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SHE MATTERS

The Safety, Health and Environment newsletter from DLA Piper UK LLP

IN THIS ISSUE

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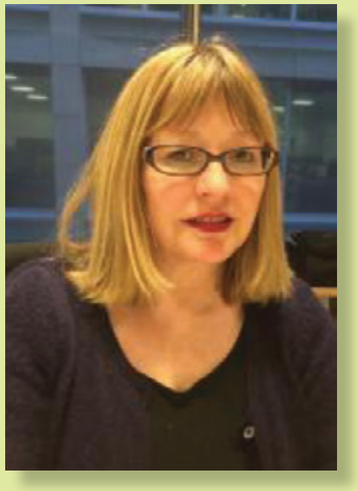
SHE MATTERS



Teresa Hitchcock
Partner

Many years ago, a colleague of mine, then a very young lawyer, was entertaining as a guest at a legal dinner in London a friend, also a young lawyer, who was visiting from the US. My colleague was at that time starting to get involved occasionally in environmental law matters. In the States, that was already a well-established legal specialism, and the friend from the US had already acted as an environmental law adviser to a State Governor.

Asked for advice on how his friend might usefully spend a few days in London amusing himself with matters of legal interest, my colleague suggested that he might spend a morning listening to argument before the House of Lords sitting in its judicial capacity. The friend replied that he had thought of that himself, but had looked at the causes list, and the cases before their Lordships were only boring commercial disputes.

My colleague took the point that, at the time, the business of the Appellate Committee of the House of Lords did tend to be mainly concerned with highly technical legal issues, and unlike the Supreme Court of the United States, it rarely grappled with issues of high constitutional or policy importance. However, he reflected that the more limited role played by the courts in general, and particularly its highest court, in a country without a written constitution, and with a theoretically sovereign Parliament, but in practice one largely dominated by the Executive, had its advantages. One of them was that judicial appointments were not a political issue, as they were in the United States. Judges were often criticised for being out of touch, but it was generally taken for granted that their decisions would not be affected by political considerations. One of the central issues in the recent Presidential Election in the US was over who would have the opportunity to fill vacancies in the Supreme Court and lower ranks in the federal judiciary.

Times may be changing. For some years we have had a Supreme Court in this country, in place of the Appellate Committee of the House of Lords. Following the recent litigation in the High Court over Brexit and Article 50, that Court will have to address issues of high political and constitutional importance. There have already been some disturbing signs of public interest in the socio-political attitudes of the justices who will have to consider the Government's appeal, and even in the attitudes of members of their families. It would indeed be unfortunate if judicial appointments became a political issue in this country.

It is now also far more common than it was for environmental issues to be the subject of litigation.

A recent development has been the rise of specialist firms who bring group claims against industrial operators in respect of the alleged environmental impacts of their activities. Some of these claims may have merit, particularly where operators have not been compliant with regulatory controls, others less so.

In some other countries, innovative lawyers have been trying to use the courts to force Governments and legislatures to take more radical steps to protect the environment than they would otherwise take.

In some cases, as in the action taken by the Supreme Court in India, in the face of complete failure by the Indian Government to take any action in respect of air pollution in Delhi, recourse to the courts may be justified. In other cases, such as the proceedings in the Netherlands, currently subject to appeal, brought to force the Dutch government to act more decisively than it has on Climate Change, the position is far less clear-cut.

There are undoubtedly some environmental lawyers of a campaigning disposition who welcome such developments and see opportunities to protect the environment through a flourishing litigation practice. They should perhaps reflect that litigation is an intrinsically expensive way of resolving disputes, and can have economic consequences for businesses that are also not in the interests of society at large. It is also far from clear that courts are better environmental decision makers than politically accountable politicians.

Nevertheless, environmental litigation can have benefits in terms of holding governments to account. A good example would seem to be provided by the recent High Court proceedings, to enforce an earlier judgment of the Supreme Court on air quality standards for ambient levels of nitrogen oxides, brought by ClientEarth and reported on in this issue of SHE Matters.

This litigation revealed that the Government was aware that the issue posed a serious public health risk in some cities, but that there was a reluctance in some quarters to embark on some relatively straightforward measures to address the problem, due to considerations of short-term political and economic cost.

Faced with the decision of the High Court, however, the Government itself promptly indicated that it will now take the action necessary to address the issue.

In future Governments may need to factor in the litigation risk posed by concerned NGOs like ClientEarth, and the especially high risks of inaction in the face of a clear legal commitment.

CORPORATE MANSLAUGHTER –
IMPACT OF THE NEW SENTENCING GUIDELINES ON BUSINESSES

Now more than ever, companies need to appreciate the significance of their financial position to when faced with a corporate manslaughter prosecution. Businesses should be on notice that regulatory fines may be much more significant in the future. They should be aware that if found guilty of the offence of corporate manslaughter, the economic consequences will be substantial and potentially more than before.

THE HEALTH AND SAFETY OFFENCES, CORPORATE MANSLAUGHTER AND FOOD SAFETY AND HYGIENE OFFENCES

The Definitive Guideline introduced in February 2016 may be regarded as one of the most significant developments in the enforcement of health and safety law in recent years. The new sentencing guidelines, have already increased the level of fines for the largest defendants for health and safety offences when compared to those imposed before their introduction.

SENTENCING GUIDELINES

When considering an appropriate penalty, the court must now consider nine steps including (i) determining the seriousness of the offence; (ii) taking into account any factors that may warrant adjustment of the proposed fine; and (iii) considering whether the proposed fine fulfils the objectives of sentencing.

Fines are now intrinsically linked to the turnover of the charged company. Courts are placing a particularly scrutiny on company financial information and accounts, including directors' pay and will on occasion take into account group company finances.

The Corporate Manslaughter and Corporate Homicide Act was designed to make it easier to prosecute large corporate bodies for an offence equivalent to common law manslaughter where a fatality could be shown to have been caused by a grossly negligent breach of duty under health and safety law. However, to date most of the prosecutions under the Act have related to smaller organisations. Nevertheless, two recent cases show the upward trend of the fines which may be imposed under the new Guideline.

COMPANY	CHARGE	GUILTY PLEA	TURNOVER	PENALTY
Monavon Construction Ltd	Two counts of corporate manslaughter and breach of HSWA	Yes	a micro firm, with a June 2015 net book value of £142,446	The company was ordered to pay £500,000 in fines and £23,000 in costs and the judge imposed a publicity order on the company.
Bilston Skips Ltd	One count of corporate manslaughter and breach of HSWA	Yes	in liquidation	The company was ordered to pay £600,000 in fines.

Whilst there was previously a definitive guideline available in relation to corporate manslaughter and health and safety offences which caused death, the guidelines were criticised for failing to achieve consistent sentencing. Under the new guideline, both convictions have led to financial consequences for the companies concerned in excess of £500,000.

GROUP COMPANIES

Under the new guidelines, the primary measure to set the starting point for a fine is the company's turnover. The judge must then consider any mitigating or aggravating factors and make the appropriate adjustments and ensure that the fine meets the objectives of punishment. It is interesting to note that in step two of the guideline relating to corporate manslaughter, it states:

"Normally, only information relating to the organisation before the court will be relevant, unless it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account."

There is no definition as to what a linked organisation is. We can only infer that the inclusion of the guidance in step two of the guideline (starting point and category range) will encourage scrutiny of the wider finances of the group if this becomes relevant in considering whether the fine is proportionate. Certainly at sentencing, the movement of funds within a group structure, such as inter-company loans, application of profit or the payment of dividends will attract far more prosecution and judicial scrutiny and will require a considerable amount of defence explanation that was simply not encountered previously. It is important to remember that the court may 'step back', review and, if necessary, adjust the initial fine based on turnover to ensure that it fulfils the objectives of sentencing for corporate manslaughter – and that adjustment can be an increase as well as a reduction.

There are already signs that companies with a high risk profile are trying to anticipate the future. For example, Balfour Beatty announced that they had set aside £25 million in anticipation of the effect of the new fining system on their foreseen health and safety issues.

LARGER FINES

Altogether, 20 companies have now been convicted of, and fined for, the offence of corporate manslaughter, with just two convictions under the new Guideline. The Crown Prosecution Service has now charged a third company, Martinisation (London) Limited, with two counts of corporate manslaughter after two employees fell from a balcony. The company entered voluntary liquidation in August 2016 which means, in the event that the company is convicted, we are unlikely to see a significant fine imposed. The company's director is also facing two HSWA charges. It is clear that in future cases where the sentencing court follows the guidelines, there is a potential for very significant fines. Simply put, the larger the company (and possibly its available financial resources), the more significant the fines are likely to be. The lack of convictions in general and in particular, the lack of convictions of large companies provide limited opportunity for analysis of the application of the guidelines. More convictions, particularly of larger companies with multiple subsidiaries and public sector bodies do have the potential to produce fines of such large sums that the higher courts will inevitably be called upon to review the application of the new Guideline.

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FEE FOR INTERVENTION – IMPACT ON BUSINESSES

On 6 April 2016, the HSE increased the amount that it charges under the Fee for Intervention (FFI) programme by 4%, in an attempt to generate more revenue to cover its costs. The hourly fee increased from £124 to £129 and has been applied to all invoices since 6 April.

The new costs came at a time when many businesses were, and still are, finding it difficult to raise their prices as other business costs continue to rise. This is particularly true in the manufacturing sector, which is more likely than most to face HSE investigation in the event of a health and safety incident. Although the FFI scheme has been hugely unpopular within the manufacturing sector, the HSE argue that it has been effective in shifting cost of health and safety regulation from the public purse to those businesses that break health and safety laws.

The 2016/17 Business Plan for the HSE shows that its funding from central government will be over £100 million less in 2019/2020 than it was in 2009/2010 (46% reduction). The income generated by the increase in the hourly fee will not match the HSE's costs for the year 2015-16. To cover its operating costs, the HSE would have to increase the hourly fee by around 18% to £147 per hour. It is likely that the HSE will review fees annually and adjust accordingly in order to clawback their costs.

FEE FOR INTERVENTION AND MANUFACTURING

The manufacturing sector has been the hit the hardest financially by FFI. In the period between February and June 2016, 1460 invoices were issued in the sector, with a total invoice value of £962,081. This represents the highest ever number of invoices issued in a six month period.

For the same period, the average cost of an invoice issued was £649.61.

Whilst the majority of FFI invoices are for sums below £500, invoices can be issued throughout the course of an intervention by HSE. The total contribution to the HSE from the sector over the 12 months up to June 2016 was £5.2 million.

Unfortunately therefore it appears that FFI will remain a significant cost to business and those who are found to be in material breach of their statutory obligations. Businesses need to understand the financial pressure being experienced by the HSE and ensure that they are well prepared to respond in the event of an incident requiring intervention, closing any gaps effectively and without the need for protracted involvement from the HSE.

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PIERCING THE CORPORATE VEIL AND HOLDING DIRECTORS INDIVIDUALLY LIABLE TO THE COSTS OF REMEDIATING ENVIRONMENTAL PERMIT BREACHES

DIRECTOR'S LIABILITY

In recent years there have been some high profile examples of environmental permit breaches where the company having caused the resultant pollution were not in funds to meet the remediation costs. In such circumstances it is left to the public body, the Environment Agency or other third party, to meet those costs, effectively at the expense of the tax payer.

As this article demonstrates, there are good reasons for Directors of companies holding environmental permits to have an appreciation of the powers available to the courts to pursue the individual Directors personally to refund costs met by the public body, with those sums sometimes running into the millions of pounds.

The previous approach was for the court to pursue the corporate entity as duty holder, via its right of action under the *Environmental Protection Act 1990*. However, the *Proceeds of Crime Act 2002* and recent case law have paved the way and emboldened the courts to recover costs directly from the Directors.

Ultimately, the courts now have to grapple with competing public policy considerations. On the one hand, it is a well-established legal principle in the United Kingdom that, by virtue of limited company status, any liability found will remain against the company, separate and distinct in its legal personality from the directors or shareholders. On the other hand, the courts have to manage the frustration of high value remediation costs being borne by the tax payer, in circumstances where the company is unable to meet the costs.

CONSIDERATION OF R V POWELL AND WESTWOOD[1]

The courts recently had to consider directors' liability and determine the position and relevant legal principles in the Court of Appeal decision of *R v Powell and Westwood*.

Jacqueline Powell and Jonathan Westwood were directors of Wormtech Limited who held an environmental permit for an in-vessel composting facility on land owned by the Ministry of Defence. In August 2012 the Environment Agency issued an Enforcement notice for breaching conditions of the permit; within two months the site was abandoned and the food waste that remained rotted down to produce leachate lagoons that were overflowing. The Ministry of Defence cleared up the leachate at a cost of approximately £1.1 million.

[1] [2016] EWCA Crim 1043.

At Newport Crown Court Powell was convicted of two counts of consenting or conniving as a Director in the failure of Wormtech Limited to comply with conditions of its environmental permit. She was handed down a suspended custodial sentence and a confiscation order was made pursuant to Section 13(6) of the *Proceeds of Crime Act 2002* in the sum of £60,000 to equate the amount it was determined she personally benefitted in the operations of the company.

Westwood pleaded guilty to different counts on the indictment which amounted to the same offences for which Powell was convicted, on the basis the company's offending was attributable to neglect rather than the consent or connivance of Directors. He was sentenced to a suspended custodial sentence and a confiscation order was made in the sum of £30,000.

The point of contention in this case surrounded the prosecution position that because the costs met by the MoD in remediating the land could not be pursued against Wormtech Limited on the basis it had gone into liquidation and the High Court did not give permission to pursue it, that those costs should therefore be met by Powell and Westwood on the grounds that they constituted the controlling mind of Wormtech Limited.

The judge at Newport Crown Court ruled against the Crown's application on the basis that the situations in which the Supreme Court accepted the corporate veil could be pierced as analysed by Lord Sumption in a case called *Prest v Petrodel Resources Ltd* were cases in which one of two principles were in operation, the concealment principle and/or the evasion principle (discussed below), and only where the person misusing the protection of the corporate veil was the sole controller or sole owner of the company.

In the current case the Court of Appeal endorsed the ruling at first instance, noting that Powell and Westwood were not the *sole* controllers or the *sole* owners of the company. Consequently, the court was not entitled to pierce the corporate veil and the respondents could not be held personally liable for the costs of the clean-up at a sum of £1.1 million. Some consideration is therefore required of the circumstances in which the corporate veil can be pierced.

WHEN CAN THE CORPORATE VEIL BE PIERCED?

In Powell, the Crown argued at the Court of Appeal proceedings that the principles on determination of when the corporate veil could be pierced were founded on the legal apparatus of Section 6(4)(c) *Proceeds of Crime Act 2002* which provides that the court must, if it decides that a defendant does not have a criminal lifestyle, decide whether he has benefitted from his particular criminal conduct.

The Court of Appeal, in providing its judgment in the current case with respect to the concealment principle and the evasion principle, relied on Lord Sumption's judgment in the case of *Prest v Petrodel Resources Limited*[2].

The concealment principle is the concept that "the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "façade", but only looking behind it to discover the facts which the corporate structure is concealing."

Therefore, in circumstances where the company is controlled or owned by a sole director, the courts will order in pursuance of Section 6(4)(c) of the *Proceeds of Crime Act 2002* the sole director (as opposed to the company) to fund the cost of remediation previously met by a public body via a confiscation order upon conviction if it is so found that the Director concealed his identity, by virtue of corporate structure etc. The operation of this principle is such that any sole director or owner of a company operating an environmental permit should carefully consider their own personal liability and heed the Court of Appeal's determination.

The evasion principle is the concept that "the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.

This principle can be engaged by the court in circumstances where the Director was the sole owner or controller and there exists a distinct right of action in law for the regulator to pursue such individual. In other words, the criminal responsibility can attach to a senior manager or officer of a company if consent, connivance or neglect are present and the relevant legislation so provides.

The application of the evasion principle has been limited by the case of *Prest* which made clear that the court was concerned with abuse of the corporate veil to evade or frustrate the law. Only in such circumstances can the legal personality of the company be disregarded, and persons in the position of the respondents be fixed with a personal liability under a confiscation order.

CONCLUSIONS

The courts have extensive powers by virtue of the *Proceeds of Crime Act 2002* to order a sole director to cover the costs incurred in remediating sites polluted by their company in circumstances where the company is not in funds.

If the conditions discussed above are so met, the Crown is entitled to make an application to the court for a confiscation order to be made against the director to meet the costs. In Powell, the Court of Appeal held that there was not one controlling mind and so the requirement of a sole director could not be established in order for the corporate veil to successfully be pierced.

Were the Crown to have been successful in this case, Jacqueline Powell and Jonathan Westwood would have become liable to compensate the Ministry of Defence for clearing up the leachate and resultant pollution at a tidy sum of £1.1 million.

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[2] [2013] 3 WLR 1.

ALL ASBESTOS **TO BE REMOVED?**

Earlier this year, the TUC published a new guide for union workplace representatives titled "Asbestos – time to get rid of it". A key point made in the guide, is that the current duty to manage asbestos is not working, and that legislation should be passed requiring all employers to remove existing asbestos.

CURRENT DUTY

The Control of Asbestos Regulations 2012 require that in respect of non-domestic premises, those with maintenance responsibilities must "manage" any asbestos containing materials (indeed this has been a requirement since 2004).

The requirement to manage means that reasonable steps must be taken to find out if there are asbestos containing materials present, and if so their condition. There should also be a presumption made that materials do contain asbestos unless there is strong evidence that they do not. A record should be kept of the location and condition of the asbestos containing materials/materials presumed to obtain asbestos, the risk of people being exposed to asbestos fibres should be identified, and a plan prepared as to how those risks should be managed. That plan must be implemented and kept up to date. Importantly, information on the location and condition of relevant materials should also be provided to anyone liable to work on or disturb them, so that risks can be assessed and appropriate precautions taken.

WHAT IS THE ISSUE?

The All-Party Parliamentary Group on Occupational Safety and Health (**"Parliamentary Group"**) considered the issue in 2015, and in its report "The asbestos crisis. Why Britain needs an eradication law" made the point that although asbestos is often seen as being a "*problem of the past*", it is still present in many buildings (being found in around half a million non-domestic premises) and is as dangerous as ever, with people still being exposed to asbestos fibres which of course can give rise to extremely serious health issues.

The Health and Safety Executive's (**"HSE"**) position is that if asbestos containing materials are in good condition, and unlikely to be damaged/worked on/disturbed, then it is usually safer to leave them in place and manage them. The view of the Parliamentary Group is that this policy is no longer appropriate and must be changed. This is based in part on its conclusion that it is extremely unlikely that asbestos containing materials will not be disturbed if left in place, and also on its view that the duty to manage is not being complied with (for example asbestos surveys not being carried out, and regular inspection/labelling not being used even when asbestos containing materials have been identified). A lack of awareness among those most at risk (for example people working in maintenance and refurbishment) is also highlighted.

WHAT ARE THE RECOMMENDATIONS?

The Parliamentary Group concludes that a new law is required which would contain a clear timetable for the eradication of asbestos from every work place. This would include a requirement for a survey to identify the presence and condition of asbestos to be carried out by a registered consultant, and for that survey to then be registered with the HSE, by no later than 2022. There would then be a duty to ensure removal of the asbestos containing materials in accordance with a timetable.

Alongside this, the Parliamentary Group notes that the regulator would need to develop a programme of workplace inspections to verify that appropriate action was being taken, and that resources should be made available to them so that they can ensure that the management, removal and disposal of asbestos is being properly dealt with.

The TUC guide refers to the Parliamentary Group's report, agrees with its findings and notes that it will lobby for the change in law. It goes on to note that in the meantime, union health and safety representatives can pressure their employer to remove existing asbestos, and not just manage it. The guide suggests that union representatives ask their employer for a copy of the asbestos survey(s) for the work place, to then ensure that it covers all relevant buildings and parts thereof, check implementation of a management plan and to then call for an agreed plan to remove and dispose of the asbestos.

IS A CHANGE TO THE LAW LIKELY?

There are real question marks as to whether removal of all asbestos containing materials is achievable in practice, and also whether it would be desirable. The HSE has commented that the existing approach is a good one, and that in some cases, removal of asbestos containing materials can create a greater risk than leaving them in place. It has also confirmed that no consultation on changes to the existing law is taking place.

Whether the law is ultimately changed or not, the existence of the Parliamentary Group and TUC documents means that the control and management of asbestos is an issue which is likely to have moved up the agenda of the regulator and union representatives. Employers and others responsible for the maintenance of non-domestic premises should take the opportunity to ensure that the requirements of the 2012 regulations are being fully complied with, in that not only have appropriate surveys of premises been carried out, but also that management plans have then been created, implemented and are kept up to date. Regulators do treat non-compliances relating to asbestos seriously, and the potential for enforcement action, including prosecution and consequently large fines must be borne in mind, as well as reputational damage in relation to what is a sensitive area.

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WATER ABSTRACTION

CHANGES TO LICENSING EXEMPTIONS IN ENGLAND AND WALES

Over the past decade, the English and Welsh Governments have signaled their intentions for a broad reform of the law and policy governing water abstraction.

On 15 January 2016, the Governments published their latest joint consultation on proposals concerning the implementing of the abstraction elements of the Water Act 2003. The proposals seek to end most exemptions from water abstraction licensing control and bring these into the licensing system. The consultation lasted for 12 weeks, closing on 8 April 2016. On 29 September 2016, the Governments published a summary of consultation responses (SOCR) from interested organisations.

WHY END EXEMPTIONS TO WATER ABSTRACTION LICENSING?

Taken from the latest consultation:

"*Most currently exempt abstractors can legally abstract without controls to protect other abstractors or the environment. Some of these exempt abstractions are causing environmental damage, and some are in areas that are already water stressed*".

It is intended that ending exemptions will "*help create a level playing field for all existing licensed abstractors and those that will be licensed*" and "*will enable regulators to better manage water resources effectively*".

Activities that will be no longer benefit from exemptions include the dewatering of mines, quarries and engineering works and the abstraction of water into internal drainage districts. Geographically exempt areas will also be affected.

KEY PROPOSALS

- Going forwards, those previously exempt and abstracting more than 20m³/day will need to apply for an abstraction licence (**"New Authorisations"**). Those abstracting less than 20m³/day will continue to be exempt. The SOCR broadly indicates that that it is fair to end most exemptions to licensing, but there are suggestions that specific activities within sectors should continue to remain exempt from licensing.
- Regulators are to take a light-touch, risk based approach to New Authorisations. Previously exempt abstractors will be allowed two years to apply for their licences, with regulators determining all applications within three years from the end of the application period. The SOCR broadly indicates support for this approach.
- Applicants for New Authorisations must be able to demonstrate that they have abstracted water from the source of supply within a period of four years preceding the removal of exemptions. If an applicant is unable to prove this, they must apply under the normal application process. Evidence used to support applications for New Authorisations might include meter readings, pump ratings, invoices for equipment, photos of infrastructure, business receipts/contracts etc. The SOCR reiterates that flexibility in the type of evidence submitted with applications is important.
- Regulators will be able to include a generic hands-off flow (HoF) condition in new and existing licences to protect rivers during very low flows. New Authorisations will also be granted in line with the volumes abstracted over the four years preceding the exemption removal. Existing licences however are to be amended to permitted volumes based on the past ten years. The SOCR suggests an agreement in principle to flow and volume controls, but raises questions about the approach of using universal HoF conditions and the requirements to measure and monitor volumes placed on licences.
- Compensation will be paid for loss or damage arising from a refused or constrained New Authorisation application, except in certain circumstances e.g. when an application is curtailed or refused because there is a risk of serious damage to the environment, or a basic universal HoF condition is included in the licence. Furthermore, no compensation will be payable for "planned abstractions" (abstractions which are not currently taking place, or increased abstractions) if a licence application is subsequently refused, or granted to a lesser extent than applied for. While the SOCR indicates general support for this, there is notable concern about the impact of not making allowances for planned abstractions or including 'headroom' for growth in the licensed volumes under the transitional arrangements.

POTENTIAL IMPLICATIONS

The proposed reforms bring with them a raft of potential costs and abstractors need to consider whether their new or revised permits are commercially viable.

First and foremost, the vast majority of currently exempt abstractions will now be regulated by a full environmental permit. This brings with it a necessity to comply with the permit's conditions and pay annual subsistence charges. Any breach of permits going forwards bring with it potential fines.

The introduction of HoF conditions for both existing licences and New Authorisations may mean abstractors need to reassess their operations, as they will be required to abstract/store water at times when flows are higher.

Going forwards, licences will be based on the abstractor's historic usage. Abstractors should therefore consider their abstraction needs; they may find themselves having to appeal the allocation in their permits, or consider a need to move their operations elsewhere if their future needs are significantly in excess if this.

CONCLUSIONS

The SOCR has served to provide further food for thought and the Governments will continue to engage with interested parties as the policy is finalised. It is expected that the response to the consultation and details of the final approach will be available by early 2017. The reforms as a whole should come into effect by the early 2020s.

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AIR QUALITY UPDATE

On 2 November 2016 the High Court quashed the revised plans for bringing the United Kingdom into compliance in certain urban areas with limits on ambient levels of nitrogen oxides in order to meet EU Air Quality Standards.

The plans had been prepared by the Government for submission to the EU Commission pursuant to an order of the Supreme Court made in April 2013 (reported on in SHE Matters Summer 2015). The Supreme Court order resulted from proceedings brought by the legal NGO ClientEarth and a reference to the Court of Justice of the European Union.

ClientEarth took the view, however, that the revised plans were inadequate and had referred the matter back to the Court.

The obligation on the Government, in forming the revised plans, had been to ensure that the ambient levels of nitrogen oxide in the affected areas were brought into compliance as soon as possible.

The evidence adduced by ClientEarth showed, however, that the target dates for compliance, 2020 in regional cities, and only 2025 in London, had not been chosen on that basis. Rather, these were thought to be the latest dates that could be specified without incurring an undue risk of EU Commission fines. That was despite evidence that high nitrogen oxide levels in the ambient environment pose a serious political health issue. Against that background the High Court had little difficulty in finding that the revised plans were inadequate.

The Government promptly accepted the result. Theresa May made a statement in Parliament indicating that the Government would revise its plans.

Previously the Government had taken an apparently insouciant attitude on the issue. Early in September the Government had effectively dismissed almost all of the recommendations made in April in a Report on Air Quality made by the House of Commons Environment Food and Rural Affairs Committee, which indicated that it would amend its policy if new modelling demonstrated that the objectives for ambient levels of nitrogen oxides could not be met.

The problem is essentially focused on big cities, and plans for five regional cities already envisaged clean air zones for Birmingham, Leeds, Southampton, Nottingham and Derby by 2020. This would involve congestion charges for older diesel buses, coaches, taxis and lorries. In the case of Birmingham and Leeds the charges would extend to cover older diesel vans, with additional measures such as park and ride schemes. A consultation on these plans was issued by DEFRA in October, with a closure date for response early in December, but this consultation was clearly overtaken by the outcome of the proceedings brought by ClientEarth.

It is possible that these schemes could now be extended so as to cover older diesel cars. It emerged in the litigation that that had been ruled out by the Treasury on the grounds that it would be politically unacceptable.

It is also mooted that CAZs could be introduced in additional cities, such as Manchester, Newcastle, Liverpool, Bristol, Leicester and Sheffield.

Now that the Government has been forced to act by litigation, there may be a case for acting sooner rather than later. Congestion charging might for example be introduced more quickly than some elements of the schemes. Since it is likely to be unpopular, a cynic might remark that it would be in the interests of the Government to take the advice given by ClientEarth immediately after the recent High Court case and introduce it by 2018, well in advance of the likely date for the next General Election.

To add to the Government's woes, the UK is on a list of Member States facing infraction proceedings brought by the EU Commission following the Volkswagen emissions scandal. The proceedings allege that the Member States in question either failed to provide for penalties in respect of the cheating, or if they did, failed to enforce them.

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