Significant UK Environmental Cases: 2012–2013

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Introduction

This year’s review considers material developments in domestic case law from April 2012 to April 2013. The volume of case law emerging from the courts has reached a point where an annual review of manageable size cannot hope to cover all the cases handed down. Instead, the increasing challenge for environmental lawyers is to understand the significance of a case and its implications for a particular practice area. Accordingly, this review attempts to highlight the most significant cases for the year and to analyse their implications.

1. The Common Law

1.1 Nuisance

The most significant nuisance case of 2012, the Court of Appeal’s decision in Barr v Biffa [2012] EWCA Civ 312 was discussed in last year’s review. It may have clarified the legal principles of nuisance but there are still practical problems associated with resolving group litigation cost effectively. Technical modelling appears to be assuming a greater importance in this respect. Anslow v Norton [2012] EWHC 2610 was the first case post Barr v Biffa. The judgment marks a new chapter in the story on quantum of damage awards in nuisance by providing for a range of awards assessed according to odour modelling which had been done to establish the likely odour impact on a range of claimants.

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1 Period covered April 2012–April 2013.
The decision of the Supreme Court in Coventry v Lawrence\(^2\) is awaited and is expected to herald another significant development in nuisance law, this time about the relevance of planning permission for an activity which is alleged to give rise to a nuisance. This may be the case that grapples with the tension between modern day statutory regulation and 19th-century principles of nuisance, after Carnwath LJ rejected Biffa’s attempts to do so in Barr v Biffa.

In the parallel field of statutory nuisance, challenges continued to the drafting of abatement notices despite the plethora of previous cases, and the Administrative Court’s decision in R (Fullers Farming Limited) v Milton Keynes Council [2012] Env LR 17 is another case in a line which rejects legalistic points of challenge (in this case the failure to specify whether the odour nuisance in question was prejudicial to health or simply a nuisance).

The case of Bentley-Thomas v Winkfield Parish Council [2013] EWHC 356, the Divisional Court emphasises the principle of the importance of the remedy under section 82 Environmental Protection Act 1990 being readily available to members of the public. The Court overturned a decision by a District Judge in the Magistrates Court to require Ms Bentley-Thomas to pay the local authority’s costs following the dismissal of her proceedings against the local authority under section 82 for causing or permitting a noise nuisance.

1.2 The Rylands and Fletcher doctrine

The Court of Appeal has handed down an important judgment considering the application of the rule in Rylands v Fletcher to cases involving the escape of fire. The case of Mark Stannard (t/a Wyvern Tyres) v Gore [2012] EWCA Civ 1248\(^3\) provides further confirmation that the Rylands v Fletcher doctrine is now very limited. The Court cite the House of Lords’ decision in Transco Plc v Stockport [2003] UKHL 61, as the ‘seminal authority for the test to be applied in a classic case of Rylands v Fletcher’, including fire and citing the ‘proper approach’ as being that ‘the defendant must bring, keep or collect an exceptionally dangerous or mischievous thing onto his land’ and that ‘there is an exceptionally high risk of danger or mischief if that thing should escape’. In an appropriate case damage caused by fire emanating from an adjoining property could fall within the doctrine but the appropriate case is likely to be rare. This is because fire itself is unlikely to be an exceptionally dangerous thing on land, unless perhaps it is started deliberately and escapes.

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\(^2\) See [2012] EWCA Civ 26 for the decision in the Court of Appeal.

1.3 Environment Agency and Duty of Care

The case of Dodson v Environment Agency [2013] EWHC 396 considers whether the Agency owed a duty of care to those affected by particular operational responsibilities in relation to an otter enhancement programme and is of interest given the wide-ranging role of the Agency. The claimant owned a fishery that stocked carp, which all disappeared between 2004–2008. The fishery was adjacent to the River Cegin. The claimant alleged that the fish disappeared because of the predatory action of otters and that the Environment Agency’s otter enhancement programme in the area was to blame. The claimant’s case was that the Agency owed him a duty of care to advise him that its otter habitat enhancement activities gave rise to harm to his property/financial interests. The judgment contains a useful assessment of why the judge concluded that the Agency did not owe a duty of care in the circumstances of the case and the nature of its role.

2. Statutory Regulation

2.1 Environmental Permitting

2.1.1 Enforcement

The case of R (European Metal Recycling Ltd) v Environment Agency [2012] EWHC 2361 (Admin) highlights the difficulties for the Agency in using the suspension notice powers under the Regulations and raises an issue about parallel statutory challenges to any notice and judicial review. The agency issued a suspension notice requiring all waste movements to cease. It also required the company to ‘design and implement measures that eliminate the risk of serious pollution from noise...[by] 31 August 2012’. The Administrative Court quashed a suspension notice on the basis that the Environment Agency failed to specify in the notice the steps by which the operator was to eliminate a risk of serious pollution by noise. The outcome may present the Agency with difficulties in that its approach to the Regulations is to put responsibility on the operator to manage their activities so as not to cause pollution. The Court accepted that, on the facts, the statutory appeal was not a convenient alternative remedy to judicial review given it would not be heard for some time.

2.2 Waste

The long-running litigation involving Thames Water over its 2003 spillage of sewage into gardens and allotments in the London borough of Bromley appears to have come to an end and clarifies that sewage companies are exposed
to serious criminal offences in the event of spills and equipment breakdowns. Following the spill, the Environment Agency prosecuted the company. A preliminary issue arose as to whether sewage that escaped from a sewage system was, as a matter of law, 'controlled waste'. The European Court of Justice (CJEU) ruled that sewage, which escaped from the sewage system and was not covered by other legislation was ‘waste’ as a matter of EU law. The case returned to the Magistrates Court and after yet more hearings, the company was convicted, inter alia, for contravening section 33(1)(a) Environmental Protection Act 1990 which provides that a person shall not deposit controlled waste or knowingly cause/permit the deposit of controlled waste. In the latest case, R(Thames Water) v Bromley Magistrates Court [2013] EWHC 472, Thames Water sought to establish whether on the true interpretation of section 33(1)(a), the unintended escape of sewage amounted to a ‘deposit’ of the sewage in question on land by Thames on the basis that ‘deposit’ required a conscious or deliberate act. Lord Justice Gross held that ‘deposit’ could extend to unintended escapes.

Meanwhile the Administrative Court has provided guidance on the scope of the duty of care for waste imposed by virtue of section 34 of the Environmental Protection Act 1990. See Mountpace Ltd v Haringey London Borough Council [2012] EWHC 698 (Admin).

2.3 Transfrontier Shipment of Waste

R v Ezeemo [2012] EWCA Crim 2064, saw the Court of Appeal consider the complex Transfrontier Shipment of Waste regime for the third time in 12 months. The Court’s decisions arose from the large-scale high-profile prosecutions by the Agency in relation to the shipping of televisions and paper to Africa and South Korea. Whilst the prosecutions have been hugely expensive for the Agency and the fines low, the Agency will nonetheless be pleased that all defendants pleaded guilty or changed their plea over the course of 18 months as the Court of Appeal successively rejected their defences.

In short, the three cases establish the following about the regime: First, the criminal offence of transporting hazardous waste to a country that is not a member of the Organisation for Economic Co-operation and Development (OECD) is one of strict liability and is not ultra vires the EU parent Regulation or disproportionate. Second, Article 36 of the Regulation 1013/2006 (exports for recovery to non-OECD countries is prohibited) contains two simple but key concepts (a) waste must be destined for recovery and (b) export is the action

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4 C252/05 R(on the application of Thames Water Utilities Ltd) v Environment Agency [2007] I-3883.
6 The other cases are KV & Others v R [2011] EWCA Crim 2342 and R v Ideal Paper Co [2011] EWCA Crim 3237.
of waste leaving the EU. Third, waste can be destined for foreign parts long before it gets anywhere near the English/Welsh docks but it is a question of fact to determine when it is ‘destined’ for another country. Fourth, the breadth of activities caught by the regime is wide—anyone involved in the transport of waste (by road, rail and sea) from point of origin where waste is collected/stored to the point it is delivered to the foreign country. Fifth, whether household waste has become paper waste is a question of fact for the jury. There appears to be a de minimis threshold for ‘contamination’ by other materials but this is a question of fact (but the Court of Appeal thought the Environment Agency should produce guidance).

3. Environmental Judicial Review

Environmental judicial review cuts across all subject areas of environmental law. It is the main vehicle for challenging environmental decisions and is therefore the engine for the development of the law. It is therefore important to understand its contours and latest developments as these in turn influence developments in the underlying substantive law.

3.1 Intensity of Review of Environmental Decisions by the Courts

The courts have tended to adopt a relatively ‘hands off’ deferential approach to environmental decision-makers like the Environment Agency and Natural England, interfering only where the decision-maker can be shown to have acted irrationally in the traditional Wednesbury sense. However, Lang J in R (Manchester Ship Canal Co Ltd & Peel Holdings Ltd) v Environment Agency [2012] EWHC 1643 took an interventionist approach to the interpretation of the Environment Agency’s flood defence policies. The Environment Agency has permission to appeal on the basis that the Court’s approach was too interventionist. At the time of writing, the Court of Appeal had just handed down judgment dismissing the appeal [2013] EWCA Civ 542. In Bowen West v Sec of State [2012] EWCA Civ 321, Laws LJ declined to rule on an argument that the courts should adopt a more intensive scrutiny to questions of European law which often arise in environmental judicial review. Nonetheless, the point remains pertinent given the prevalence of EU law in environmental law.

3.2 Promptness

It has been a central requirement of judicial review that a claim should be filed promptly and in any event not later than 3 months after the grounds to make
the claim first arose. Following C-406/08 Uniplex(UK) Ltd v NHS Business Authority\(^7\); R (Buglife) v Medway Council\(^8\) and R (U & Partners (East Anglia) Ltd) v The Broads Authority\(^9\), it is clear that promptness is disapplied in environmental cases which raise EU law. However, the Court of Appeal’s decision in Berky v Newport City Council [2012] EWCA Civ 378 is now the leading case in the domestic context, albeit that all the observations on promptness were strictly obiter and each judge took a different view on whether and how Uniplex applied in the purely domestic context. It remains to be seen how long it remains the position that there are different timing requirements for making a claim according to whether the claim raises matters of EU law or not.

### 3.3 Costs Protection

In practical terms, costs have a significant impact on the development of environmental law. Costs and funding can raise serious practical obstacles for claimants who are often interest groups or local residents. As a consequence, environmental judicial review is leading the way in developing jurisprudence on costs protection, driven in large part by Article 9(4) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.\(^10\) The courts have also led the way and it is now difficult for defendants in environmental judicial reviews to resist some form of protective costs order (PCO). The issue is often the terms of the PCO. The main question which has occupied the domestic courts in recent times is whether the Aarhus requirement that litigation is not ‘prohibitively expensive’ is to be decided on an ‘objective’ basis (by reference to the average citizen) or on a ‘subjective’ basis (ie the claimant in question). The position is uncertain.

Further developments in costs jurisprudence are likely. The Supreme Court referred the question of costs to the European Court in the case of C-260/11 Edwards v Environment Agency (11 April 2013) and judgment has recently been handed down. The case will now return to the Supreme Court and it will be interesting to see what the Court makes of the decision.

Meanwhile, the Ministry of Justice has introduced a costs regime for judicial review cases falling within the scope of the Aarhus Convention and the Directive 2003/35/EC. A PCO would limit the liability of a claimant to pay a defendant’s costs to £5,000, and £10,000 in the case of an organisation. It would limit the liability of a defendant to pay the claimant’s costs to £35,000. Costs protection will apply from the point at which the claim is issued. The

\(^7\) [2010] ECR I-817.  
\(^8\) [2011] EWHC 746 (Admin).  
\(^10\) 2161 UNTS 447.
reforms came into force by amendments to Part 45 Civil Procedure Rules, made through the 60th update on 1 April 2013.

### 3.4 Costs in Discontinued and Compromised Claims

The default position had been that in the absence of a clear view as to how the litigation would have resolved itself there would be no order to costs (See *R (Boxall) v Waltham Forest LBC* (2001) 4 CCL 258). However, the number of instances in subsequent cases in which claimants were deprived of their costs led some to question the default rule. The more nuanced position is apparent in the Court of Appeal’s decision in *M v London Borough of Croydon* [2012] EWCA Civ 595 in which the Court emphasised that the general rule is that the successful party is entitled to his costs, so the defendant would need to justify another order but also emphasising that the Court is not in a good position to ascertain who might have won and on what terms where a matter settles as opposed to where a case is heard.

### 3.5 Discretion of the Court not to Quash Decisions that are Unlawful

The case of *Berkeley v Secretary of State* remains the high point for Claimants seeking to argue that the Court has no discretion not to quash a defective environmental decision. Lord Carnwath has however been mounting a steady campaign to limit its boundaries, the latest expression of which is in *Walton v The Scottish Ministers* [2012] UKSC 44 at [124]-[140].

### 3.6 Environmental Decision-Making—Public Consultation

Challenging the public consultation on controversial environmental decisions, like the future of nuclear power, has tended to be fertile territory for environmental groups campaigning on the substantive issue underlying the consultation. The case of *R (Friends of the Earth & Others) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28, is authority for the proposition that, exceptionally, a challenge to a potential decision can be brought during a consultation period on the decision.

3.7 References to the European Court

The state of the law on references to the CJEU in environmental cases is an issue that has not tended to receive particular attention but which, nonetheless, has an impact on the development of environmental law. Our domestic judiciary are reluctant to refer cases to the CJEU and this undermines the effectiveness of EU law and, on one view, results in the UK court rulings that are less protective of the environment than they would have been, had a reference been made. Despite the prevalence of EU law in environmental law only 10 cases were referred from 2007 to 2012. Only two cases are currently pending before the European Court—C279/12 Fish Legal v Shirley and Ors which was referred in 2012 and the recent Supreme Court reference in R (on the application of ClientEarth) v Secretary of State for the Secretary of State for the Environment and Rural Affairs [2013] UKSC 25.

Where given, the judiciary’s reasons for refusing an application to refer demonstrate a variety of reactions ranging from irritation to rewriting the constitutional relationship between the EU and domestic Courts (Lord Brown in R (on the application Morge) v Hampshire CC [2011] UKSC 2 at [25] characterising the CJEU as an unhelpful assistant to the Supreme Court). During the course of 2012 there have however been indications that the judiciary consider it prudent (maybe to avoid a Kobler damages claim) to give more reasons for refusing references (as with, for example the unreported decision of the Supreme Court on the application for permission to appeal to the Court in Bowen West v Secretary of State [2013] UKSC 25) could herald a greater willingness by the judiciary to refer.

4. Environmental Impact Assessment

Environmental impact assessment (EIA) continues to generate significant case law by comparison with other areas of environmental law. This presents a real challenge in seeing the wood for the trees. In R (Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869 the Court of Appeal gave important guidance on the proper test in screening. It rejected the Appellant’s suggestion that screening was required in all cases where the effect would influence the development consent decision (Pill LJ suggesting at [46] that such an approach would ‘devalue the entire concept’). In the Court’s

13 C-224/01 Kobler v Austria [2003] I-10239.
14 Citation of the decision in the Court of Appeal is [2012] EWCA Civ 321. The decision of the Supreme Court is contained in a letter of 19 July 2012 sent on behalf of the Registrar of the Supreme Court refusing permission to appeal.
15 The first instance decision at [2011] EWHC 2010 (Admin) was considered in last year’s review. See (2012) 24 JEL 371, 379.
view the test to be applied is: ‘is this project likely to have significant effects on the environment?’

The case of R (Burridge) v Breckland DC [2013] EWCA Civ 228 considers the issue of ‘project splitting’, which was also considered by the Court of Appeal in Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321. Splitting projects and thereby avoiding EIA requirements is prohibited by the EIA Directive. This has presented problems for the domestic EIA regime because the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 focus on particular planning applications as opposed to the broader concept of ‘project’. The Court of Appeal has now confirmed that the domestic Regulations must be construed in light of the purpose of the Directive’s focus on projects and this could require several planning applications to be screened together.

The case of Threadneedle Property Investments v Southwark LBC [2012] EWHC 855 (Admin) gives guidance on the Secretary of State’s power of direction under Regulation 4(8) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (now replaced by Regulation 4(9) of the 2011 Regulations). The judge emphasised the exceptional nature of the power, exceptional not just in the sense that it was reserved to the Secretary of State but also in the sense that the Secretary of State would only use it in an exceptional case.

The case of R (Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council [2012] EWHC 2161 (Admin) considers the meaning of ‘development’ in the context of whether poultry units were development and thereby susceptible to EIA. Lang J’s view (see [113]) was that the EIA Directive could only be effectively implemented in the UK if the definition of ‘development’ in section 55 of the Town and Country Planning Act 1990 was interpreted broadly so as to include projects which required an EIA under either the Directive or the Regulations.

For an English audience the Scottish Strategic Environmental Assessment Directive case of Walton v The Scottish Ministers [2012] UKSC 44, is of interest for Lord Carnwath’s obiter discussion of the discretion available to the judiciary after Berkeley at [124]-[140] (discussed above) not to quash an unlawful EIA decision. The divergence of approach in the Court on this issue in the Burridge case (see above) highlights the need for clarity as to the principles by which a court exercises its discretion.

17 SI 2011/1824.
5. Strategic Environmental Assessment

The main issue over the past 12 months in relation to the Strategic Environmental Assessment (SEA) is the requirement on a decision-maker to consider reasonable alternatives to the chosen plan/programme. The key decisions in this regard are Heard v Broadland District Council [2012] EWHC 344 (Admin) in which Ouseley J adopted a broad and purposive approach to the issue and Cogent Land LLP v Rochford District Council [2012] EWHC 2542 (Admin) which is a good illustration of the fact that SEA is a process in which defects may be cured. In the Cogent case Singh J was inclined to accept that there had been errors in the assessment of alternatives at the preferred options stage. However, he found that an Addendum report, which had later been produced, was adequate and capable in law of curing any defects that had arisen.

6. Habitats

Cornwall Waste Forum St Denis Branch v Secretary of State for Communities and Local Government (SSCLG) [2012] EWCA Civ 379 is a helpful decision on the allocation of responsibilities under the Habitats regime between the Secretary of State for Communities and Local Government and the Environment Agency, which can often give rise to practical difficulties. The judgment is in the context of a challenge to the grant of planning permission for a waste incinerator following a local inquiry. The Court held that the SSCLG was the relevant competent authority and could not be bound by the Planning Inspectorate or a particular Inspector to a decision that the project was more appropriately assessed by another competent authority under Reg 65(2) of the Conservation of Habitats and Species Regulation 2010 (a competent authority is not required to do an assessment which is more appropriately done by another competent authority) or to the form of his decision. The debate about responsibility under the Directive was of no practical significance since whether or not the Inspector was a decision-maker under the Habitats Directive, he was entitled to rely on expert guidance from the Agency (and Natural England). It would only be if their guidance was flawed that his decision would be open to challenge.

Elliott v Secretary of State for Communities and Local Government [2012] EWHC 1574 (Admin) concerned a challenge to the proposed ‘makeover’ of Crystal Palace Park and raised issues relating to ‘imperative reasons of
overriding public interest' (IROPI) for the purposes of Regulation 62 of the 2010 Regulations. The point of wider interest in the case concerns Keith J’s assessment of the claimant’s contention that the need to raise funds for a development could not as a matter of EU law constitute ‘exceptional circumstances’ forming the basis of an IROPI. There is an outstanding appeal to the Court of Appeal including on the IROPI issue.

7. Administrative Decision-Making and Expert Evidence

Inspectors, who are experts in their own right, are finding it tricky to know how much they need to explain the view they take of expert evidence before them. The courts also appear to be finding it difficult. In *Macarthur v Secretary of State for Communities and Local Government* [2013] EWHC 3 (Admin) Lang J made clear that she thought the Court of Appeal in *RWE Npower Renewables Ltd v Welsh Ministers* [2012] EWCA Civ 311 had got it wrong with the consequence that ‘an unsuccessful party will usually not know, in any detail, why the evidence of an expert has been accepted or rejected by the Inspector and therefore will not be able to discern whether the Inspector has correctly understood and applied the evidence of the expert’. She was however bound to follow the Court of Appeal and did so. It looks like this issue has further to run.

8. Parent Company Liability

The case of *Chandler v Cape plc* [2012] EWCA Civ 525 is a health and safety case but potentially applicable to environmental law in areas like nuisance law. It is therefore a potentially interesting development but remains to be tested. The Court of Appeal held that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary’s employees. Those circumstances include a situation where, as in the present case: (1) the businesses of the parent and subsidiary are in a relevant respect the same, (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry, (3) the subsidiary’s system of work is unsafe as the parent company knew or ought to have known, and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on it using that superior knowledge for the employee’s protection. Although a health and safety case, the principles in the judgment could translate to the environmental arena, as for example in a nuisance claim where the defendant subsidiary company is of limited means (and uninsured) and the claimant(s) seek to involve the parent company.