Environmental Law Developments

a presentation by

STEPHEN TROMANS

Tuesday 1st March 2005

Tales of the riverbank ................................................................. 2
Crying over spilt milk ................................................................ 3
Flying feathers and bad smells – intermittent nuisances and evidence .......... 5
Proximity matters ..................................................................... 6
Bad vibes, man ........................................................................ 8
An unpleasant occurrence .......................................................... 9
Van de Walle – bombshell or wet squib? ....................................... 11
Challenges with the waste definition .......................................... 13
BPEO and Waste Objectives .................................................... 18
Contaminated land and Green Belt Policy ..................................... 19
Cockle-picking and other projects .............................................. 20
Railroading it through ... a reminder of the width of EIA .............. 21
More EIA – life after Wells .......................................................... 22
Yet more EIA – procedural irregularities ..................................... 23
The past year has seen a continued flow of developments in the field of environmental law, some domestic, others European. Together they indicate how complex and multi-faceted environmental law has become. There can be few areas of law where day-to-day practice involves such a broad consideration of public law, tort, EC law and criminal law. Various principles, old and new, have required consideration in the light of current problems such as flooding, conflicts between economic and environmental interests, and seemingly intractable issues such as waste disposal.

**Tales of the riverbank**

The Court of Appeal has confirmed that the ‘common enemy’ rule in nuisance, whereby an occupier of land is entitled to use or develop his land so as to prevent flood waters coming on to his land, and is not liable in nuisance if flood waters which would have entered his land consequently caused damage to another's land, does not in principle contravene the European Convention on Human Rights 1950 Art.8 and Protocol 1 Art.1. In *Arscott & Others v The Coal Authority & Another* [2004] EWCA (Civ) 892, [2005] Env LR 5 the appellants appealed against a decision dismissing their claims in nuisance against the respondents for damage to their property caused by flooding. The local council owned a large recreation area known as Grove Fields, in Aberfan, South Wales, which was susceptible to flooding. In 1972 the Coal Authority agreed with the council to deposit coal waste from an adjacent tip onto Grove Fields in order to raise the level to create a playing area. In October 1998 a river overflowed and caused damage to a number of residential properties in the vicinity. The Coal Authority and the council accepted that the raised level of Grove Fields was a material cause to the damage, however, claims for damages in nuisance were dismissed, primarily on the basis of the common enemy doctrine, and that it had not been reasonably foreseeable, at the time the work was carried out, that the infilling of Grove Fields might cause flood damage to the claimant’s properties. On appeal, the claimants submitted that: (1) the common enemy doctrine had no application on the facts because their properties were inland of the river and so they could not have been expected to take protective measures against the flooding; (2) the common enemy doctrine, if potentially applicable, should be more narrowly confined in light of the
court's obligation to protect the claimant's rights under the Human Rights Act; and (3) it had been reasonably foreseeable that the infilling of Grove Fields might cause flood damage to the claimant’s properties.

On July 13, 2004, the Court of Appeal dismissed the appeal, finding that it was a necessary premise of the claimant's case that the flooding of their properties was reasonably foreseeable, and therefore the waters of the river were a ‘common enemy’: the fact that the properties were some distance from the riverbank possessed no legal significance, and the common enemy doctrine applied. The Human Rights Act submissions were irrelevant to the claims at issue, as the Act had not been in force at the relevant time. In any event, the application of the common enemy doctrine was not, in principle, contrary to Art. 8 of the European Convention. First, the doctrine struck a balance between the right of an occupier of land to do what he liked with his own property, and the right of neighbours not to be interfered with. Secondly, the rule balanced the interests of persons whose homes and property were affected and the interests of the general public (in accordance with Marcic v Thames Water Utilities Ltd [2003] UKHL 66). Thirdly, the doctrine also satisfied the principle in Sporrong & Lonnroth v Sweden ((A/52) (1983) 5 E.H.R.R. 35), whereby the court had to determine whether a ‘fair balance’ had been struck between the public interest and the protection of the individual’s fundamental rights. Neither had the flood damage been reasonably foreseeable at the time that the works had been carried out: the flood risk had not been identified by any of the public authorities at the time, and it had taken a great deal of expert analysis to even establish that the infilling was "probably" causative of the damage.

Crying over spilt milk

Guidance on the extent of liability under section 217(3) of the Water Resources Act 1991, whereby liability may arise where a breach of inter alia section 85(1) is due to the act or default of another, has been provided by the Divisional Court in the case of Express Ltd v Environment Agency [2004] EWHC 1710 (Admin), [2005] Env LR 6. The appellant had been convicted under the 1991 by the Redditch Justices, and appealed by way of case stated. The appellant had a dairy depot where it permitted one of its customers to take delivery of cream from an outside supplier. Delivery was
taken by transferring a ‘grundy’ (a kind of drum on wheels) from an articulated lorry to a transit van by using a forklift truck. On one occasion, a vat of cream accidentally toppled over while being transferred to the van. Despite efforts to control the spread of the cream some entered the controlled waters of a brook via surface water drains. The cream resulted in discolouration for 150-200 metres, increased bio-chemical oxygen demand, an increased level in suspended solids, and increased ammoniacal nitrogen. The Depot Manager gave evidence that he had not been aware of any similar incident during his employment of seven years. Although there had been a general risk assessment, no prior thought appears to have been given to reducing the risk of spillage, or to prevent environmental damage should a spillage occur.

The customer pleaded guilty to a charge under s.85(1), whilst the appellant unsuccessfully argued before the magistrates that the cream that escaped was not a "polluting matter" for the purposes of s.85(1) and that having regard to the limited amount that escaped and its prompt reaction to the spillage it should not be held liable under s.85(1) or s.217(3). On appeal, two issues fell to be decided by the Divisional Court: first whether the commission of the offence under s.85(1) was due to the act or default of the appellant; and secondly, whether, on the Justices' findings, cream was "polluting matter" within the meaning of s.85. The appellant submitted that in order for it to be guilty of an offence under s.217(3) the commission of the offence by its customer had to be shown to be due to the act or default of the appellant, and it had been under no statutory duty to carry out a risk assessment in relation to the cream transfer operation nor any duty to prescribe how the customer carried out this out. The appellant further submitted that its customer had not contravened s.85(1), as the Justices had found that the cream that entered the water had done no harm, so that there could be no contravention of s.217(3), contending that "polluting matter" was not defined in the Act and that the matter would only be “polluting” if it caused harm.

On July 15, 2004, Kennedy LJ gave the main judgment dismissing the appeal. He found that in order to establish liability under s.217(3), the prosecutor had been required to show that the customer's contravention of s.85(1) had been due to an act or default of the appellant. The instant case could be distinguished from Welsh Water Authority v Williams Motors (Cymru) ((1989) C.O.D. 14) as in the instant case the magistrates had identified a number of defaults by the appellant. There was a statutory
duty to act because there was a duty not to cause or knowingly permit polluting matter to enter controlled waters under s.85. If a landowner, such as the appellant, was going to permit an operation on his land which gave rise to a risk of pollution then, in order not to fall foul of s.85(1), he had to carry out a risk assessment and respond to what that assessment revealed. Otherwise, if pollution did occur, it might be impossible for the landowner to say that the offence committed by those using the land was not due to one or more of his acts or defaults. The magistrates had not been asked to decide the first issue but Kennedy LJ considered that, on the basis of their findings of fact, they would have answered this in the affirmative. As to the second issue, although the Justices had not been satisfied that the entry of cream into the brook had caused harm, the scientific evidence had shown the potential harm and the polluting effect of the cream in the water course. In any event, it had been made clear in R. v Dovermoss Ltd [1995] Env. L.R. 258 that the polluting matter referred to in s.85(1) did not need to be either poisonous or noxious. Accordingly the Justices were entitled to reach the conclusion they made on the second issue.

Flying feathers and bad smells – intermittent nuisances and evidence

In a case involving an ongoing nuisance for a period of around seven years, the Court of Appeal gave judgment on an appeal against the refusal of injunctive relief. In Piper v Clifford Kent Ltd [2003] EWCA Civ 1692; [2004] Env LR 30 the claimants lived in a bungalow which had a garden adjacent to the defendant company who ran a very large egg-producing poultry farm which had around half a million birds. The claimants brought an action in 1993 against the defendant alleging a common law nuisance caused by fly infestation, smell, noise, smoke, dust and feathers. At first instance, the judge held that there was no continuing nuisance of any kind, the smell nuisance having stopped in 2000, and so refused injunctive relief but awarded £10,000 damages for past nuisance. The claimants had called witnesses who gave evidence that the smell, which was intermittent, had continued beyond 2000, and this evidence, which also covered the other alleged nuisances, had been accepted as truthful by the trial judge. A joint expert had also given evidence that the smell was not overpowering or obnoxious on the days of his visit. The expert had only made two brief site visits whilst the judge had made a single site visit. The claimants appealed,
submitting that the expert evidence, which had not included wind direction measurement, and the single site visit, had been insufficient to displace the evidence of their witnesses, and that injunctive relief or damages were appropriate remedies. Jacob LJ (with whom Auld and Clarke LJJ agreed) allowed the appeal, finding that the trial judge had overlooked the fact that the nuisance was never said to be a continuous nuisance, but was of an intermittent character. In view of this, proving that a smell did not exist on one day did not prove that it did not exist on others: the trial judge had overlooked the evidence called by P to the effect that the smells were repetitious. Given the finding that nuisances, including by smell, had existed between 1995 and 2000, more had been needed to show that the smell was acceptable at the date of trial, and further investigation had been required before a concluded view could be formed on the appropriate remedy. Accordingly, the matter was remitted back for that purpose.

The issue of expert evidence was also considered by the Court of Appeal in Armstrong v. First York Limited (The Times 19 January 2005, Brooke, Arden Longmore LJJ) in which it was held there was no principle of law preventing a court preferring the evidence of honest lay witnesses over that of a joint expert with whose evidence the judge could find no flaw (in that case, an expert in accident reconstruction). The court was entitled to weigh all the evidence.

**Proximity matters**

The Court of Appeal (Kennedy and Wall LJJ, Clarke LJ dissenting) in Sutradhar v. Natural Environment Research Council [2004] EWCA Civ 175 (The Times, March 19, 2004) struck out a claim in personal injury against the NERC for alleged failure to carry out tests for the presence of arsenic in drinking water. The British Geological Survey, a part of NERC, had carried out research services, funded by the Overseas Development Agency, on groundwater resources in Bangladesh. In 1992 the BGS published a report to the Bangladesh government confirming that that water was safe to drink. However, it had not been tested for arsenic, and the report made no express reference to this fact.
The claimant suffered personal injury from arsenic poisoning and brought an action in negligence against BGS. It was conceded that if there had been reliance on the report as representing the water was safe to drink, then it was foreseeable that the claimant would suffer personal injury. However, it was argued that no duty of care was owed and an application was made to strike out the claim.

The first instance judge, Simon J, held that the case raised a novel point in a developing area of law, and should be allowed to proceed to trial. By a 2/1 majority the Court of Appeal disagreed.

Kennedy LJ and Wall LJ, whilst recognising that the Bangladeshi authorities in 1992 did not have the capability to test the conclusions in the report, held that to impose liability on BGS in these circumstances would be a major step forward in the law on proximity, and not simply an incremental development: see Watson v. British Boxing Board of Control [2001] QB 1134. They were influenced by the fact that it was the Bangladeshi government, not BGS, who owed a duty to provide safe drinking water to the populace. The BGS report was of a short term pilot project, of limited scope, and had been prepared for the ODA, not the Bangladeshi government. To impose liability would, per Kennedy LJ, render the concept of foreseeability almost meaningless, and would not have regard to matters of public policy such as the uninsurability of the risk, and the inhibition of research activities in the Third World. Essentially, BGS in producing the report were not assuming any legally enforceable assurance to a large cohort of the Bangladeshi population as to the safety of their water. In these circumstances, the court had a duty to strike out the claim, especially where the litigation was likely to be lengthy and expensive.

Clarke LJ, dissenting, held that proximity was convenient shorthand for a relationship between two parties which made it fair and reasonable that a duty of care be owed. It was foreseeable that the 1992 report would be seen by those with responsibility for water supply, and accordingly foreseeable that if it were relied on as to the safety of the water to drink, the claimant was among a class of people who would suffer personal injury as a result. He held it was arguable that BGS should have tested for all trace elements including arsenic, or made it clear in the report that it had not done so.
Bad vibes, man

The Court of Appeal has been asked to consider liability for magnetic radiation causing interference with premises used as a recording studio. In *Network Rail Infrastructure Ltd v Morris* [2004] EWCA Civ 172; [2004] Env LR 41, the installation of a new “track circuit” as part of a railway signalling system caused interference at premises used as a recording studio, which were situated approximately 80 metres away. The studio had been operated since 1987, and in 1994 the appellant installed a new type of “track circuit” to operate the signal system in the area. Once the new track circuit was installed noise interference in the studio became evident when playing electric guitars through amplifiers. It transpired that this interference was caused by a magnetic field generated by the new track circuit. The result was that the interference in the studio was such that it had become unsatisfactory for making recordings. The claimant lost customers and claimed to have suffered financial loss in excess of £60,000 as a result of activities which amounted to a private nuisance. The claim was granted in the County Court and damages awarded, following which the appellant appealed to the Court of Appeal.

The appellant did not dispute that electromagnetic interference of the use of equipment was capable of amounting to a nuisance, but contended that this was the case only if such equipment was ‘normal’ equipment in general use. It further submitted that the use of electric guitars with amplifiers was an extraordinary commercial activity with a particular sensitivity to the magnetic waves created, and that the damage suffered had not been reasonably foreseeable. Although the Court of Appeal discussed the principle of extraordinary users being exempt from protection under the law of nuisance, it expressed no conclusion on the matter, instead suggesting that the difficulty encountered in applying the law of private nuisance to electronic interference indicated that the area would be better addressed by regulation. It did find, however, that the fact that magnetic radiation from the track circuit could cause interference to the studio had not been foreseeable. Expert evidence stated that the field created was very small and most engineers would have discounted effects beyond a distance of 60 to 70 metres. Although there had been earlier incidences of interference, these had been solely from complaints by tenants under railway arches and positioned within a few metres of railway lines. If the issue of extraordinary user had required a concluded view, it appears that the circumstances would have been
considered to fall within this category, so that liability would not have been imposed. Accordingly the appeal was allowed.

**An unpleasant occurrence**

The Court of Session has considered issues arising out of the deposit of radioactive particles from the Dounreay nuclear power station on to neighbouring land. In *Magnohard Ltd & Others v UKAEA & Another* [2004] Env LR 19 (Court of Session (Outer House)) the petitioners owned property close to the power station, operated by the first respondent, and complained that particles of nuclear matter originating from the power station had been found on an adjacent, causing damage to their land. UKAEA had a duty to secure that no “occurrence” involving nuclear matter caused injury to any person or damage to any property arising out of the radioactive properties of that nuclear matter under section 7 of the Nuclear Installations Act 1965. Signs warning the public of the possible presence of radioactive particles had been placed on the beach. The first petitioner had to terminate certain fishing licences as a result of the Food Protection (Emergency Prohibitions) (Dounreay Nuclear Establishment) Order 1997 (S.I. 1997, No. 2622), which resulted from concerns regarding fragments of irradiated nuclear fuel entering the human food chain. The other three petitioners further complained that they had suffered personal injury as a result of the stress and anxiety caused by the deposit of radioactive particles. UKAEA had accepted that prolonged contact with one of the particles could cause blistering of the skin, but pointed to the statistical improbability of such an event. The petitioners also criticised the adequacy of the monitoring and clean-up programme in place (which included the use of special radioactivity-seeking vehicle moving slowly around the beach), which was conducted by UKAEA’s contractors in accordance with conditions imposed by SEPA under the Radioactive Substances Act 1993. Accordingly, the petitioners sought: a declaration that UKAEA was in breach of section 7; an order for the specific performance of UKAEA’s statutory duty to monitor, attempt to cure, and/or clean up any damage caused by an “occurrence” involving nuclear matter; and an interim order requiring UKAEA to implement either a suggested monitoring and clean-up programme, the existing programme more frequently, or such other programme as determined by the Court.
Lady Paton found that the word “occurrence” in section 7 was broad enough to cover both the particles’ arrival at the beach, and also the fact of its remaining on the beach. The petitioners had not needed to show both personal injury and damage to property to establish a breach: one or the other would suffice. Section 26 of the 1965 Act defined “injury” as meaning “personal injury and includes loss of life”. The 1965 Act compensated for proved personal injury, but not the risk of future injury (Merlin v British Nuclear Fuels plc) and it was a well-established principle in law that where there was no physical injury, damages were awarded only where there was an identifiable psychiatric or psychological illness or condition caused by the wrongful act. Accordingly, any breach of section 7 had not caused injury to any person. The stress and anxiety could, however, be relevant to any future submissions in relation to human rights, which the petitioners had expressly reserved the right to make. The phrase “damage to property” was not defined in the 1965 Act, but it was not necessary to restrict this to purely physical damage (as it had been in Merlin), and so questions of amenity, loss of value and stigma were found to be very relevant. In any event, the beach had suffered physical damage in the form of a “physical change”, caused by the radioactive properties of the material and rendering the property less useful, less frequently used, and less valuable. Damage had occurred as soon as the particle was deposited on the beach, and also in the form of warning signs to protect the public, removal of particles together with portions of sand, and lorry track-marks in the sand. Together these constituted a change in the physical characteristics of the land which was not de minimis and which arose out of the radioactive properties of the particles. The case was similar to that in Blue Circle Industries plc v Ministry of Defence, and Merlin was found to be distinguishable on its facts. As a result of a peculiarly unpleasant type of physical contamination which could not easily be cured, the beach had been made unattractive to any potential user or purchaser. As there was no evidence that particles had been found on land other than the beach, it was impossible to conclude that any other land had been damaged. Accordingly, a declaration was granted that UKAEA had failed, and was continuing to fail its duty under section 7, but in relation to the first petitioner only. However, section 7 Act did not entitle the petitioners to an order for specific performance because it did not impose any clear statutory duty to monitor, or to attempt to cure or clean up, any damage to or contamination of property caused by an ‘occurrence’.
Van de Walle – bombshell or wet squib?

Much concern and interest has been aroused by the decision of the ECJ in Case C-1/03 Paul Van de Walle and others –v- Texaco Belgium (September 7, 2004). The case relates to a Texaco service station in Belgium which was operated under a contract with Texaco by Van de Walle and others. When hydrocarbons were found to have leaked from the underground tanks and to have contaminated the soil and groundwater under the station, the Belgium authorities used a strict liability law on abandonment of waste to require clean up. Belgium does not have its own contaminated land regime and, accordingly, the prosecuting authority needed to establish that the contaminated soils were waste in order for its waste abandonment law to apply. The case was referred to the ECJ by the Belgium court for clarification.

The ECJ's judgment establishes that the definition of "waste" in the Waste Framework Directive does extend to contaminated soils, even where the discarding of the contaminant (here it was hydrocarbons) was accidental. There then arises an obligation on the Member State to ensure that the "holder" of the contaminated soils either has them handled by a waste contractor or recovers/disposes of them himself (Article 8 of the WFD). In addition, responsibility for the recovery/disposal of the waste must be borne by the holder and/or the previous holders or the producer of the product from which the waste came (Article 15 of the WFD). The ECJ held that the meaning of "holder" in the WFD can extend to previous holders who are neither the producers nor the possessors of the waste, if their activities or contractual obligations with the producers/possessors of the waste are such that they may be considered to be the producers of the product which then becomes the waste. Accordingly, the ECJ left it to the Belgium court to look at Texaco's contractual obligations with the petrol station manager and determine whether it was in fact the waste holder for the purposes of waste regulation.

The case has aroused fervid speculation as to its implications in national law. It has been suggested that it creates a new, court-made regime providing for “strict, retroactive, joint and several liability of operators, land owners, and product manufacturers for the costs of spill cleanup and soil and groundwater remediation” : see Prof Lucas Bergkamp [2004] 4 Env Liab 171. Perhaps more immediately, the issue is how the ruling impacts on the UK’s own contaminated land and waste
regimes and their interrelationship. In particular, absent any changes to the exemptions regime for waste management licensing, it will need to be considered whether the occupier of contaminated land may be said to be criminally liable for “keeping” controlled waste without a licence, and if so what form the licence would take. The problem is of course that if the site is presenting risks, for example to groundwater, what licence would or could be granted? There would then arise the problem of the interrelationship with Part IIA, in view of the restrictions of using the Part IIA regime in sections 78YB(2) and (3) where waste is involved. The problem is essentially that in Belgium, the contaminated land regime operates through a 1991 Order of the Brussels-Capital Region, which implements the Waste Framework Directive and depends on the material in question being classified as waste. The UK regime is essentially predicated on separate legislation to secure the clean-up of contaminated soil and groundwater, which is based on principles of risk assessment absent from the simply classification of material as “waste”.

The key focus should perhaps be on what the Waste Framework Directive 91/156/EC may require. It may be noted that the ruling of the ECJ was foreseeable in that the list of wastes at Annex I of the Directive includes at item Q4 “Materials spilled, lost or having undergone any other mishap, including any materials, equipment, etc, contaminated as a result of the mishap”. However, it may also be noted that the key articles of the Directive – in particular 4, 7-10 and 15 – bite, on the “disposal” or “recovery” of waste and it is not clear how contaminated material which simply remains without any interference in soil or groundwater can be said to be the subject of disposal or recovery operations as listed in the Directive – whether it should be recovered or disposed of by way of remediation is a different matter. In any event, the Government will inevitably have to address the question at some stage, whether by guidance to the relevant enforcing authorities or by changes to legislation. It may be that one way forward would be to seek to mesh the waste and contaminated land regimes in the following way. If contaminated soil poses risks requiring clean up, then Part IIA would apply, subject to any waste licence or exemption necessary to deal with the material. There might well need to be some amendment to s. 78YB to allow this. If however, the site is not presenting such risks, then there could be a simple form or licence or exemption to allow the waste to be retained there – possibly subject to ongoing requirements of monitoring. Effectively this would be a register of
contaminated land which does not require immediate clean up, and to that extent would be useful in informing the public of the fact.

**Challenges with the waste definition**

In *R (on the application of Paul Rackham Limited) v. Swaffham Magistrates’ Court and the Environment Agency* [2004] EWHC 1417 (Admin) June 17, 2004 the Divisional Court (Newman J and Toulson J) considered, in the context of a two-day judicial review permission hearing, the issue of whether the imposition of criminal sanctions based on the current EC definition of waste infringed the principle of legal certainty enshrined in Article 7 of the European Convention on Human Rights. The claimant, Paul Rackham Limited, was seeking permission to apply for judicial review in connection with two decisions of District Judge Healy in the Swaffham Magistrates’ Court:

1. a ruling refusing a stay of the prosecution brought by the Environment Agency; and

2. a subsequent refusal to state a case for the High Court in relation to that ruling.

District Judge Healy had assumed jurisdiction in connection with two categories of alleged abuse of process:

1. The conduct on the part of the Environment Agency in bringing the proceedings and its alleged failure to take into account relevant considerations, its failure to comply with its own internal policy and practice in connection with prosecution and other matters relating to this particular prosecution which, it was submitted, bore upon the lawfulness of the decision to prosecute. The District Judge, and the Divisional Court, held that these issues of fact required examination on evidence and could not be determined on a preliminary basis.

2. The second ground was whether the legislation under which the prosecution was brought was incompatible with Article 7 of the ECHR. The argument was put in two ways:
i. that the Environment Agency, in pursuing the prosecution in respect of the activities of the claimant in 1999, was seeking to give retrospective effect to a development in the law in connection with waste, which development occurred through a decision of the European Court of Justice in the case of ARCO Chemie Nederland Limited [2002] QB 646;

ii. that the definition of waste, which was taken from the Waste Framework Directive, read now as it had to be in the light of the decision in ARCO, meant that the law in this regard was not formulated with sufficient precision to enable the claimant to regulate his conduct. Reliance was placed upon the decision of the European Court of Human Rights in the Sunday Times v The United Kingdom 2 EHRR 245.

The brief facts were that the Environment Agency brought the prosecution in respect of a number of alleged offences relating to the treatment, keeping and deposit of controlled waste at a farm owned by the claimant at Camp Farm in Norfolk. The activity at the Farm, undertaken by another company, Anti-Waste Limited, involved the production of a composted product which was created by mixing a waste-derived material (referred to as “Material A”) with green waste and farm manure and composting it in windrows on the farm so as to produce Product A. Material A was derived from the processing of municipal solid waste in Lowestoft. It was waste collected from households in the area.

The claimants’ case was that, after careful consideration, it took the view that both Material A and Product A were recovered products and not controlled waste. The conclusion was reached after consideration of the definition of waste in the Directive and the view expressed by the government in its Circular 11/94, in particular paragraph 2.47. Various complaints were made as to the decision of the agency to prosecute in these circumstances. Whilst not denying the merits of these claims, which, according to Newman J, “…on any view, call for a response”, it was held that they could only be properly be resolved in the context of the evidence at trial.
The substance of the Article 7 complaint was that it was not foreseeable in 1999 that the law could be applied in the way in which it is now alleged the prosecution seek to utilise it and, that by reason of the development of the law in the case of ARCO, it can be seen as a form of retrospectivity. So far as the argument advanced on the basis of the Sunday Times test was concerned, Newman J held that the District Judge had correctly observed that some cases will be more straightforward than others. In many cases it will be clear that a particular material is discarded material so that no meaning of the term other than the usual one will need to be looked for and that in such situations the holder of the material will know that it is waste and that the regulatory regime will apply to dealings with it. As Newman J put it:

“There will undoubtedly be difficulties in some cases in determining whether certain materials are waste, but clarity in the law can be achieved on a case by case basis. The availability of advice from lawyers is also relevant for it should enable those involved to foresee the potentiality for criminal proceedings and to conduct themselves accordingly.”

Against this approach, counsel for the Claimant submitted that on a true view we had reached a position in which what was controlled waste was what the Environment Agency said was controlled waste; that the uncertainty was so great that before anybody could proceed with any safety to deal in waste and recovered products they would need clearance from the Environment Agency and that, as a result, the position was so distorted that it amounted to the prosecution of the criminal law according to executive choice and discretion.

Newman J did not regard it as being helpful at this stage to comment in great detail upon the merits of this important submission. In his judgment the matter would have to be resolved in the course of a trial when all the facts are available. In his judgment the submission was “…potentially significant and according to the facts of the case may well be strongly arguable”, but he was unpersuaded that it was right for the arguments to be considered without reference to the facts:

“In my judgment, the journey towards a declaration of incompatibility, however persuasive the arguments may appear to be, cannot bypass the membrane of section 3 of the Human Rights Act 1998, which requires a court seized of any particular matter
to seek, within the context of the case in hand, to interpret the legislation in a way which is compatible with the Convention.”

Having considered the development of the case-law on the meaning of waste, Newman J was of the view that the argument advanced by the Claimant overstated the difference between the *Mayer Parry* position and paragraph 2.47 of the Circular on the one hand, and the judgment in *ARCO* on the other:

“… It seems to me that the judgment in *ARCO* can be seen as an example of how the law develops by reference to particular facts, which facts can call for particular interpretations to be allied to legislative provisions … It will be a matter for the District Judge who has to try this case to apply the terms of the legislation and the Directive. He must consider the meaning of waste guided by the aim and purpose contained in the preamble to the Directive and apply it to the facts of this case. That is not to say that the task will be easy, but I have endeavoured to state very briefly what in my judgment is the essential area for attention in an endeavour to provide some guidance. In addition, it will serve to explain the conclusion to which I have come, namely that the real force and potential of this argument must be worked out within the context of the facts of this particular case and that this is not a case where the Court can simply interpret a statutory provision and test its compatibility against an established principle or doctrine of law without regard to a factual matrix … I have deliberately limited the extent of my comment on the various arguments which have been adduced because they have yet to be determined in their proper context. The fact that I have concluded that permission to apply for judicial review should be refused should not, at a later date, be seen as reflecting on the merits. I consider this application is premature.”

Toulson J agreed, and added some comments of his own

“I have reservations whether the district judge was right to entertain the challenge to the prosecution based on Article 7 and the uncertainty of the meaning of waste, because a decision to uphold that challenge and to stay the prosecution on that ground would have involved a judicial decision that the relevant statutory criminal provisions were incompatible with the Convention. It seems to me that any such challenge ought to have been made to this Court, which has jurisdiction to make a declaration of
incompatibility, rather than to the district judge, who did not. Subject to that, I am not persuaded that valid criticism can be made of the way in which the district judge decided the issue …

“I am not persuaded that the claimant has shown a sufficiently good case (that the meaning of waste is so vague as to contravene Article 7) to merit giving permission to apply for judicial review at this stage of the proceedings. In relation to the question when waste ceases to be waste, it seems to me that Circular 11/94 takes a sensible and helpful approach in its suggestion that recovery of waste occurs when its processing produces a material of sufficient beneficial use to eliminate or diminish sufficiently the threat posed by the original production of the waste (i.e. sufficiently to achieve the essential objective of the Directive, namely the protection of human health and the environment against harmful effects caused by the collection, etc. of waste) …

“I can see nothing in ARCO which is inconsistent with that approach. It admittedly requires an element of judgement, and there may be borderline cases; but if the evidence leaves the matter open to real doubt, the claimant will be entitled to be acquitted. (It is to be noted that in ARCO the Court observed in paragraph 41 of its judgment that, in the absence of Community provisions, the member states are free to choose the modes of proof of the various matters defined in the Directives which they transpose, provided that the effectiveness of Community law is not undermined.) …

“For similar reasons I am not persuaded that the decision in ARCO has put the claimant at risk of conviction for activities in 1999 which could not then have been reasonably supposed to carry any such risk. In any case I do not see how a decision to the contrary could be reached without evidence, which the district judge did not have, about what those activities were and how the decision in ARCO may on the facts have exposed the claimant to a risk of conviction to which it would not otherwise have been exposed ….

“As to the complaints about the decision to prosecute, it is generally undesirable that criminal proceedings should be held up by collateral challenges. In this case, although the complaints about the decision to prosecute are put in a number of ways, essentially the claimant asserts that the prosecution has been brought without proper thought and without proper consideration of the available evidence. Even if that were
so, it would not follow that it would be just or in the public interest to stay the prosecution if in fact there is proper evidence to justify it; but in this case that could only be satisfactorily determined through the ordinary process of trial. Questions about what led the Environment Agency to bring the prosecution may arise during the trial, but I agree with Newman J that it would be wrong for the trial process to be delayed. The district judge’s decision to refuse a stay was therefore not only justifiable but was the only decision properly open to him.”

BPEO and Waste Objectives

In Derbyshire Waste Limited v. Blewett [2004] EWCA Civ 1508 the Court of Appeal turned its mind once again to the issue of the waste objectives under Schedule 4 of the Waste Management Licensing Regulations 1994 and their status on planning applications. The Court undertook a detailed analysis of the relevant underlying provisions of EC law, in particular the Waste Framework Directive and the Landfill Directive. Of particular note are the Court’s comments on Art 8(b) of the Landfill Directive, which requires that Member States should take measures in order that the landfill project be in line with the relevant waste management plan under Art 7 of the Waste Framework Directive. Article 8(b) has not been made part of UK law. However, by para 4(1)(b) of Schedule 4 to the 1994 Regulations, effectively results in an obligation to implement, so far as material, the plan made under Article 7 of the Directive, namely “Waste Strategy 2000”. The issue was whether Sullivan J was correct to hold, at first instance, that planning permission should only be granted for a landfill site if it is the BPEO for the waste stream concerned. Sullivan J had proceeded on the assumption that Art 8(b) of the Landfill Directive had been made part of domestic law, and that its language “in line with” was more stringent as an obligation than the Waste Framework Directive.

The Court of Appeal held that although Art 8(b) had not been expressly transposed, it was part of UK law through the medium of the pre-existing para 4(1)(b) of Schedule 4. On the stringency of Art 8(b) the Court held that EC law gave Member States a discretion as to the degree of specificity in waste management plans – hence this militated against undue prescription in the interpretation of Art 8(b). Moreover the Court noted the comments of the ECJ in Joined Cases C-53/02 & C-217/02 Commune
de Braine-le-Château & Tilliet and Others v Région Wallonne (ECJ, April 1, 2004) to the effect that management plans cannot always be the only factor determining the exact location of waste disposal sites, inasmuch as the final decision depends on the relevant rules relating to land-use planning (see para 30 of judgment). Further, the concept of being “in line with” a plan was of itself imprecise. Essentially the Court saw it as a matter of weight – the waste objectives being required to be given “substantial weight” rather than being treated as simply material considerations. An added focus was given where a landfill proposal was concerned, but even there the attainment of the objectives could not sensibly be treated as an overriding factor, trumping all other decisions, or as a pre-condition.

The more specific issue was whether the planning authority was guilty of defective reasoning in not having carried out a BPEO assessment for the proposal. Whilst accepting that it would be difficult to do so in the absence of a county waste management plan, the Court found there was a strong case for concluding that the authority was required by law and could be expected to do some BPEO analysis. Thus it is clear that in all cases of planning applications involving waste disposal some consideration of BPEO will be required. There are legal obligations to do so flowing from the Waste Framework Directive and the Landfill Directive, and recognized in “Waste Strategy 2000” which calls for the application of BPEO policies so far as practicable at the planning permission stage.

Contaminated land and Green Belt Policy

The decision of Owen J in Angele Dowmunt-Iwaszkiewicz v First Secretary of State [2004] EWHC 2537 (QB) deals with the relationship between contaminated land and green belt policy. The claimant had applied for planning permission for residential development of a site (Old Mushroom Farm) in the green belt, on which were derelict buildings contaminated by asbestos. The local planning authority refused permission on green belt policy grounds. It was argued that the desirability of removing the asbestos constituted “very special circumstances” justifying planning permission, as there were concerns from the Health and Safety Executive, the local EHO and the Nottinghamshire Fire & Rescue Service. The inspector referred to guidance in para 20 of Annex 1 to Circular 02/2000 on contaminated land, and concluded what while it
would be in the public interest to deal with the risk associated with asbestos, the presence of contamination did not constitute such as unusual situation as to be special circumstances sufficient to set aside the presumption of inappropriate development in the green belt.

It was argued that: the inspector had (1) misinterpreted the relevant policy; and (2) had failed to give adequate reasons for rejecting the argument that the risks amounted to “very special circumstances” justifying development. On the first ground, Owen J held that para 20 is advice in the context of regulatory action rather than voluntary clean-up – however, it does acknowledge that sites which are contaminated may be located in areas, such as green belt, which are unsuitable for redevelopment, and the fact that a site is creating unacceptable risks is not in itself justification for development. Thus the inspector had not misinterpreted para 20; he had not been suggesting that contamination could never amount to very special circumstances. However, the reasons limb of the challenge succeeded. The inspector had asserted that the presence of contamination was not sufficient to amount to a very special circumstance, but did not make any quantitative judgment about the level of contamination and the risks it presented, or to assess the factors on the other side, in particular the impact of the development on the green belt. Applying the test of Lord Brown of Eaton-under-Haywood in South Bucks District Council v. Porter (2) [2004] UK HL 33, [2004] 1 WLR 1953, para 36, the claimant had genuinely been prejudiced by the failure to provide adequate reasons and the decision had to be quashed.

**Cockle-picking and other projects**

In Case C-127/02, Landelijke Vereniging tot van de Waddenzee v. Staatssecretaris van Landbouw, Natuurbeheer en Vissertij (Grand Chamber, September 7, 2004) the Court considered the application of the Habitats Directive 92/43/EEC to recurrent activities (in that case mechanical cockle fishing which was subject to an annual licence). The Court held that such activity was within the Directive as a “plan or project”. As such the activity fell within Art 6(3) of the Directive requiring an appropriate assessment. In these circumstances, the general obligation of Art 6(2), requiring appropriate steps to be taken to avoid the deterioration of habitats or the disturbance of species, could not be applied concomitantly with Art 6(3).
In considering the implications of Art 6(3), the Court as might be expected took a strict line. A plan or project likely to undermine the site’s conservation objectives must be considered likely to have a significant effect on the site, the assessment of the risk being made in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned. The Court also stressed how rigorous a process the appropriate assessment of the effects of the project must be, and that the activity may only be authorised where no reasonable scientific doubt remains as to the absence of effects on the integrity of the site. It was also ruled that where a national court is called on to ascertain the lawfulness of an authorisation under Art 6(3), it can determine whether the limits on discretion have been complied with, even though the Article has not been transposed into the national law of the State concerned.

**Railroading it through … a reminder of the width of EIA**

The E.C.J. has held that Spain was in breach of Directive 85/337/EEC on environmental assessment through failing to subject part of the Valencia-Tarragona ‘Mediterranean Corridor’ railway project to environmental assessment. In Case C-227/01 *Commission v Spain* (Second Chamber, September 16, 2004), the Commission brought proceedings in relation to a 13 kilometre section of the project which, it was common ground, had not been subjected to environmental assessment procedures. Spain argued that the Directive’s requirements did not apply as the project was not within the meaning of point 7 of Annex I (“Construction of … lines for long-distance railway traffic”) – that section of the project consisting of the doubling of the original single track, without constructing a new railway line and with no need for a new long-distance route (since it linked two towns 13 kilometres apart). The Court held that given the objectives of the Directive, its wide scope and very broad purpose (Case C-72/95 *Kraaijeveld*), point 7 of Annex I had to be understood as including the doubling of an existing railway track. A project of that kind could have significant effects on the environment, and to exclude such projects would seriously undermine the Directive’s objective, and could not be considered a mere modification to an existing project within the meaning of point 12 to Annex II. In addition, the project was part of a 251 kilometre railway line project, and the Directive’s obligations could not be
allowed to be undermined by the splitting up of such a project into a number of successive shorter sections.

**More EIA – life after Wells**

The Administrative Court has confirmed that planning authorities can have regard to a decision not to require an Environmental Impact Assessment at the outline permission stage when determining an application for approval of reserved matters. In *R (on the application of the Noble Organisation) v Thanet District Council & Others* [2004] EWHC 2576 (Admin), the local authority gave a negative ‘screening opinion’ under the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (S.I. 1999, No. 293) in relation to a bare outline application for a leisure development, which left details such as siting, design, means of access, appearance and landscaping to reserved matters approval. The site had also been granted bare outline permission for a business park five years previously. The earlier permission had been granted without an EIA, but without any record as to whether the matter had been considered. The need for an EIA for the later outline permission was considered, and screening decision that it was not was given in 2000. A further screening opinion was given following the application for reserved matters approval in 2004. In considering whether the Schedule 2 development required an EIA, the officers referred to the fact that outline planning permission had originally been granted for a business park, and to the fact that no EIA had been considered necessary for the grant of outline permission in 2000. The claimant sought judicial review of the decision to grant approval of the reserved matters, on the basis that the decision not to require an EIA was unlawful because these irrelevant factors had been taken into account, as a matter of EC law, the authority should have looked behind the formal validity of the earlier planning and screening decisions and examined the adequacy of the consideration given in them to the need for an EIA.

Reference was made to the reference to the ECJ made by the House of Lords in *R v London Borough of Bromley v Barker*, and also the ECJ decision in *R (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02, January 7, 2004), and the fact that the House of Lords had decided to maintain the Barker reference despite the *Wells* decision. Richards J
considered that whether the need to consider the requirement of an EIA remained at the reserved matters stage, or was to be considered only at the outline stage, remained an open question. In the present case, of course, it had been considered at both stages, with the challenge being the way in which it had been considered. Richards J then dismissed the application as the decisions which should have been challenged were the grants of outline permission; such a challenge now being well out of time and no application to extend time having being made. In the circumstances the authority had been plainly entitled, when considering the application for reserved matters approval, to have regard to the earlier decisions, which formed part of the legal and factual context within which the need for an EIA fell to be assessed. In principle, there was nothing wrong in comparing the reserved matters with the development approved by the outline planning permission. Neither by virtue of that comparison, nor in any other respect, had the authority erred in reaching its decision that an EIA was not needed at the reserved matters stage.

**Yet more EIA – procedural irregularities**

Does a defective screening opinion render a subsequent planning permission an unlawful act, or is it merely a failure to comply with relevant requirements? The important distinction is that the latter brings an application within s.288(1)(b)(ii) of the Town and Country Planning Act, so that a claimant has to show that its interests have been substantially prejudiced by that failure and providing a discretion whether to quash the permission, whereas the former brings it within s.288(1)(b)(ii), with no such requirement or discretion. The Court of Appeal has considered this issue in relation to a retail and swimming pool development in *Younger Homes (Northern) Ltd v First Secretary of State* [2004] EWCA (Civ). The application for this development had been the subject of a local inquiry, and an officer of the local planning authority had produced as a ‘screening opinion’ an untitled, unsigned, manuscript document which stated the development was not an environmental impact development for the purposes of the 1999 Regulations. Copies of the screening opinion were not sent to the developers, nor placed on the planning register, in breach of regs. 5(5) and 20(1). The Secretary of State wrote to the developers stating that he was minded to grant the application (subject to a s.106 agreement), but one of the developers then sold its
interest in the site to the claimant, who wanted to develop it for housing. The permission was subsequently granted and the claimant then sought to quash this on the grounds that the Secretary had not made a screening opinion and could not rely on the local authorities’ ‘opinion’ as this had been unlawful. At first instance, Ouseley J found that the failure did not mean that the grant had been outwith the power of the Secretary, but fell under s.288(1)(b)(ii), so that substantial prejudice to the claimant’s interests had to be shown, and that this had not been. The claimants appeal to the Court of Appeal was dismissed on 30 June 2004. The Court found that the failure to meet the requirements under regs.5(5) and 20(1) had not rendered the screening opinion unlawful. As the specific regulations in question were procedural provisions which could not go to the question of whether there had been a breach of reg.5 or reg.8 or of Art.4(4) of the Directive, the failure to meet the requirements did not mean that the grant of planning permission was not within the power of the Secretary of State. Accordingly, there was a failure to comply with relevant requirements under s.288(1)(b)(ii), so that substantial prejudice to the claimant’s interests resulting from that failure was required, but had not been demonstrated.

Stephen Tromans
39 Essex Street
stephen.tromans@39essex.com