

Environment end of year review—life in 2015

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Environment analysis: Our panel of experts looks back at the most important developments and challenges for environment lawyers in 2015.

The experts

Matthew Townsend, partner in the environmental and regulatory Law Group at Allen & Overy

Simon Tilling, senior associate at Burges Salmon

James Burton, barrister at 39 Essex Chambers

What is your take on the environmental law market in 2015?

Matthew Townsend: In terms of work, 2015 has seen a pick-up in M&A work and this has had a positive knock-on effect. In addition, clients seem more willing to spend on external counsel on strategic environmental matters. As a result, it's been a busy year and the pipeline looks strong.

Simon Tilling: Environmental law is a discipline that is in constant flux and 2015 has been no different. Environmental lawyers need to be adaptable and versatile to respond to changing priorities, shifts in governmental policy and emerging law. The bread and butter work for environmental lawyers even five years ago is quite different to 2015. However, for those who are adaptable, there remain great opportunities in the environmental law market.

James Burton: From a barrister's perspective, the market has been healthy but far from stable--some areas of work have increased markedly, others have dropped off equally noticeably. There has been an increase in criminal work, almost certainly due to the level of fines that clients now face due to the Sentencing Guideline for Environmental Crime. For those involved in the petitioning stage and litigation surrounding the High Speed Rail (Midlands) Bill (HS2), 2015 has been very busy indeed. But there has been a marked decrease in group action nuisance work, almost certainly due to the change in the funding environment.

How has the market changed over the past 12 months?

Matthew Townsend: There has been a continued consolidation of practitioners in this practice area. Unfortunately, there are fewer environmental practices doing high-end work than there were 12 months ago.

Simon Tilling: The past 12 months have been a period of evolution rather than revolution. For example, following changes to funding arrangements for private claims in the civil courts, there are fewer private nuisance actions for environmental issues such as noise and odour pollution. However, we are seeing a corresponding increase in statutory nuisance actions pursued by local authority environmental health teams.

James Burton: The increasing availability of costs protection for environmental claims for judicial review has encouraged individuals and smaller NGOs to at least consider litigation, when previously they would have steered clear.

What legal developments have had the biggest impact on your practice in 2015?

Matthew Townsend: The growing focus on mandatory environmental, corporate social responsibility and human rights reporting is an important issue for our clients. This began at the end of 2014 with the entry into force of the Reports on Payments to Governments Regulation 2014, SI 2014/3209 for the extractive/primary logging sectors, has continued with the transparency in supply chains reporting requirements under the Modern Slavery Act 2015 and will be an issue going forward. We are seeing a lot of work on these and wider human rights initiatives.

As mentioned above, there has been a surge in M&A and capital markets work. This shows no signs of abating which is encouraging.

The UK is also developing a new generation of nuclear plants which is keeping my practice busy (as it is for a number of other practices).

Simon Tilling: The introduction of enforcement undertakings for environmental permitting offences is an important change. Enforcement undertakings provide an opportunity for efficient and cost effective resolution of investigations for incidents of non-compliance with environmental permits. It enables the regulated community to take control in what can otherwise be a very difficult period for a business and the individuals involved, and can remove the threat of prosecution. We have a good track record of using enforcement undertakings for both pollution events and producer responsibility non-compliance. The change in the law now allows us to support businesses subject to investigations for breaches of permit as well.

James Burton: In the civil courts, undoubtedly the biggest impact has come from the bedding down of the Civil Procedure Rules 1998, SI 1998/3132 providing for costs limits in Aarhus claims. These have encouraged members of the public to risk challenging decisions by way of judicial review who previously would have steered clear for fear of substantial adverse costs.

In the criminal courts, without question it has been the coming into force of the Sentencing Guideline for Environmental Crime, coupled with the decision of the Court of Appeal in *R v Thames Water Utilities* [2015] EWCA Crim 960, [2015] All ER (D) 31 (Jun) and the expansion of enforcement undertakings. Put simply, fines for 'everyday' environmental crime, including permitting breaches, are now potentially huge, which has knock-on effects throughout the way permit holders, in particular, approach their activities and any breach.

How have these affected your ongoing matters and working life? How have you dealt with these on a practical level?

Matthew Townsend: Our practice is a blend of support work for corporate, projects and finance transactions and our own stand-alone regulatory clients. Maintaining this balance is always a challenge as you can find yourself blown off course by a large matter that consumes significant time within the team. We've just about struck the right balance in 2015.

Simon Tilling: The working life of an environmental lawyer is incredibly varied. That is one of the things that makes the job so enjoyable. If you don't like the fact that the law is constantly changing then you shouldn't be an environmental lawyer.

James Burton: In the civil courts, instructions are now more likely to come via direct public access or licensed professional access. In the criminal sphere, environmental offenders/potential environmental offenders are more likely to involve counsel.

Have all the expected developments of 2015 come to pass?

Matthew Townsend: I would not regard 2015 as a year where we witnessed significant legislative change. There have been new initiatives, and as expected the new government has sought to rationalise certain areas of environmental and health and safety law. For certain sectors there has been a reduction in the amount of subsidies available for development purposes but this was expected.

The push for greater energy efficiencies in buildings continues. The government appears to have recognised that the plethora of different initiatives in this space is creating inefficiencies and may need reform. This will be welcomed by many.

We were hoping that 2015 would see strides in the development of legislation on the EU's circular economy agenda. This seems to have gone back to the drawing board which is disappointing.

Simon Tilling: In broad terms, yes. Of course, the big unknown of 2015 was the outcome of the general election. Environmental law and policy remains a highly political arena. The new Conservative government has its views on environment and energy and we are already seeing the repercussions of its policy on support mechanisms for renewable energy. What remains to be seen is how this government will meet its carbon emission reduction commitments through energy efficiency policies. We are watching this space with interest.

James Burton: Most of them. We knew ClientEarth would succeed in the Supreme Court in relation to the UK's non-compliance with the Air Quality Directive (*R (on the application of ClientEarth) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs (Respondent)* [2015] UKSC 28, [2015] All ER (D) 221 (Apr) and [2013] UKSC 25, [2013] 2 All ER 928).

It has taken the government a little longer than anticipated to move to address the obvious gaps within the Aarhus claims costs limiting regime highlighted by the decision in *Venn v Secretary of State* [2013] EWHC 354.

As expected, there has been a drop off in new group nuisance actions as the removal of uplifted conditional fee agreements (CFAs) and recoverable ATE bites.

How has your business developed in 2015? Has this been a good year for work in your area?

Matthew Townsend: It's been a strong year for us. The practice is busy and we're recruiting. A mixture of a strong M&A market, infrastructure developments in the UK and high-quality regulatory work has meant that 2015 will be seen as a very good year.

Simon Tilling: We are seeing a significant increase in instructions for product stewardships matters. Product stewardship is a product-centred approach to Environmental Protection and encompasses European regimes such as REACH. These complex regimes have been bedding in for a number of years and enforcement activity is now increasing, targeting those businesses that are not yet in compliance.

Overall, it has been another good year for Burges Salmon's environmental law practice.

James Burton: While this question is not obviously one for a barrister, 2015 has been another interesting and rewarding year. The beauty of environmental law is its sheer breadth and the past 12 months have not disappointed--only an environmental law practice could allow me to deal with separate instructions concerning aviation noise, air quality, pollution of a watercourse, asbestos, and mushroom cultivation over a summer.

How has the profile of your clients developed? Can you identify any trends in your clients or types of cases?

Matthew Townsend: We are geared to working for large multinational corporates and financial institutions. While different clients have different issues at particular times, the demographics of our client base have not really changed.

Simon Tilling: With the increased focus on product stewardship under European environmental law, we are seeing more multinational clients who are interested in understanding European law but want to deal with a UK-based specialist outfit. The environment is a global issue--not just for issues such as carbon emissions and climate change but also for global resource use and supply chain compliance.

James Burton: If anything, both my client base and my instructions have become more varied.

Interviewed by Jenny Rayner.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor



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