Talking Points--tackling recurring issues

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Environment analysis: Our panel of experts gives its views on how to handle common and recurring issues in environmental law.

The experts

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Is there a common issue you are coming across time and again in environmental law at the moment? How do you deal with it?

Simon Tilling: The tension between public access to environmental information, and the desire of businesses to protect commercially sensitive material, remains a fertile ground for disputes. Environmental lawyers must also now be information rights lawyers. We regularly advise on all sides of this complex issue, for those seeking to protect confidential information, those seeking access to it, and for regulators and other government bodies who need to make decisions.

The recent case of *Natural Resources Wales and SI Green (UK) Limited v Information Commissioner and Friends of the Earth Swansea* [2013] UKUT 0473 (AAC) is a good example. It concerned access to financial information about the provision of a bond as security for environmental liabilities arising from the operation of a landfill. The Environmental Information Regulations 2004, SI 2004/3391 protect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest, but only if the public interest in maintaining the confidentiality outweighs the public interest in disclosing the information. The First Tier Tribunal had ordered disclosure, but the Upper Tribunal reversed that decision in December 2013 with a broader and more pragmatic interpretation of the regulations.

Helen Simm and Victoria Turner: From recent work we have undertaken in connection with Environment Agency (EA) criminal investigations, it is clear the EA has a focus on money laundering offences as well as the substantive environmental law offences. It is also clear that the EA is keen to pursue confiscation when convictions are achieved. From recent cases we have been involved in we have seen, from the very early stages, that the EA is alleging that there are 'proceeds of crime'. This occurs prior to conviction and on some occasions prior to charges being brought. This suggests to us that the EA has an alternative agenda when it is investigating alleged criminal offences.

In such cases where money laundering is being alleged and where the EA is expressing a keen interest in 'proceeds of crime' (ie confiscation) it is important that we ensure that the focus remains on the substantive

EA offences and that the EA correctly applies the money laundering offences and the definition of 'criminal property'. Where any arguments are put forward by the EA relating to 'proceeds of crime', we should try to ensure these arguments are held in abeyance until the appropriate time when confiscation is being considered.

Emma Feeney: As recent cases have demonstrated, courts are increasingly willing to adopt a more robust approach to non-compliance with environmental legislation. The approach adopted in *R v Sellafield Ltd* [2014] EWCA Crim 49, [2014] All ER (D) 111 (Jan) was subsequently followed in *R v Southern Water Services Ltd* [2014] EWCA Crim 120*,* where the water company unsuccessfully appealed against a £200,000 fine for illegally discharging raw sewage in the sea after two of its pumps broke down.

In addition, in the recent Court of Appeal decision in the case of *Walker & Son (Hauliers) Ltd v Environment Agency* [2014] EWCA Crim 100, [2014] All ER (D) 45 (Feb), the court was asked to clarify the meaning of 'knowingly permitting' under the Environmental Permitting (England and Wales) Regulations 2007, SI 2007/3538. The court confirmed that the law required Walker & Son (Hauliers) to ensure that what was happening on its land was compliant with the conditions of an environmental permit. The prosecution only had to establish that the appellant knew that operations were taking place; that he allowed, or failed to prevent them; and that they were not being performed in accordance with an environmental permit. The words 'knowingly permit' relate to knowledge of the facts and not to the existence and scope of the permission or conditions of a licence.

It is, therefore, evident that the implications of non-compliance for our clients can be substantial and can adversely affect both their financial and reputational performance. Bearing this in mind, we aim to adopt a proactive stance by constantly keeping our clients abreast of new developments in environmental legislation and advising them on the steps they need to take in order to comply with legislative requirements and helping to cultivate a compliance culture within an organisation.

John Bates: In nuisance claims, defendants are increasingly saying that a claimant must provide evidence of each odour/dust, etc, and event--its date, nature and duration. There is no legal justification for this approach. Nuisance claims are determined over a period, not on a day by day basis. The best way of dealing with such an approach by a defendant is to make it clear that any costs incurred in relation to it will be sought on the indemnity basis as it is an approach that is 'doomed from the start'.

Professor Karen Morrow: I think the most significant problem facing environmental law is the return of an old difficulty--its portrayal as an expensive indulgence in light of the ongoing ramifications of the global financial crisis. In reality, nothing could be further from the truth. Our unwillingness to engage with the systemic threat that irresponsible resource use and pollution now poses to our own well-being and that of the biosphere of which we form part should both give serious pause for thought and provoke us to action.

I would make Rockström et al: 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity (2009) 14(2) Ecology and Society 32 (http://www.ecologyandsociety.org/vol14/iss2/art32/) compulsory reading for all as it places these issues into sharp relief.

Robert Biddlecombe and Anita Lloyd: One of the biggest delays that we face carrying out due diligence in the context of M&A transactions is the lack of evidence that a target company is compliant with its obligations under environmental law. Vital days can be lost while copies of asbestos surveys, Waste Electrical and Electronic Equipment Directive 2002/96/EC (WEEE) compliance scheme membership details, hazardous waste registrations, trade effluent consents, etc are being located. To an impatient seller, such matters can seem trivial in the context of the wider deal.

However, a well-advised purchaser will be aware of the potential criminal penalties for non-compliance with environmental law and will want to see proof that the target company is not in breach. The solution, however, is for lawyers to advise their seller clients at the very outset of a transaction as to what evidence a buyer will require as comfort that the target company is compliant. The seller should then trawl their files and records ensure that the necessary documentation is placed in the dataroom as soon as it is opened, or there is a clear explanation available as to why the documentation is not lawfully required.

Interviewed by Nicola Laver.

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