KEY DECISIONS OF THE COURTS
2002 REPORT UNITED KINGDOM

Richard Macrory

R on the application of Greenpeace v Secretary of State for the Environment (Court of Appeal, Civil Division 25 July 2002).

This was a challenge to import permits granted by the UK Government to timber imported from Brazil, and involved both the Convention on Trade in Endangers Species of Wild Flora and Fauna (CITIES) and EC Regulation 338/97. The relevant authority in Brazil has granted export permits with the assurance that timber came from properly controlled forests. The basic question before the Court was whether the country of import had a duty to re-examine this question and look behind the decision of the exporting authority, or simply has to be satisfied that the relevant export permit was in place.

There was a great deal of complex factual background, particularly evidence from the Brazilian authority that they had given their permits under order from the Brazilian courts in ill judged decisions. By a majority of 2-1 the Court of Appeal held that the country of import did not under the regime have any duty to go behind the decision of the export authority. They felt that the purpose of the Convention was both to promote conservation by regulating trade, but certainty would be jeopardized if officials of importing states had to re-examine the validity of export permits.

The decision is probably correct on a proper interpretation of the Convention. But the Court of Appeal decisions was notable for a robust dissenting judgment of Laws LJ who held the Convention should be interpreted differently and in language very usual for British judges "*It is neither surprising nor regrettable that in confronting their task of interpretation, the judges have to a greater or lesser degree been moved by the aspiration of their time…In the century before last the sanctity of contract with all that said for trade across the British Empire and beyond was a powerful engine of statutory construction. Now the world is a more fragile place. Considerations of ecology and the protection of the environment are interests of high importance…The delicate balances of the natural order are continuously liable to be disturbed by human activity which in particular threatens the survival of many flora and fauna. within the proper limits of the court's role and in appropriate contexts I think we should be ready to give them special weight.*"

FAIRCHILD V GLENHAVEN FUNERAL SERVICES (HOUSE OF LORDS 20 JUNE 2002).

This case concerns liability for injuries to workers caused by exposure to asbestos during a number of different employments. But the decision of the House of Lords has potentially immense importance for liability to environmental exposure from different sources and over different time-scales. Essentially, the claimants had died from exposure to asbestos fibres while being employed by a number of different companies over 20 years or so. The companies accepted that they had been negligent in their practices but as with any civil litigation the claimants had to prove causation. With the more familiar asbestosis, the disease is described as cumulative in that the greater the exposure the greater the risk and worst the disease. In such cases, where a number of employers were involved, the courts have had little problem is imposed joint and several liability (in practice, insurers then divide liability on a time exposure basis).

The problem with this case was that medical experts said the disease suffered here, mesothelioma, was "indivisible", meaning that it was caused not by repeated exposure but by a single fibre. However no-one could pin-point the time of that exposure and which employer was responsible. The Court of Appeal held that traditional notions of causation did not equate causation to mere exposure of risk. If they held that all the employers were jointly liable, it was known that some of them had not actually 'caused' the disease. Therefore none should be liable. The Court acknowledged this was an unjust result but said that rather tinkering with causation principles, Parliament must introduce legislation. The House of Lords robustly reversed the decision. They held that "causation" was not simply a matter of fact and common sense (as often described in the courts) but was a legal creation, part of the conditions of liability. In this case, they felt that it was intellectually correct to say that there was a causal relationship between all the employers activities and the damage suffered, in effect hold that exposure to risk amounted to causation. The House of Lords was careful to restrict their decision to the type of case in hand, but it clearly is of importance to cases involving, say, exposure to chemicals.

R ON THE APPLICATION OF VALPAK V ENVIRONMENT AGENCY (HIGH COURT 23 MAY 2002)

A dispute between the Environment Agency and one of companies involved in packaging recycling schemes over what is or is not sales "packaging" for the purposes of the EC Directive. This is defined in the Directive as *"packaging conceived so as to constitute a sales unit for the final user or consumer at the point of purchase*." The Agency argued that this could not encompass bottles of alcohol sold in pubs since these were normally poured out before the consumer drunk the contents. Their view was that therefore the primary obligation under the Directive fell upon the brewers or

wholesalers who supplied the pubs, not the pubs themselves. The Court disagreed. In its view the bottle when made was "conceived so as to constitute a sales unit to the final user at the point of purchase" . As a matter of law, when a consumer ordered their beer they were purchasing both the bottle and the contents (even if the bottle was retained and thrown out by the publican). The implication of the decision is that the obligations under the Directive will now fall on publicans, and by analogy restaurants and similar outlets. At present only large chains fall within the Government's limits (exemptions apply to operations with a less than £50 m turnover or 50 tonnes of packaging) but the Government may have to revise these limits downwards to comply with their reduction obligations.

The decision consciously followed another boundary dispute on the packaging regulations decided in the High Court in 2001 **Davies v Hillier Nurseries** where the High Court agreed with the Agency that plastic plant pots sold in a garden nursery were also packaging.. The court held that the time when the plants were put into the pot was the critical factor in decided whether they were "conceived" as a sales unit, but that the fact there might be other purposes (such as growing the plant) was not fatal. The court noted that at least nine other Member States have decided that such pots are packages, though France apparently takes the opposite view. The case received a lot of mischievous comment in the popular press (nightmare Brussels bureaucrats etc.) but the Agency has point that commercial garden centres produce an enormous amount of plastic pots – one large wholesaler is known to sell over 30 million such pots.

POLICY AND INSTITUTIONAL

Government Departments

A major reorganization of Government departments took place in 2001 in place of the Minister of Agriculture Fisheries and Food **,** a new Department of Environment, Food and Rural Affairs was created. In summer 2002 further reorganizations took place with the creation of a separate Transport Department and the transfer of land use planning functions to the Office of the Deputy Prime Minister. For environmental policy all this, in my view, is a retrograde step. The original 1970 post Stockholm vision of a new Department of the Environment combining environment, land use planning and transport has now been totally abandoned. Environmental policy is now a small division within a much larger agricultural one. Their presence may assist the 'greening' of agriculture but does little for assisting an environmental transformation across key policy sectors of government.

(a) Land use planning

In December 2001 the Government launched an extensive consultation exercise aimed at reforming, simplifying and speeding up the land use planning system, with proposals

for new legislation announced in July 2002. Although the consultation papers noted the role of land use planning in environmental protection, the flavour of the exercise was essentially business driven with many more references to the needs of business and growth.

Almost coincidentally, **the Royal Commission on Environmental Pollution** in March published a major report on Environmental Planning. The Commission agreed that the land use planning system needed reform they took a completely different perspective looking at principles rather than process, arguing for far greater coordination between land use planning and environmental plans (integrated spatial strategies) and quite bold proposals for environmental tribunals, improved access to justice etc. Their report is likely to set a context for much of the legislative debate on the planning proposals.

(c) **Aviation** In 2002 the Government launched a policy discussion paper on aviation, with a White Paper on its 30 year strategy planned for 2003. The paper predicts passenger usage in UK airports growing from 180 m 2000 to 400 m in 2020 and 500 m in 2030. "Air travel is crucial to our expanding economy" according to the new Secretary of State for Transport. Although the Government argues that aviation should meet its external costs, it suggests that even a 100% fuel tax would be more than outweighed by predicted falls in fares (2% annually at present). Essentially the message is one of predict and provide, with proposals for new airports and airport expansion.

LEGISLATION

No major new legislation to report on, though the usual mass of regulations.