

Regulatory Breach



ST. PAULS CHAMBERS

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Welcome..

The September edition of Regulatory breach marks an important milestone in the development of the Regulatory Group at St Pauls chambers. The group began some years ago by defending importers and manufacturers in dangerous product cases, in particular baby products and toy safety prosecutions. We also appeared on both sides in Health and Safety prosecutions concerning fatal and non fatal accidents. These areas still provide the majority of instructions for our team in this field.

The group has expanded into inquests, prosecution of FACT cases around the country, heavy Trading Standards prosecutions involving motor vehicle 'clocking' and professional discipline ie Solicitors, Nurses, Accountants, Police and FSA tribunals. We have now included articles of interest in Employment Law as our employment team goes from strength to strength and are very grateful to a number of 'partner' firms of solicitors who continue to submit articles of interest on various topics.

This edition however sees the introduction of an emerging topic in Environmental Law which will bring about a great deal of new Regulation for all businesses, ie Carbon Law. As the effects of greenhouse gasses become clear to governments and regulators around the world, new technology and processes require new regulatory frameworks to govern the risks and markets that are being developed.

In this edition we consider definitions such as sustainable development and an overview of fossil fuels and alternative energy sources, and a general introduction to Carbon Law. Over the next few months we will consider some of the topics in more detail, especially Carbon Capture Storage [CCS] technologies, often known as 'clean coal' and Carbon Trading, two main strands of activity aimed at reducing global CO2 emissions.

We also feature interesting articles on the scope of the Disability Discrimination Act 1995 in the context of housing cases, an FSA crackdown on insider dealing and a review of recent decisions concerning cartel activity.

As ever, we are quite happy to consider articles, reports or advice on the whole range of regulatory activity and hope that the newsletter continues to be of interest to practitioners around the country.

Jeremy Barnett

Editor: Jeremy Barnett Email: jvb@stpaulschambers.com
Asst Editor: Alun Jones Email: ajj@stpaulschambers.com
Snr Clerk: Catherine Grimshaw
Email: cjg@stpaulschambers.com
Tel: 0113 2455866 Fax: 0113 2455807
DX26410 Leeds Park Square



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Carbon Capture Storage Environmental Law

Jeremy Barnett
St Pauls Chambers

Much recent regulation and legislation is centred around environmental issues. The world's excessive reliance on carbon-based energy ('fossil' fuels) has resulted in a growth in 'sustainable development' which is best described as development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. As India and China develop modern economies, the global demand for energy is growing at such a rate as to threaten the environment and cause climate change. This article is an introduction to some of the issues and developments which will be explored in detail in coming editions of Regulatory Breach.

The impacts of Fossil Fuel

Fossil fuels are the primary cause of climate change – described as the human induced atmospheric build up of greenhouse gasses (GHGs) that trap heat from escaping into space, somewhat like a greenhouse. The burning of coal, oil and natural gas accounts for the overwhelming majority of human caused emissions of CO₂. For example, more than half of the US energy related emissions come from power plants, a third from transportation and the rest from a variety of sources including industrial sources and waste management.

Climate change and its impact are now recognised by courts around the world. For example, in 2007 the US Supreme Court in *Massachusetts v EPA* ruled that 'the harms associated with climate change are well-documented' and that the harms are serious and well recognised. Each fuel has its own considerations for example:

Coal: the dirtiest and most environmentally impactful of all fuels, with over 1 billion tonnes being burned in the USA, and China burning more than the USA, EU and Japan combined. Transportation and mining cause multiple adverse effects on health, land, water, air pollution and waste.

Natural Gas: the cleanest of fossil fuels, which accounts for 24% of global energy, still prevents the baggage of negative climate change, and other health and environment issues through drilling, transportation and refining. Produces less CO₂ than coal or oil, but burning releases other hydrocarbons

Petroleum: Oil or light crude provides 40% of the world energy needs, the majority being used for transport, with 16% used in chemical manufacturing. The burning of petroleum to produce energy is a primary cause of air pollution. New searches for oil have increased the used of 'heavy oils', eg oil sands and shale which bring a higher environmental impact.

Alternative Energy Sources include:-

Nuclear Power: has received a resurgence of interest, but cause carbon emissions in mining and milling, transporting the fuel, building the plants and in enrichment operations. The risk of catastrophic event such as Chernobyl is high, for example in 1976 there were 51 long-term shut downs in 12 months in the US.

Biomass: which refers to plant material, animal and other biodegradable wastes, including wood, construction residues and energy crops. Many products now made from Petroleum such as plastics and solvents can be made from renewable biomass which are carbon neutral and non toxic. However, the industry emits GHGs, and deforestation creates a conflict with food production.

Water Power: has been used for thousands of years. At least 45,000 large dams have been built around the world, with half the world's rivers being dammed. Great environmental damage has caused litigation in the USA since 1965, and China is facing serious issues with forcible eviction and other damage. Dams also cause other pollution through the build up of silts and sediment causing illness and poisoning. Ocean based hydro power promises a great deal with the development of new technologies.

Geothermal: resources including steam, heat and electricity also bring the promise of renewable energy in China, the USA and Iceland, again encouraged by the growth of new technologies.

Solar: energy can be converted directly or indirectly, with great benefits as the 'fuel' is vast, free, inexhaustible, clean and noiseless. Being producible near the point of use transport and infrastructure costs are low but bring about an intensive land use with substantial planning issues.

Wind: is the fastest growing source of electricity in the world, but wind farms require large areas of land raising concerns and objections over development and public objection because of visibility impacts. The World Wind Energy Association predicts a doubling of wind energy by 2010, mainly in USA, India and China.

The EU does not have general competence in relation to energy policy, leaving regulation to individual members but various financial support mechanisms have been encouraged – for example the Renewable Obligation [RO] which came into force in England Wales and Scotland in 2002 which moves away from direct subsidy to market driven support, by requiring all suppliers to buy electricity from renewable sources and allowing the sale of Renewable Obligation Certificates [ROCs], regulated by Ofgem.



Carbon Capture Storage cont...

Hydrogen and Fuel Cells have created a great deal of excitement about the possibility of replacing petrol and diesel with a renewable source. However the fuel may be produced from coal, thereby wiping out the benefits. The massive growth of road building and car use in China may result in lighter vehicles, and the use of these fuels in conjunction with oil based products. Research predicts the emergence of microgrids with distributed generators producing power from a number of sources, to be called 'hydricity'.

Carbon Law

It is clear that numerous international legal and regulatory issues emerge from the growth of the use of renewable energy, and the desire to reduce the global use of GHGs. The 1992 Climate Change Convention forms the bedrock on which future developments such as the 1997 Kyoto Protocol was based. At Kyoto developed states committed themselves to explicit unambiguous targets and timetables for the reduction of chief GHGs, using mechanisms including CDMS – clean development mechanisms to allow countries to invest in emission – reducing projects in developing countries whilst achieving credits in the host country hence Carbon Trading.

The other main area of emerging interest is Carbon Capture and Storage [CCS], which is the technique for trapping carbon dioxide as it is emitted from large power sources, compressing it and transporting it to a suitable site and injecting it into the ground. New technology is being designed to create a safe and reliable process, sequestering CO2 directly in geological formations including oil and gas reservoirs, unmineable coal seams, and deep saline reservoirs.

On 28.2.08, the EU commission proposed a Directive on the geological storage of CO2 as part of a major legislative package. This will consider the management of risks, removing barriers, and promoting deployment and the

process for assessing the impacts of options. On 1.5.08 a new Energy Bill was brought forward from the House of Commons which deals with gas importation, electricity from renewable sources, dealing with nuclear waste, and third party access to oil and gas pipelines.

At the Global CO2 summit in London, June 08, Dr Faith Birol, Chief economist to the International Energy Agency spoke of the 'New world energy order' whereby India and China are beginning to drive international regulation because of their increased demand, and difficulties faced on the supply side by international oil companies. He called for a big push for CCS in China and India, a call that seems to have been heard here in Leeds, where Yorkshire Forward announced on 6th June 08 a new CCS initiative proposing the development of a new network to transport CO2 from existing users such as Drax to the North Sea for storage in redundant oil reservoirs.



The International Centre for Legal Compliance (ICLC)

www.ic4lc.com

ICLC is an academic and professional centre of excellence which provides a research capability in carbon trading and emissions law, waste, financial, business process and safety compliance for global businesses.

ICLC is a joint venture between Burton Burton & Ho solicitors (BBHO) and Jeremy Barnett who is a member of St Pauls Chambers and Visiting Professor of Law Informatics at Leeds University which formed the Court 21 project in 2002. William Ho is the senior partner of BBHO, a UK based solicitors practice with a vibrant PRC department which specialises in bringing Chinese capital to Europe. The head of research is Macella Wan who studied law at Hull University before joining BBHO in 2006.

ICLC will offer research and consultancy to Chinese and Indian firms who operate in a global marketplace.. The Advisory Board also contains a number of leading academics who specialise in UK/East Asian Business and Law. Key areas of interest in this emerging market are Carbon Capture and Storage [CCS] legal and regulatory issues, financing and initiatives, CO2 pipeline access, safety/health issues and Carbon Trading.

'ICLC are also participating in a research project at Court 21 to develop an intelligent platform to support regulatory compliance and the design of the virtual technical file.'

Members of the advisory board include:

- Professor Peter Buckley from the Centre of International Business, University of Leeds
- Alan Ho, General Manager of The Harmony Climate Group Carbon Assets Consulting (Beijing) Co Ltd.
- Professor Surya Subedi, School of Law, University of Leeds
- Peter Dew, Professor of Computer Science, University of Leeds
- Sharon Bamford, founding Chief Executive of the UK India Business Council (UKIBC).
- Professor John Oakland, Oakland Consulting and Carbon Ready.
- Dr Hinrich Voss who is a Post Doctorial Fellow at the White Rose East Asia Centre, University of Leeds.

Discrimination For a Reason Related To Disability: Now Much Harder to Prove

Andrew Sugarman
Barrister, St Pauls Chambers

Any business employing disabled people will be well aware of the various duties imposed by the Disability Discrimination Act 1995. Now the House of Lords, in the context of a housing case, has delivered a very important judgment on the scope of disability discrimination law which all who practice in the area ought to be aware of.

In *Mayor & Burgesses of the London Borough of Lewisham v. Malcolm*, a schizophrenic man sublet his council flat, in breach of his tenancy agreement, during a period when he was not taking medication for his condition. The local authority terminated his tenancy agreement and began possession proceedings. The House of Lords had to consider, amongst other issues, whether the local authority had discriminated against Malcolm because, for a reason which related to his disability, it treated him less favourably than it treated or would have treated others to whom that reason did not or would not apply. If so, the issue would then have been whether any such less favourable treatment was justified.

In order to determine less favourable treatment it is necessary to identify a comparator. The Court of Appeal in *Clark v. Novacold* held that there was no requirement, under the 1995 Act, that the comparator be in the same, or not materially different, circumstances to the complainant. The classic battle ground for such arguments has therefore been in cases where an employer has been faced with a disabled employee who has had or is likely to have a substantial amount of time off work due to their disability. The disabled employee previously could argue that someone without their disability would not have been off work at all and therefore there was discrimination which needed to be justified.

In *Malcolm*, the House of Lords felt (Baroness Hale dissenting) that the existing test made it too easy for a complainant to prove disability related discrimination. They felt that the correct comparator was a person who did not have a disability but otherwise was in the same circumstances as the complainant. In a case fought in the usual employment context, the comparator would be someone who is not disabled but who has had a similar amount of absence. In this case, the comparator was another tenant who had sublet in breach of the tenancy agreement. The local authority were therefore able to show such a person would have been treated in the same way and thus there was no less favourable treatment. The issue of justification therefore did not arise.

The House of Lords also held that the previously accepted view; that it was not necessary for an employer to have knowledge of the person's disability in order to commit an act of disability discrimination, was wrong. Their Lordships felt that disability related discrimination did require actual or at least imputed knowledge of disability, unless of course the act complained of was inherently discriminatory. Further, knowledge of the disability would need to have a role to play in the decision-making process in order to satisfy the "reason why" test, i.e. the reason why the employer acted in the way it did. In this case there was no less favourable treatment and also no disability related reason for the action.

This new definition of disability related discrimination arguably makes it very similar to direct disability discrimination which was introduced in the employment context and appears now under Section 3A(5). Interestingly, it is not replicated in Part III which deals with other areas outside the employment context and one wonders if this affected the ultimate decision reached. As Baroness Hale said, the judgment has altered the "settled understanding of employment lawyers and tribunals".

Some academic commentary following the decision has suggested that the move may well make the law incompatible with Article 2 of the Equal Treatment Directive which requires indirect disability discrimination to be prohibited. The decision of the House of Lords in this case reduces the protection offered to disabled people from provisions, criteria and practices which, although apparently neutral on their surface, put them at a substantial disadvantage. Arguably on the facts of this particular case, that argument was, in any event, somewhat remote. However, given employees will continue to be able to advance similar arguments by focusing more on the duty to make reasonable adjustments, clearly the effects of decisions and the application of provisions, criteria and practices upon disabled workers ought to be kept firmly in mind by businesses.

HSE Carbon Capture Storage consultation

An important New HSE consultation guide on Carbon Capture and Storage was issued on 30th June 2008. It calls for a response from the power generation sector, offshore shipping, waste disposal sector and non government organisations in climate change by 22nd September 2008.

It is a very useful guide to the subject of CCS. Section 3 asks for views on the proposal in Article 32 of the Draft Directive that the Carbon Capture Readiness (CCR) of any new combustion plant of 300MW or more must be addressed by the developers in the design process and taken into account by the regulatory authorities in deciding whether or not to consent to such a new plant.

It also asks for views on the types of power stations to which CCR should be applied, and suggests that the UK should take a robust view, even if the EU declines to do so.

Section 4 sets out a framework for the licensing of carbon dioxide in the UK offshore, and considers whether multiple uses of the seabed for enhanced oil recovery and CCS to be prohibited.

Other areas are also considered, in particular identifying fundamental principles to support a Europe wide infrastructure to encourage commercial development of CCS technology, clearly a necessary driver if CCS research and development is to be encouraged in the UK.

On 29 July 2008, eight individuals were arrested and search warrants were executed at sites across London and the South East in connection with what the FSA has described as a major ongoing investigation into insider dealing. Such action is indicative of a clear intention on the part of the FSA to crack down on market abuse, and to use its criminal powers in so doing.

This operation involved 40 staff from the FSA assisted by the City of London Police. The size and scale of the operation and the use of search warrants suggest the FSA suspected an organised group and was concerned that destruction of evidence was a genuine risk.

The FSA and its predecessor bodies have long possessed powers to bring criminal prosecutions for insider dealing contrary to section 52 of the Criminal Justice Act 1993, with penalties of up to seven years' imprisonment. In addition, there are a number of other offences under the Financial Services and Markets Act 2000, including carrying on unauthorised business, making an illegal financial promotion and misleading the FSA. However, the FSA has traditionally been reluctant to use its prosecution powers and its first criminal case, for insider dealing, was not brought until January this year. The FSA has instead preferred to use civil sanctions for market abuse under section 118 FSMA. Many have expressed the view that where criminal prosecution is available it should be used and the FSA's failure to invoke its ultimate sanction has made it appear unnecessarily weak, especially in comparison with its counterpart across the Atlantic. The US Securities and Exchange Commission (SEC) has shown itself much more willing to prosecute and to pursue larger financial penalties than its UK equivalent and a recent study by Professor John Coffee of Columbia university has suggested that this may be having an adverse impact on the UK markets and the cost of capital for UK PLC..

The FSA has responded to the debate, with Director of Enforcement Margaret Cole recently reaffirming its commitment to 'be visible in the market place sending tough messages about wrongful behaviour and imposing sanctions (which doesn't just mean fines) which are severe enough to have a deterrent effect.'

Recent arrests and raids suggest that the FSA is putting its money where its mouth is and embracing a more proactive enforcement approach, including prosecution.

In total, the FSA now has three criminal cases underway. Whether this signals a lasting change in approach or a short term, damage-limitation exercise post Northern Rock remains to be seen: the acid test is whether the FSA is able to prosecute successfully, and whether this marks the start of a new era of deterrence for those who are tempted to cross the boundaries.

Imprisonment for director who caused fatality.

Jeremy Barnett
St Pauls Chambers

Sharaz Butt, 44, the sole director of Norwich firm Alcon Construction, was sent to prison for 12 months by Norwich Crown Court on 21 August after pleading guilty to the manslaughter of Wu Zhu Weng. He was also disqualified from acting as a company director for five years after pleading guilty to breaching s37 of HSWA 1974 by neglecting the safety of his workers as a company director.

The court heard that three Chinese men, who were illegal immigrants and illegally employed, had been working for Alcon Construction on a project to refurbish and extend an old bakery in Trowse, Norwich, on 31 January 2008. Two of the workers had been constructing a "jerry-built" form of temporary edge protection for the open flat roof, according to HSE inspector.

Although it is not clear exactly what happened, the Deceased had climbed on to the roof to assist the two other men and it appears he either tripped over the raised lip of the skylight that was covered with a white tarpaulin, or fell straight through it, through the sheet. He dropped 3.26 metres on to a concrete floor, sustaining fatal injuries.

The Defendant had conducted no risk assessment, had no training in place and had conducted no site supervision. The task being undertaken was clearly highly dangerous and demonstrated a wholesale disregard for current Health and Safety practice.

In mitigation it was said that there was no financial gain and that imprisonment would cause the firm to collapse. Remedial action had been taken after the incident to prevent a reoccurrence – both Butt and a site supervisor attended a site safety training course.

Alcon Construction had also been charged under s2(1) of HSWA, but due to a lack of funds a nominal fine of £10 was imposed. Judge Peter Jacobs said he would have fined the firm tens of thousands of pounds had the company been in a position to pay such an amount. To be on a flat roof with open, unguarded skylights without an accident happening was, the judge added, "total lunacy", and Mr Butt had shown a "cynical disregard" for his workers.

Competition Update

Recent Decisions

There have been two recent decisions in respect of cartel activity. On Friday 11 July, Mr Justice Pitchford quashed an indictment alleging price fixing against Goldshield and 4 other drugs companies over allegations that they conspired to overcharge the NHS for generic medicines. On the same date, Gallaher and five retailers agreed to pay £132 million to settle charges brought by the Office of Fair Trading (OFT).

The Serious Fraud Office (SFO) began investigating allegations of price fixing in the pharmaceutical industry in 2000. In April 2002 more than 30 premises were raided including the offices of pharmaceutical companies and the homes of a number of executives. Civil proceedings began in October 2002 against the pharmaceutical companies. The cost of the investigation amounted to £25 million and was the largest prosecution ever brought by the SFO.

The charges brought against the companies and the individuals were under the common law offence of conspiracy to defraud. The decision by the trial judge to quash the Indictment followed the decision by the House of Lords in April 2008 that price fixing was not necessarily amount to a criminal offence in the UK prior to the introduction of the Enterprise Act in 2002. The SFO may appeal to the Court of Appeal.

In the Tobacco case, The OFT identified Imperial Tobacco as the company at the centre of the scheme. Imperial Tobacco owns brands such as Embassy and Gallaher. These two companies control about 85% of the UK's cigarette market. UK cigarette prices are among the highest in Europe. The allegations related to the sharing of information of future price rises.

On 11 July, Gallaher agreed to pay £93 million to settle the charges with the OFT. Retailers ASDA, First Quench, One Stop Stores, Somerfield and TM Retail also signed early resolution agreements with the OFT in exchange for a significant reduction in fines. These companies will pay the balance of the £132 million agreement. The discounts given for the co-operation will reduce the maximum fine of £173 million down to £132 million. This reduction is dependant upon continued assistance with the investigations.

J Sainsbury has received complete immunity from any financial penalty as it was the first company to apply for leniency. This position, again, rests upon continued co-operation. Six further companies continue to contest the allegations.

The levels of fine have been growing steadily over the past few years but even so, the fine of £121.5 million imposed last August by the OFT on British Airways (for agreeing with Virgin Atlantic to fix the prices of long haul passenger fuel surcharges), came as a something of a shock. This was exacerbated by the \$300 million fine imposed by the US Department of Justice. The size of the fine was a clear indication that the OFT is no longer prepared to tolerate the most abusive kinds of anti-competitive behaviour.

There are signs that this warning has not gone unheeded. When, at the end of 2007, the OFT announced that it had uncovered evidence of price fixing in the dairy sector, a number of the retailers and producers identified agreed to cooperate with the investigation, admitting price fixing, in return for a reduced fine. The practice of reaching an early resolution agreement with the competition authorities, which was embraced last year by some in the construction business in respect of bid rigging activities, is something we are likely to see more of as organisations come to realise the benefits of avoiding a large fine (as well as the attendant benefits of reduced legal costs, waste of management time and certainty). The construction sector has since seen 112 companies issued with a Statements of Objections by the OFT detailing alleged anti-competitive behaviour.

Damages actions

However, an early resolution agreement with the competition authorities (or indeed, a formal application for leniency) will not remove the risk of a damages action being brought by a third party that has suffered loss as a result of the anti-competitive activity.

This is a comparatively new feature of the legal landscape, at least on this side of the Atlantic. The claimant could be an aggrieved competitor but it could also be a class action brought by consumers, as seen recently in the case of JJB Sports who were fined by the OFT for fixing the price of replica football shirts. On the back of the OFT prosecution, the consumer group, Which?, brought the first UK class action under the provisions of the Enterprise Act 2002 on behalf of consumers affected by anti-competitive behaviour. This culminated in the recent agreement by JJB Sports to pay £10 to anyone who could prove that they had bought one of the replica shirts in question.

It is already reported that BA is considering an out of court compensation package for those customers adversely affected by its price fixing. This trend is likely to be followed pursuant to the construction case, with claims possible from public or private sector bodies who can prove loss. The risk is that compensation claims could negate the benefits of any leniency application.

Background material supplied by Jeanette Harwood Walker Morris



Civil Forfeiture of Cash

Denise Breen-Lawton
Barrister, St Pauls Chambers

St Pauls Chambers has an established and experienced team of counsel who conduct civil forfeiture hearings on behalf of the Police, Revenue and Customs and Respondents. All Counsel also have expertise in Criminal law which is all important when one is dealing with 'unlawful conduct' as a potential source of cash.

Please speak to our clerks for further information or to book Counsel for such hearings