose is to merge the current PPC regulations with the current waste management licensing and landfill regulations – with common permitting arrangements designed to cover most major industrial and waste operations. Between them the regulations will implement some 11 European directives. The aim is not to amend the underlying substantive law covering what are now called PPC permits and waste management licences, but to implement a common set of procedures for these permits.

19. The second, at the European level, is to merge the IPPC Directive with existing directives covering waste incineration, organic solvents and large combustion plants, under the umbrella of a new Industrial Emissions Directive. Commission Proposals on this score may be forthcoming by December 2007. Much of the substance of these existing directives will simply be consolidated into one. However, it also appears if Best Available Techniques Reference documents (BREFs, which are designed to flesh out the meaning of BAT in different sectors) will become more important at the legislative level in the IPPC replacement. The proposals are also likely to include additions to the various activities defined as installations under Annex I of what is currently the IPPC Directive. Consultation papers[8] have suggested that scrap metal, treatment of slags and ashes for recycling, and pre-treatment of combustible waste for co-incineration might be added to the list.

[6] Statutory instruments remain often impenetrable.

[7] At one stage 622 amendments were proposed to the new Waste Framework Directive currently going through the Community institutions.

[8] The Commission's *Data Gathering and Impact Assessment for a review and possible widening of the scope of the IPPC Directive in relation to waste treatment activities*, of October 2006: websearch for "IPPC data gathering".

WASTE NOT, WANT NOT: THE DEFINITION OF WASTE AND THE NEW WASTE FRAMEWORK DIRECTIVE

Rachel Marcus

The policy problem

1. The 2005 Commission **Thematic Strategy on the Prevention and Recycling of Waste**[9] calls waste an "*environmental, social and economic challenge*"; the control of waste has been at the centre of EU environment policy for 30 years. This means that the regulation of the collection, holding, managing, processing and disposal of waste is detailed and complex. Once waste is created, there is a European and environmental interest in controlling it, and controlling it as early and as long as possible.

2. However, there is no doubt that the rules and regulations are onerous; and this is where the policy conflict emerges, for there is also a European and environmental interest in recycling and reuse and the reduction in the use of natural resources. The long-term goal, says the Commission, is for Europe to become an "*economically and environmentally efficient recycling society*". This means that there must be incentives built into the waste regime to promote that reuse and recycling, and to encourage economic actors to find alternatives to natural resources; and, when any resource is used, to encourage as efficient a use of it as possible.

3. It is for this reason that the definition of waste is important: at what point does the weight of the waste regime in fact inhibit the realisation of the European Union's environmental objectives?

4. Firstly, if the reuse and recycling of waste is to be encouraged, there must come a point when that recycling should be considered to have successfully rescued it from the trash pile and brought it back to be used in the economy on equal terms with the natural resources that would otherwise be exploited. In other words, at some point the definition of waste must come to an end: the end of waste. Secondly, if the efficient use of resources is to be encouraged, there must be some incentive to ensure that as little of possible of any resource goes to waste: this is the importance of the contentious distinction between the by-products of industrial processes, which can be re-used, and "production residues" which are to be considered as waste.

5. So far, so obvious: but amongst all the semantic wrangling over the definition and end of waste that's taken place in the European and domestic courts, it is important to keep sight of the overall aims of environmental protection in Europe.

6. It was widely agreed that the Waste Framework Directive, issued in 1975[10] and consolidated with all its bolt-ons and amendments in 2006,[11] was in very great need of revision; in 2004 the Council called on the Commission to provide a proposal for the revision of the Directive.[12] Political agreement was reached on the revised Waste Framework Directive at the Environment Council meeting on 28 June 2007. The text of the revised Directive which I have examined is the version issued by the Council of the European Union and dated 30 August 2007, which includes the comments of various Member States.[13] The Common Position is to be passed on to the European Parliament before the end of the year.

[9] COM (2005) 666 final, 21 December 2005
[10] As Directive 75/442
[11] As Directive 2006/12/EC
[12] See Recital (5) of the new Directive
[13] Council document 12463/07 ENV 445 CODEC 869, 30 August 2007

7. I shall deal first with the question of the end of waste, looking first at the state of the UK caselaw as it stands after ***OSS v Environment Agency*** **[2007] EWCA Civ 611**.

8. I shall then address the **new Waste Framework Directive**, and how it deals – or doesn't deal – with the problems of end of waste and by-products, respectively.

9. I shall then skate over two other issues that are thrown up by the new Directive: that is, firstly, the question of whether and when the **incineration of municipal waste** may count as a recovery operation *(and thus, in the event, whether and when the waste designated for those incinerators will ever reach the status of end of waste)*; and secondly, the end of the road for the case of **C-1/03 *Van de Walle*** **[2004] ECR I-7613**, which determined that soil contaminated by hydrocarbons spilled onto land under a petrol station was waste.

End of waste: OSS v Environment Agency

10. At first instance there were two appellants: Solvent Resource Management Ltd ("SRM"), which took old, contaminated solvents and processed them to be used as products in the market; OSS Group Ltd did a similar thing with contaminated lubricating oils. Both substances were indisputably waste. The question was whether, having gone through the decontamination process, the products, which had not originally been used as fuel, could "*thereafter be burnt other than as waste*". The question was, as Burton J pointed out at first instance, "*of very considerable financial and practical significance, because, so long as material is waste, it is subject to stringent controls in respect of handling, transport, storage, disposal and, in particular, incineration*". As there was no dispute between SRM and the Agency as to whether the products made by the company were just as environmentally "clean" as the natural fuels they were intended to replace, thus removing one layer of factual dispute from the equation, SRM was chosen as the lead appellant. After an adverse finding from the judge, however, it was only OSS who chose to appeal to the Court of Appeal.

11. As Carnwath LJ pointed out in his judgment, it was an "*unashamed*" part of the Agency's case that identical substances have undergone identical recovery processes could be or not be waste according to the purposes to which they were then put: if they were to be marketed as products for use other than as fuel, they would not be waste and could be handled like any virgin product; but if they were burnt, they would be considered waste until burnt and the incinerators in which they were burnt would have to comply with the onerous and costly controls applying to waste incinerators.

12. The dispute, in the end, revolved around the interpretation of a very few cases. Before addressing how the Court of Appeal approached them, it is convenient to set out very shortly the nub of the problem as it appears in the Directive.

13. **Article 1** of the Directive, of course, defined waste as any substance in the categories set out in **Annex 1** which the holder "*discards or intends…to discard*". Given that the categories in Annex 1 included "*any materials which are not contained in the above-mentioned categories*", the Article 1 definition can essentially be applied to any substance and it is very clear that the definition revolves around the "*discard*".

14. However, the word "*discard*" does not necessary have its natural English meaning: the concept of waste "*cannot be interpreted restrictively*"[14] and the caselaw determines that the term "*discard*" can include not only the "*disposal*" but also the "*recovery*" of a substance or object within the terms of

[14] *ARCO* para 40

Annex IIA and **IIB** of the Directive.[15] Incineration can be either a disposal operation (**D10**, "Incineration on land" or **D11**, "Incineration at sea") or a recovery operation (**R1**), if such incineration makes use of the substance "*principally as a fuel or other means to generate energy*". This is because using waste as a fuel means that it replaces "*other materials which would have had to be used for that purpose, thereby conserving natural resources*".[16]

15. The Court of Appeal's decision came down to its understanding of, essentially, one single passage in the case of **C-418 *ARCO Chemie Nederland v Minister van Volkshuisvesting* [2000] ECR I-4475**. *ARCO* had asked whether the fact that a substance was a result of one of the recovery operations in Annex IIB meant that it should be considered as having been "*discarded*" and so should be considered as waste. The answer seems, at first glance, to be simple. It was, essentially, and according to paragraph 97, no: the fact that a substance had gone through that process was only one of the factors to be taken into account. Whether or not it should be considered waste was a question to be determined "*in the light of all the circumstances, by comparison with the definition set out in Article 1 of the Directive...regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.*"[17]

16. Those circumstances were not defined. However, the Court had already discounted the factor that the recovery operation would have the effect of giving the substance in question "*the same properties and characteristics as a raw material*"; likewise that the substance was the result of a "*complete recovery operation*", whatever that meant.[18] It simply repeated that if the holder intended to discard it, the substance would still be waste. The Agency argued in *OSS* that this meant that the environmental impact of the produced substances when burned was, to all intents and purposes, irrelevant.

17. It should be reiterated here that the European meaning of "*discard"* is not, of course, that contemplated in ordinary language: that is, meaning "get rid of". Discarding can also encompass all those recovery operations which by no stretch of the imagination could be considered a getting rid of any substance.

18. In ***Scottish Power v Scottish Environment Protection Agency***,[19] a case heard in the Scottish Court of Session, Lord Reed traversed the caselaw in exhaustive detail and grappled with what the European Court had meant by this passage in *ARCO*. He concluded, essentially, that the European Court was when considering the subjective intent of the holder using the term "discard" in its ordinary sense. This meant that a substance which had undergone a recovery operation might still be discarded – in its ordinary sense – if no market was found for it. The Court of Appeal in *OSS* thought this unconvincing and unlikely to occur in a real context. However, it is notable one of the matters which SRM was at pains to establish before Burton J at first instance was that its decision whether or not to burn its products as fuel was dependent on whether it was financially advantageous to do so rather than buy in virgin fuels and sell the products on to third parties. It is not inconceivable that such a financial calculation be influenced by a downturn in the market for its products and could be framed as a "discarding" of excess product.

19. In any event, Burton J had also disagreed with Lord Reed and thought that the Court had meant that even a substance which had undergone a complete recovery operation within the meaning of

[15] *Wallonie* para 27; *ARCO* para 47
[16] C-228/00 *Commission v Germany* [2003] ECR I-1439
[17] *ARCO* para 97
[18] *ARCO* paras 94-5
[19] *Scottish Power v. Scottish Environment Protection Agency,* Outer House, Court of Session, 22nd December 2004

Annex IIB might be discarded by undergoing another one. The Court of Appeal was not convinced by this either. *ARCO* remained a mystery to it.

20. However, Carnwath LJ made sense of the caselaw by appearing to agree with Advocate General Alber in **C-444/00 *Mayer Parry* [2003] ECR I-6163**, who had pointed out that the test of an intention to discard was not, in fact, a subjective one: rather, the Court would determine an intention to discard from "*a series of objective indicators derived from the policy of the Directive*";[20] what is required from the national court, he said, is a value judgment on the facts of the case in the light of those indicators. He found in favour of OSS on that basis, stating that "*it should be enough*" that the holder has converted the waste material into a distinct, marketable product, which can be used in exactly the same way as an ordinary fuel, and with no worse environmental effects.[21]

21. Those factors were used simply as those which in this case fulfilled the end of waste test: the court did not definitively lay down a single, easily applicable and predictable test for when a substance would achieve the status of ex-waste. Indeed, Carnwath LJ stated that it would be wrong for the domestic court to fill the gap and provide one where the European Court had declined to do so.[22] Unfortunately for waste handlers, this means that little more legal certainty was achieved: it will always be open to the regulator to argue that different factors should apply in any particular case. Moreover, as his Lordship acknowledged, the test he used gives the court – and so the potential waste holder – the problem of finding an appropriate comparator.[23]

22. In any event, he encouraged DEFRA and the Agency to formulate some practical guidance for the assistance of waste handlers. It appears that the Agency has taken this to mean guidance for those dealing with waste oils alone, and not more generally.[24]

The new WFD: End of waste

23. The Directive has amongst its primary purposes the clarification of the definition of waste, recovery and disposal and the introduction of an approach that "*takes into account the whole life-cycle of products and materials and not merely the waste phase…thereby strengthening the economic value of waste*". The recovery of waste should be encouraged, it states, as well as "*the use of recovered materials*". "*Waste often has value as a resource*", says the new Directive at **recital 18(a)**, "*and the further application of economic instruments may maximise environmental benefits*".

24. **Recital 13** pledges to modify the definitions of recovery and disposal in order to ensure a clear distinction based on "*a genuine difference in environmental impact through the substitution of natural resources in the economy*". The Directive is keen to encourage recovery "*in order to conserve natural resources*".[25]

25. To that end, it has finally formulated a test for the end of waste. However, according to **Article 3c**, this will apply to "*certain specified waste*" alone. As long as it has undergone a "*recovery operation*" and complies with certain criteria, it will be considered no longer waste. Those criteria are to be developed, in accordance with the conditions set out:

    (a) the substance is commonly used for the specific [better: specified] purposes;

[20] *Mayer Parry*, Opinion of AG Alber at para 109
[21] *OSS* at para 63
[22] *OSS* at para 67
[23] *OSS* at para 65
[24] EA Document Regulation of Waste Oil: Interim Arrangements, 19 September 2007 (http://www.environment-agency.gov.uk/commondata/acrobat/interim_arrangements_1865514.pdf)
[25] Recitals to New Waste Framework Directive, Council document 12463/07 ENV 445 CODEC 869, 30 August 2007

(b) a market or demand exists for the substance;
(c) the substance fulfils the technical requirements for the specific [better: specified] purpose and meets the existing legislation and standards applicable; and
(d) the use of the substance will not lead to overall adverse environmental or human health impacts.

26. The problems with the definition are immediately obvious:

(a) What if the product has more than one specified purpose?
(b) What criteria are to be used to determine what counts as "*commonly used*"?
(c) What does it mean that a substance will "*overall*" not lead to adverse environmental impacts? It should be noted that this condition is not comparative: does this mean that a substance has to have no adverse environmental impacts, even though the natural substance which it replaces has some? Or does it mean that a secondary substance may have some adverse impacts, even if they are worse than those produced by the natural product, as long as "*overall*" its impact is acceptable?

27. The Article has been contentious: Denmark wants to delete it entirely and have the definition thrashed out through co-decision. Austria has suggested an answer to the last problem to give the condition a comparative flavour: it wants the secondary substance to contain no more pollutants than the comparable primary substance. The Czech Republic has suggested a recital which seems aimed almost directly at the situation dealt with in SRM and OSS, stating that "*In principle, waste destined for incineration or co-incineration will not cease to be waste until the completion of incineration or co-incineration. However,…if waste is processed so that it is the same as primary fuel (so that it can be hardly distinguished from such material) then it can no longer be waste.*" This seems a test as stringent as the Agency's in OSS, which wanted the two products essentially to be identical. The Czech example is that of "*bio-diesel recovered from used cooking oil which meets the requirements of Community legislation*".

28. In any event, the criteria according to which those conditions are to be met, and the wastes which is entitled to take advantage of the end of waste Article, are of course yet to be determined. Moreover, the Article only applies to certain, specified wastes. In the meantime, and for waste where no criteria have been set out, Member States may decide case by case whether a certain waste has ceased to be waste, "*taking into account the applicable caselaw*".

29. How will the Directive affect the decision in *OSS*? Probably not at all: each case will still be looked at in the round and on its own facts. The new Directive does indicate that the Court of Appeal was on the right track in the factors it chose. The main worry, however, is the lack of a comparator in the Directive for adverse environmental impact. *OSS* determines that a secondary substance may be "*no more*" polluting than the primary substance it is intended to replace. It may be arguable, on the basis of the new Directive, that in fact the European standard is higher than that. The impact remains to be seen: it is clear that, given the continued dispute over the Article itself, the development of criteria under it will be difficult and contested. National courts will have to muddle through as they always have. This will not solve the problem of widely differing decisions by national courts on the same facts, and subsequent burden on the companies concerned.

The new WFD: By-products

30. From the end of waste to the beginning: when does a substance become waste at all? The Court has been reluctant write off any substance resulting from a production process which was not the primary aim of that process: to do so would not encourage the use of such "*by-products*" in the economy.

31. Despite the Commission's original position that the definition of a by-product was better left to guidelines rather than be contained within the Directive,[26] **recital (14)** states that there "*should be no confusion between the various aspects of the waste definition and appropriate procedures should be applied, where necessary, to by-products that are not waste on the one hand or to waste that ceases to be a waste on the other hand.*" The Directive is intended to clarify when "*substances or objects resulting from a production process not primarily aimed at producing such a substance or object are by-products and not waste*".

32. **Article 3a** states that such a substance as a by-product rather than as waste as long as

    (a) Further use of the substance is "*certain*"
    (b) The substance can be used directly without any further processing other than "*normal industrial practice*";
    (c) The substance is produced as an "*integral part*" of a production process; and
    (d) Further use is "*lawful*", i.e.:
        (i) the substance fulfils all relevant product, environmental and health protection requirements for the specified use and
        (ii) will not lead to overall adverse environmental or human health impacts.

33. This, essentially, codifies the previous caselaw in **C-9/00 *Palin Granit* [2002] I-03533.**

34. It is to be presumed that the Court's explanation of the phrases such as "*certain*", without any further processing, and "*integral part of a production process*" will still prevail. For example, if a further recovery process is needed before the material can be used, it is evidence that the material remains a waste until the process is completed: **C-114/01 *AvestaPolarit Chrome Oy* [2003] ECR I-8725**, which was heard with *Palin Granit*.

35. The Commission's Interpretative Communication gives a decision tree for the determination of whether a substance is a product, by-product or waste, as follows:[27]

    (a) Is use of the material lawful? If not, it is a waste;
    (b) Was the material deliberately produced? If it was, it is a product and the enquiry ends there; if not, a production residue which may be a by-product or a waste;
    (c) Is use of the material certain? If not, it is a waste;
    (d) Is the material ready for use without further processing (other than normal processing as part of the production process)? If not, it is a waste;
    (e) Is the material produced as an integral part of the production process? If not, it is a waste.

    If all these steps are fulfilled, the material will be a by-product and not a waste and is not subject to the waste controls.

36. Austria wants these criteria to be minimum requirements, allowing Member States to impose more stringent requirements if they wish. The Article also provides for European measures to be adopted by committee to determine when specific substances are to be regarded as by-products and not waste.

37. It should be noted that the Commission believed that the environmental impact of using a substance was relevant to whether it should be considered a waste: for example, if the use of it

[26] See Commission Communication on the Interpretative Communication on Waste and By-Products COM (2007) 59 final
[27] Ibid at Annex II

requires special environmental protection measures or has a high environmental impact, it will be a waste.[28] Such use might be "*lawful*" within the meaning of the Article but could carry a great risk of environmental damage. Would it, following the implementation of the Directive, be open to the national court to find that such a product fulfilled the requirements of Article 3a and so was a by-product and not a waste.

Municipal incinerators

38. We have already seen that incineration can be classified either as a disposal operation or as a recovery operation; it will be a recovery operation if it involves the use of waste "*principally as a fuel or other means to generate energy*". Incineration is one of the ways in which municipalities deal with waste, rather than sending it to landfill. Should they be allowed to classify that incineration as waste recovery?

39. In **C-228/00 *Commission v Germany* [2003] ECR I-1439** the Court stated that this meant

(a) that the "*main purpose*" of the operation is to generate energy from the waste;
(b) that the conditions in which the operation takes place "*give reason to believe*" that it is indeed a means to generate energy; that is, that the energy generation by the combustion of waste greater than that consumed, and that the energy was to be used immediately in the form of heat or after processing in the form of electricity;
(c) The greater part of the waste must be consumed and the greater part of the energy must be recovered and used.

In the *Germany* case the waste was destined for cement kilns in Belgium, and the Court had no difficulty in determining that it was therefore destined for a recovery operation.

40. In **C-458 *Commission v Luxemburg* [2003] ECR I-1439**, however, the waste was household waste heading for the incinerator of the municipality of Strasbourg. Since the primary purpose of the plant was "*thermal processing with a view to the mineralisation of the waste*", and the plant was therefore designed to dispose of waste, incineration of waste in that plant could not constitute a recovery operation – even though reclamation of the heat generated was a secondary effect of the operation. The Court indicated the sort of evidence required: that the plant would have had to operate using an primary energy source if not supplied with waste, or that the plant paid for the delivery of the waste.[29]

41. The new Directive puts these criteria on a much more scientific footing. **Recital 13(a)** currently states that the Directive should "*clarify when the incineration of municipal solid waste is energy efficient and can be considered a recovery operation*". **Annex II** now specifies that in order for municipal incinerators will be considered as recovery operations within the meaning of R1, their energy efficiency must be above a certain limit; the Annex also provides the formula for energy efficiency. **Article 35** provides that guidelines for the interpretation of the definitions of recovery and disposal may be developed by the Commission, and "*the application of the formula for incineration facilities referred to Annex II R1 shall be specified*."

[28] Interpretative Communication at paragraph 3.4.1

[29] The context of both cases was Regulation (EC) 259/93 on Shipments of Waste between Member States, which provides that either the dispatching or the destination state can object to the shipment if the ratio of recoverable to non-recoverable waste, the value of the recovered waste, and the attendant costs of disposal, did not justify the recovery environmentally or economically.

42. It remains to be seen whether the courts will continue to apply the other conditions in *Commission v Germany* and *Commission v Luxemburg*, or whether the energy efficiency formula will replace them entirely.

The end of Van de Walle

43. In *Van de Walle* the petitioners were the responsible staff of the Texaco petrol company who had been prosecuted for allowing the soil close to their petrol station to become contaminated by leaking hydrocarbons. As well as determining, unsurprisingly, that the notion of "*discarding*" included the accidental spilling of hydrocarbons, the court also determined that the soil which had become contaminated was itself waste – even if it had not been excavated but remained in situ. The practical effect of this is that anyone sitting on land contaminated by spilled products would potentially be liable to hold a waste management licence. The potential for confusing overlap with the contaminated land regime is obvious.

44. Article 2(1) of the new directive lists those substances which are excluded from its scope: including, at **Article 2(1)(b)** "*land (in situ) including unexcavated contaminated soil and buildings permanently connected with land*".

45. Austria has suggested a new recital stating [in what seems a rather provisional translation] that "*The exclusion of land in situ does not restrict the possibilities of the Member States to apply waste legislation on land*", perhaps designed to encourage stringency on the part of Member in their treatment of contaminated soil. Once the land is excavated, however, it will presumably become "*movable property*", the subject of the presidential suggested recital relating to the Article: "*Effective and consistent rules on waste treatment should be applied, subject to certain exemptions, to movable property which the holder discards or intends or is required to discard."* Both these recitals seem somewhat superfluous.

Conclusion

46. The new WFD does not lay down any easy definition for the end of waste, and the courts are likely to continue to apply the approach followed by the Court of Appeal in OSS. It remains to be seen just how effective the codified definition of by-products will be, and if the courts will continue to apply the existing jurisprudence or use the Directive as a jumping-off point for re-arguing the issues within the new framework. As for municipal incinerators, it also remains to be seen whether energy efficiency will be the last word on whether the combustion of household waste will be regarded as a recovery or a disposal operation. Indeed, the only clear-cut determination made by the Directive is the outright rejection of the Court's decision in *Van de Walle*. Despite the new Directive's purported aims to clarify and define the definitions current in the Directive, it leaves plenty of scope for future litigation. We await any comments and amendments by the European Parliament with bated breath.

"MUDDY WATERS"

NUISANCE, NEGLIGENCE AND HUMAN RIGHTS: WHEN DOES THE STATUTORY PROCESS PRECLUDE A CAUSE OF ACTION?

Jeremy Hyam

Introduction

1. The intersection between the statutory and common law duties of care owed by a public body has long been a muddy pool in the coherent development of the law. What happens when a specific duty of care ascribed to a public body under statute seems to give rise to a parallel duty of care in common law? Does breach of that statutory duty allow a Claimant to recover damages for the breach? Does it depend on whether the common law duty owed is in nuisance or negligence?

2. The pool has been muddied yet further by the development of human rights jurisprudence, particularly in the ever-widening area of Article 8 of the ECHR. What difference does it make to the equation where there is an apparent contravention of the Claimant's human rights?

Common law negligence and statutory powers

3. Since the House of Lords decision of ***X v Bedfordshire CC* [1995] UKHL 9** (the effect of which has been much diminished over the past 10 years by a series of cases such as ***Barrett v. Enfield*, *Gorringe v. Calderdale***, ***JD v. East Berks*** etc), the courts have been grappling with when a common law duty of care in negligence can co-exist with a statutory power which does not, on its face, create a private law cause of action.

Common law nuisance and statutory powers

4. In cases based on nuisance, environmental lawyers have been grappling with ***Marcic v Thames Water Utilities Ltd* [2004] AC 42** which suggests that a duty to avoid ***Leakey*** nuisance, is inconsistent with the statutory scheme under s.94(1)(a) of the Water Industry Act..

5. *Leakey* nuisance, or the *Leakey* principle, may be stated as follows:-

> "*the occupation of land carries with it a duty to one's neighbour. An occupier must do whatever is reasonable in all the circumstances to prevent hazards on his land, however they may arise, from causing damage to his neighbour*"

Dobson: meeting of the principles

6. The case of *Dobson*, recently heard before the TCC (Ramsey J) is of interest because the two lines of authority intersect and shed new light on the extent to which common law duties can co-exist with statutory powers. It is this case which I am going to focus on in this talk. The full reference for the case ***Hanifa Dobson v Thames Water Utilities* [2007] EWCH 2021 (TCC)**.

The common law background for negligence claims: X v Bedfordshire et al.

7. Before I discuss the case of *Dobson*, I should outline the recent case-law in relation to the existence of common law duties in negligence in and around the exercise or discharge of statutory powers and functions.

8. The starting point for this discussion is the HL decision in ***X v Bedfordshire***, where Lord Browne-Wilkinson said that a claimant could have a cause of action flowing from the careless exercise of

statutory powers or duties, as long as he can show that the circumstances are such as to raise a common law duty of care. He was careful to draw a distinction between:

a) the exercise of a statutory *discretion,* and

b) implementing a statutory duty in practice.

(An example of (a) would be a decision whether or not to exercise a statutory discretion to close a school; whereas an example of (b) would be the actual running of a school pursuant to the statutory duties.)

9. If the issue concerns the latter - the implementation of a statutory duty in practice – it was held that the common law duty to take reasonable care *could* arise.

10. If the issue concerns the exercise of a statutory *discretion* built in to the Act – the general rule was said to be that it is for the public authority, not for the courts, to exercise the discretion. Therefore the issue will not be actionable at common law.

11. The rationale for this distinction is that the local authority should not be liable in private law for damages for doing that which Parliament has authorised by statute.

12. However, if the decision complained of relates to a matter of statutory discretion but the decision in fact falls *outside* the statutory discretion (e.g. it is *ultra vires*), it *can* - but not necessarily will - give rise to common law liability.

Thus in ***Barret v. Enfield*** **[2001] 2 AC at 572**, Lords Slynn said:-

> "*A claim of negligence in the taking of a decision to exercise a statutory discretion is likely to be barred, unless it is wholly unreasonable so as not to be a real exercise of discretion, or if it involves the making of a policy decision involving the balancing of different public interests*;"

13. However he continued:-

> *"acts done pursuant to the lawful exercise of the discretion can, however, in my view be subject to a duty of care, even if some element of discretion is involved*."

14. The difficult question of when a cause of action in negligence can exist in conjunction with a statutory power - if that statutory power does not expressly create a private law cause of action - was further illuminated by Lord Steyn in his speech in ***Gorringe v. Calderdale Metropolitan Borough Council*** **[2004] 1 WLR 1057 at 1059**. After review of the line of cases from ***X v. Bedfordshire***, ***Stovin v. Wise***; ***Phelps v. Hillingdon LBC*** he said:-

> "*There are two comments on these decisions I would make. First, except on a very careful study of these decisions, there is a principled distinction which is not always in the forefront of discussions. It is this: in a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether statute excludes a private law remedy. An assimilation of the two inquiries will sometimes produce the wrong results."*

15. Lord Hoffman in the same case said this at [38]:

> *"In such cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty. A hospital trust provides medical treatment pursuant to the public law duty in the 1977 Act, but the existence of its common law duty is based simply upon its acceptance of a professional relationship with the patient no different from that which would be accepted by a doctor in private practice. The duty rests upon a solid, orthodox common law foundation and the question is not whether it is created by the statute but whether the terms of the statute (for example in requiring a particular thing to be done or conferring a discretion) are sufficient to exclude it. The law in this respect has been well established since* ***Geddis v. Proprietors of Bann Reservoir*** **(1878) 3 App Cas 430**."

16. Finally, and again from the same case, is Lord Scott who at [71] said:

> "*In my opinion, if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there. If the policy of the statute is not consistent with the creation of a statutory liability to pay compensation for damage caused by a breach of the statutory duty, the same policy would, in my opinion, exclude the use of the statutory duty in order to create a common law duty of care that would be broken by a failure to perform the statutory duty"*

Common law nuisance and Marcic

17. Many if not all of you will be familiar with case of *Marcic*. In a nutshell, Mr Marcic, a homeowner, brought a claim against Thames Water hoping to be awarded damages in respect of the repeated flooding of his property with sewage which was caused by the overloading of the nearby sewers.

18. The claim was brought on the twin bases of common law nuisance and with human rights (namely Article 8 – the right to respect for private and family life, and article 1 of the First Protocol – the right to peaceful enjoyment of possessions). Both of these breaches, in respect of Mr. Marcic's case, mirrored *a specific statutory duty* owed by Thames Water under s.94(1)(a) of the Water Industry Act 1991 to members of the public: namely to '*improve and extend its sewerage system*, *so as to ensure that the local area is effectively drained*' (and thus, by necessary implication, guarding against the flooding of sewage).

19. The House of Lords found against the Claimant in *Marcic*. One key aspect of their decision was that the *means of enforceability* for the statutory duty in question was *specifically prescribed elsewhere in the relevant Act*. Specifically, s.94(3) of the Water Industry Act directs any person affected by a breach of that duty to seek an enforcement notice against the undertaker from the Director of Water Services at Ofwat, using the procedure set out under s.18.

20. Lord Nicholls referred to the case of ***Robinson v Workington Corporation*** **[1897] 1 QB 619**: a 19th Century authority with similar facts to *Marcic*. It was obviously decided pre- the Water Industry Act, but the Public Health Act 1875 contained a similar duty and a mechanism for enforcement (which was then to seek a 'writ of mandamus' from the Local Government Board as the equivalent of a notice of enforcement.) He quoted Lord Esher MR who said (p.61):

> 'It has been laid down for many years that, *if a duty is imposed by statute* which but for the statute would not exist, and a remedy for default or breach is provided by the statute that creates the duty, that is the *only remedy'*.

21. With respect to the *Marcic* case: not only does s.18 of the Act set out a procedure for obtaining an enforcement order, but it goes on further to ring-fence this procedure by *explicitly limiting the availability of other remedies available*. s.18(8) states:

> '*Where any act or omission constitutes a contravention of…a statutory or other requirement enforceable under this section, the only remedies for that contravention, apart from those available by virtue of that section, shall be those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting such a contravention*.'

22. The Lords took the view that the nature of the Defendant, and the existence and contents of the relevant statute in *Marcic*, distinguished it from the *Leakey* line of cases (***Leakey v National Trust* [1980] QB 485**), and thus exempted it from the principle of nuisance liability upheld in those cases: namely that where an occupier of land has knowledge of a hazard to another landowner posed by the accumulation of a substance on its land, it has a duty to take such steps as are reasonable in all the circumstances to discharge it. As Lord Nicholls put it:

> '*Thames Water is no ordinary occupier of land' and its 'obligations regarding these sewers cannot sensibly be considered without regard to the...statutory scheme'*.

23. The second issue considered by the Lords in *Marcic*, was the viability of the human rights claim. The respective judgements of Lord Nicholls, Lord Hoffmann and Hope (Lords Steyn and Scott concurring) stated that the reasoning was similar to that used in respect of the common law claim: that precedence should be given to the prescribed statutory scheme for enforcement, as long as that scheme strikes an appropriate balance between the needs of the individual and the community. As Lord Hope put it, in relation to the scheme set out in s.18 of the Water Industry Act:

> '*Parliament has decided that the most appropriate method of achieving a fair balance between the competing interests of the individual and the community is by means of a statutory scheme administered by an independent expert regulator, whose decisions are subject to JR if there is a doubt as to whether the necessary balance has been struck in the right place'*. (Para 77)

24. Lord Hope noted that 'the European Court has repeatedly recognised the value to be attached to the process of review by a judicial body that has full jurisdiction' (para 83). He also pointed to ECHR authorities such as ***Hatton v UK*** which accord the Convention a subsidiary role in respect of the implementation of social and economic policies by state legislatures, giving them a 'wide margin of appreciation' (para 84). [***Hatton v UK:* Application No 36022/97**, 8 July 2003 (a case concerning a complaint made under article 8 about aircraft noise from night flights at Heathrow)]

25. In assessing the adequacy of the statutory scheme, the Lords looked at the particular *route to enforcement* set out in s.18 and the nature of the obligation on the Director to make an enforcement order in similar cases. They commented on the balancing act that needs to be undertaken by the Director of Ofwat between the interests of individual homes at risk of flooding, and interests of the company's customers who have to pay for the cost of works to alleviate that risk.

26. They looked at the *issues pertaining to enforcement* in the particular case brought by Mr Marcic, in particular the significant financial implications of requiring Thames Water were to carry out remedial work (essentially, to build new sewers). They took into account a report by the Director of Ofwat estimated the cost at £50-70,000 per property, amounting to a total of £1 billion, without taking into account future house building.

Dobson

27. It is against the background of these two lines of authority on nuisance, negligence and statutory powers that we now have the decision of Ramsey J in *Dobson.*

28. This was a trial of 14 preliminary issues based on assumed facts. The claim was brought as a group action by a large number of residents of Isleworth and Twickenham who live near the Mogden Sewage Treatment Works, run by Thames Water. Their complaint was/is that odours and mosquitoes from the Sewage Works have caused them a nuisance, and their case is that the cause of that nuisance was Thames Water's negligence in failing to treat the sewage properly. In addition to nuisance and negligence, they sought damages under the Human Rights Act for breach of their rights under Article 8 and article 1 of the First Protocol.

29. One element of Thames Water's defence was that the complaints of nuisance and negligence in the case amounted to a complaint that it had breached its duties under s.94(1)(b) of the Water Industry Act 1991, in '*failing effectually to deal with the contents of the sewer'*. A cause of action (whether in nuisance or negligence) to seek a remedy in respect of such a breach was therefore precluded by the decision in *Marcic*.

30. The Claimants contended that they were not, in fact, seeking to enforce those statutory duties – for the following reasons:

    a) The obligation under s.94(1)(b) is only concerned with "effectually dealing with the contents of the sewers" and that this does not extend to environmental protection issues.

    b) A duty to "maintain or cleanse" does not exist under the s.94(1)(b) and cannot be implied, and as such s.94(1)(a) is distinct from s.91(4)(b);

    c) Effectually dealing with the contents does not extent to treatment of the contents; it relates to the task of getting rid of the contents, or administering them, and claimed that this interpretation is supported by ***British Waterways Board v Severn Trent Water***.

    d) Moreover, the Claimants sought to distinguish the case from *Marcic* on the basis that capital expenditure was not required to deal with the problem in the same way; *Marcic* was essentially a case to determine whether or not Thames Water should be required by a court to increase their capacity by building more or better sewers; whereas this case was about the need for sewage works to be cleaned and maintained so that they have "better environmental controls", and this falls outside of *Marcic.*

    e) The Claimants contended in the alternative that, even if they were seeking to enforce s.94(1)(b) duties, then the effect would be to allow Thames Water to cause a nuisance, which could not have been parliament's intention. They referred to a DEFRA Code of Practice on Odour Nuisance from Sewage Treatment Works, which sets out the practice to be followed by local authority environmental health officers in respect of statutory nuisance proceedings under s.80 of the Environment Protection Act, and pointed out that Ofwat did not seek to argue about that enforcement regime in their response to DEFRA's consultation on the Code.

31. Thames Water denied all of those contentions.

    a) As for the contention that 'effectually dealing with' sewage did not include treatment of the sewage, they asserted that it *did*, and in so doing relied on the provision of the Urban Waste

Water Treatment Regulations (1994) which implemented an EC Directive by amending s.94 WIA, naming 'treatment' of sewage as being within the duty imposed by subsection (1)(b).

b) They did not accept that s.94(1)(a) and (b) were distinct provisions for the purposes of enforcement of the statutory scheme, but contended that they were in fact closely related.

c) They concurred with the Claimants that the effect of s.94(1)(b) was to give them the statutory right to commit a nuisance without contention, and argued that there is nothing objectionable about that as it was simply the effect of *Marcic*.

d) They rejected the Claimant's argument that the claim could be distinguished from *Marcic* on the basis that it did not require them to dedicate more resources to address the problems at the Mogen Sewage Works. Capital expenditure would be required to deal with the problem, and this was the realm of Ofwat.

32. Ofwat supported Thames Water's submissions in respect of the question of whether the Claimants were seeking to enforce a statutory duty and added that there was nothing in the DEFRA Code could not affect the proper construction of s.94(1)(b).

33. Ramsey J's findings on the key issues in the case were as follows:

(a) That the Claimants *were* seeking to enforce duties which arise under section 94(1)(b) of the Water Industry Act in respect of odours from Mogden STW and/or Mosquitoes which live and breed *as a result* of sewage or sewage sludge at Mogden STW and/or the plant or equipment holding or treating such sewage or sludge.

(b) The Claimants were precluded from bringing a claim in nuisance, *absent* any negligence by reason of the principle in *Marcic*.

(c) The Claimants were precluded by the principle in *Marcic* from bringing claims for nuisance involving allegations of negligence or based on negligence under the HRA where the exercise of adjudicating on that cause of action *is inconsistent and conflicts with* the statutory process under the WIA.

(d) The extent to which the claims in negligence were "*inconsistent and in conflict with"* the statutory process under WIA was "*a matter of fact and degree*" not suitable for disposal as a preliminary issue. Having said that, causes of action based on the physical operation and/or operational management of the works are not likely to be precluded but that will depend on the facts.

(e) Damages for nuisance might confer a sufficient remedy on those with a legal right to occupy such as to disentitle those living in the same household without such a legal right to a separate remedy under Article 8 and/or the HRA. When the court awards damages for nuisance to those with a proprietary interest those damages will usually afford just satisfaction to partners and children but that there might be circumstances where they will not.

Comment

30. There are three matters which are noteworthy about these conclusions:

i. First, Ramsey J. has fashioned a entirely pragmatic outcome to the preliminary issues which permits the Claimants claims to continue to the extent that (i) they are based on negligence or human rights involving negligence and not nuisance and (ii) they are based on operational as opposed to policy matters, but in deference to the fact that there is no bright line between policy and operational matters, he has concluded that it is a matter of "fact and degree" only suitable for determination after hearing the full facts.

ii. Second, despite his conclusion above, it is clear that he felt that those matters which were essentially operational would give rise to a cause of action.

iii. Third, he upheld the Defendants arguments that there could be no separate claims for children under the HRA, at least on the one case he had pleaded before him, which involved the child of parents who were making a nuisance claim. The parents' award for nuisance would be just satisfaction for any alleged infringement of the child's rights. He did not though exclude the fact that there may be circumstances which give rise to such separate claims, and although he did not give examples, the sort of examples raised by the Claimants were foster children, and lodgers. This matter remains to be determined at the substantive hearing.

The primary issue: a duty of care co-existing with a statutory duty

31. From the above authorities it should be reasonably clear that the reason why such claims as were being brought by the Claimants should co-exist with the statutory duty under WIA s.94(1))(b) is because the statutory framework does not exclude, nor is it inconsistent with the existence of a private law cause of action for breach of duty at common law. This follows from the line of authorities that runs from ***X v Beds*** to ***Gorringe v. Calderdale***.

32. The superficially surprising conclusion that, having accepted that the Claimants *were* attempting to enforce duties under the statutory scheme viz. the effectual cleaning of sewers, he should nonetheless held that:

a) there co-existed a common law duty in respect of the discharge of that statutory duty; and

b) that the extent to which such co-existent common law duty survived the decision of *Marcic*, was the policy/operational distinction about which (as he recognised at [141]) Lord Browne-Wilkinson's had expressed clear reservations in ***Barrett v. Enfield*** **[2001] 2 AC 557**;

is explained by the fact that *Marcic* is properly only dealing with nuisance under the *Leakey* principle, the existence of which cause of action was held to be inconsistent with the statutory scheme. Not so claims in negligence in respect of the discharge of the statutory duty to effectually clean the sewers.

33. The decision is perhaps best explained by drawing the important distinction recognised by Lord Steyn in *Gorringe*: "*whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether statute excludes a private law remedy.*

34. *Marcic* was a case which more conveniently falls into the former category, or at least is a case where the duty in nuisance is inconsistent with the statutory scheme and it cannot have been envisaged that the statute intended to create a private law right to compensation for such nuisance.

35. By contrast, *Dobson* falls into the latter category. This was a case where negligence was framed against the background of a statutory power. The relevant question for Ramsey J. was essentially

whether the statute *excluded* a private law remedy or was inconsistent with it. His answer, that it did not, was (it is respectfully suggested) correct.

36. As to the scope of the duty, should it have been limited to operational matters? Again (it is respectfully suggested) the judge was right. The distinction may however better be described not as the policy operational distinction (see e.g. ***Dorset Yacht***) but rather the distinction recognised in ***Rowling v. Takaro Properties Ltd* [1988] AC 473, 501G** where the Privy Council held that:

> "*It is only where the decision involves the weighing of competing public interests or is dictated by considerations which the courts are not fitted to assess that the courts will hold that the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory discretion*."

37. The close analysis of what *Marcic* did and did not decide is helpful. Notably, the observation of Lord Nicholls, Lord Hoffman and Lord Hope, that s.18(8) of the WIA did not rule out the existence of "other remedies" except insofar that a cause of action for *Leakey* nuisance was inconsistent with the duty under s.94(1)(a).

38. As a result the muddy waters created by the different strands of common law authority on negligence and nuisance co-existing with statutory powers, are now perhaps a little clearer.

JOB ADS

For those who have an environmental law job to advertise, e-law is a cost effective way of reaching over 1,000 people with relevant skills and interest. Advertising your job in e-law costs £200, with £50 for NGOs, academic institutions and statutory bodies including local authorities.

You will need to be mindful of e-law's publication dates when planning to place an advert, although we can also include them in the members' mailings which we circulate in between editions of e-law. My email is catherine.davey@stevens-bolton.co.uk and I'm happy to discuss your requirements.

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STUDENT SOCIAL AND CAREERS INFORMATION EVENING

Over fifty students enjoyed mince pies and wine with professionals working in a variety of environmental law fields at UKELA's annual student social and careers evening.

Our thanks go to those who talked to the students for the three hour event: government lawyers; Environment Agency; Friends of the Earth; the Foundation for International Environmental Law and Development; No 5 Chambers; Freshfields Bruckhaus Deringer; S.J. Berwin; the Environmental Law Consultancy; WSP; Watermans Environmental.

Students, the majority studying law but others more interested in environmental management, came from all over the country including Cardiff, Oxford, Nottingham, Lancaster, Plymouth, Bristol and many from London.

Students said afterwards that it was so much better to be able to meet people and find out how they got where they are now, rather than just reading about organisations on websites. For some it redirected their career plan and helped them identify opportunities for work experience.

UKELA is grateful to Freshfields for hosting this event which was free of charge to ensure as many students as possible would be encouraged to attend.

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OPPORTUNITIES FOR STUDENTS

UKELA's student membership is growing rapidly and we have some great offers and opportunities for students this academic year.

Please could you help by distributing the information in this mailing to any students with a potential interest in environmental law. They may be studying subjects other than law so please do share the materials as widely as possible.

STUDENT COMPETITIONS

Now the Christmas holidays are on the horizon student members (and your friends) please consider entering our student competitions. There are some great prizes and you don't have to be a member to enter. Please pass this on to others who may be interested.

1,000 WORD ARTICLE COMPETITION

The theme of the article is:

Theodore Roosevelt said:

The nation behaves well if it treats the natural resources as assets which it must turn over to the next generation increased and not impaired in value. Conservation means development as much as it does protection.

Was he right?

Your essay and completed form (see end) should be sent to Richard Kimblin, No5 Chambers, 76 Shoe Lane, London, EC4A 3JB (DX 449 Chancery Lane) and/or to rk@no5.com. You may send a hard copy, and electronic copy, or both, as you wish, but only electronic copies will receive an acknowledgment.

They are to reach him by 4pm on **25th January 2008, which is an absolute deadline.**

Prizes:
Free conference places at Kent conference in June to winner and runner up. Winner's article published in e-law.
Full details are on the website: http://www.ukela.org/groups_students_essay_page.shtml

MOOT

There are two mooting competitions:

The Lord Slynn of Hadley Mooting Trophy Competition is open to all those who as of 31st October 2007 are in pupillage, a trainee solicitor, on the bar vocational course or legal practice course, or who are taking the CPE. In essence this competition is for those on vocational courses

The UKELA Student Prize Moot is open to those who as of 31st October 2007 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.

Deadline for skeleton arguments – 4pm Monday 21st January.

Full details and the moot problem are on the website:
http://www.ukela.org/groups_students_moot_page.shtml

Cash and book prizes, plus trophies.

UKELA LONDON MEETING
Corporate Responsibility
Thursday 17th January 2008 at 6pm

At Herbert Smith
Exchange House
Primrose Street
Exchange Square
London EC2A 2HS

UKELA members are cordially invited to this early evening session where the subject will be **Corporate Responsibility**.

The speakers will be:

Maria Cull – Maria is a partner with the international law firm of K&L Gates LLP where she heads up the environmental law practice in London. She has significant experience advising on social and environmental risks associated with infrastructure projects in developing countries and has worked in Asia, Africa and the Middle East. She has advised extensively on the application of voluntary commitments such as the Equator Principles and the IFC Social and Environmental Performance Standards to project financing in non-OECD countries. *Chambers UK 2007* noted that Maria is *"tipped as being one of the leading international environmental lawyers in the UK."* She is also identified as a leading practitioner in *Chambers UK 2007*. Maria is a solicitor and has the New York Bar.

Alan Knight, OBE – Alan Knight has 15 years experience of understanding the impact and opportunities CSR and sustainable development provide to global retail.
He works with top level management and policy makers involved in the global retail and consumer products arena to help then develop the confidence, tools and inspiration to embed Sustainable Development within their product range and brand. He is the founder of "Single Planet Living Limited", a company that offers coaching and presentations on SD in retailing and commerce.
He is currently the Independent Sustainable Development Advisor to the Virgin Group, Wyevale Garden Centres, Fortnum and Mason and Furniture Village. For almost 3 years he was Head of SD for SABMiller, the world's second largest brewery.
From 1990 to 2000 he served as Head of Sustainable Development at B&Q, the UK's market leader in home improvement and part of the Kingfisher Group. Alan also works with Government. He co-chaired the UK Government's Roundtable on Sustainable Consumption; he serves on the UK Sustainable Development Commission and was for 6 years chair of the Government's Advisory Committee on Consumer Products and the Environment (ACCPE). He chaired DEFRA's Food Industry Ethical Trading Champions Group and DTI's Retail Innovation and Sustainability group. He sits on the technical advisory panel for Duchy Originals, is a Fellow of WWF UK and serves on the International board of the Forest Stewardship Council. He is former director of the Tropical Forest Trust.

The Meeting will be chaired by:

Begonia Filgueria – Begonia Filgueira is the founder and a director of Gaia Law, the environmental law consultancy. She is an environmental lawyer qualified both as Solicitor and Spanish Advocate and was formerly with Freshfields Bruckhaus Deringer. Begonia is currently a consultant to Northern Ireland's DOE working on cutting edge environmental legislation, Editor of Butterworth's' Encyclopaedia of Forms and Precedent's (EF&P) environmental law volume and teaches at City University. Begonia is also a Council member of UKELA.

The Meeting will last for approximately 90 minutes after which refreshments will be provided to enable those attending to discuss the issues informally.

Registration is 5.30 pm with seminar due to start at 6 pm.

1.5 CPD points will be available for all attending.

There will be a small contribution to cover costs at £10 for Members and £20 for Non-members. Students and Unwaged members are free. Your booking is not confirmed until a cheque has been received.

If you wish to accept please contact by e-mail Angela Pallett at Herbert Smith: angela.pallett@herbertsmith.com

All cheques should be made payable to UKELA and sent to:

UKELA
c/o Angela Pallett
Exchange House
Primrose Street
London EC2A 2HS
(DX 28 London)

UKELA "ANDREW LEES PRIZE" ESSAY COMPETITION

NAME: _____

NAME OF ACADEMIC INSTITUTION / CHAMBERS OR LAW FIRM: _____

CONTACT ADDRESS: _____

_____

DAYTIME TEL: _____

EMAIL: _____

The qualification for entering the competition is that you must be either a student, trainee solicitor, pupil barrister or be a solicitor or barrister with less than 2 years post qualification experience.

I confirm that I have read and understood the rules and I meet the criteria set out above.

……..
(Signed)

……
(Date)

UK Environmental Law Association (North East Region)

The UKELA North East Regional Group in association with the Chartered Institution of Wastes Management is pleased to announce an Environmental Law update seminar on Key Cases and Environmental Permitting. It will take place on Thursday 7 February 2008.

Speakers
Stephen Tromans of 39 Essex St: Environmental Law Update - Key Cases of 2006/2007
Jeremy Frost of the Environment Agency: The Environmental Permitting Regulations - What they mean to you

There will be an opportunity for discussion and networking afterwards with light refreshments.

Date: Thursday 7 February 2008

Time: 4.30pm – 7.00pm (speakers at 5pm)

Venue: Pinsent Masons, 1 Park Row, Leeds, LS1 5AB

CPD Points: 1

Cost:
Members £10
Non-members £20
Students free of charge although places are limited
All places must be booked.

Booking:
Please book your place by sending the attached form and cheque, payable to UK Environmental Law Association, to Alison Boyd, UKELA, Member Support Officer, PO Box 487, Dorking, Surrey RH4 9BH.

UKELA North East Region Seminar on Environmental Update and EPP

Thursday 7 February 2008

All places must be booked

I enclose a cheque for £ _____ payable to the UK Environmental Law Association

Fees:

UKELA members/CIWM members	£10
Non-members	£20
Students	free of charge

Name

Address

Firm/Organisation/Academic Institution

Email address

Phone number/mobile

UKELA member/CIWM member ☐

Student ☐

Other ☐

Please return this form with your payment (cheques payable to UK Environmental Law Association) to:

Alison Boyd
UKELA
Members Support Officer
PO Box 487
Dorking
Surrey RH4 9BH

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

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E - LAW

The editorial team wants articles, news and views from you for the next edition due to go out in February 2008.
All contributions should be dispatched to Catherine Davey as soon as possible by email at: catherine.davey@stevens-bolton.co.uk by 28 January 2008
Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.

Letters to the editor will be published, space permitting