# Introduction to Environmental Law

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**Environmental law is difficult to conceive as a single, stand-alone entity. It encapsulates a myriad of different issues and topics, including pollution control, air quality, waste management, contaminated land and so on. Drawing on the experience of members of chambers in these areas, this paper will summarise, very broadly, the key areas of this extensive, unwieldy, and ever-changing area of law.**

### INTRODUCTION

1. Environmental law is the body of law that seeks to protect the environment directly or persons or property that are affected by the environment.

2. In England & Wales it is not codified by any single legislative source, though much of what might be regarded as environmental law derives from EU law. As such it encompasses the law in relation to a wide variety of subject matters.

3. These include, for example, aspects of the law of real property, waste management, the law relating to contaminated land, regulatory standards applicable to products and industrial processes, environmental permitting and a variety of aspects of the common law.

4. The purpose of this note is to provide an introductory overview of Environmental Law in this jurisdiction and in the EU more widely of interest to foreign lawyers. It also provides an introduction to the law and

practice relating to group litigation, which is increasingly relevant to large-scale environmental claims.

## ENVIRONMENTAL LAW IN ENGLAND AND WALES

5. Initially, the concepts we now might describe as environmental law developed due to concern for the protection of private property rights. The industrial revolution, however, brought forth large-scale mechanised production, and with it, large-scale environmental problems which could not be tackled by focusing merely on individual rights. For example, the impact of the alkali-making industry that developed from the early 1800's was that alkali works caused huge volumes of foul-smelling hydrogen chloride gas to be released into the atmosphere. The problem led to a series of Alkali Acts, the first of which was passed in 1863 and which represented the country's first systematic approach to pollution control. So, for example, the Alkali Acts introduced emissions limits for the first time.

6. The development of environmental law was also heavily impacted upon by the European Communities Act 1972, and the subsequent need for England and Wales to implement European directives concerning environmental issues. The vast majority of regulatory law in the UK is now derived from – or at least informed by – European legislation.

7. There are two main regimes that deal with environmental law in England and Wales:

   a. The Regulatory Framework; and

   b. The Common Law.

8. This paper will offer a brief overview of each in turn.

## The Regulatory Framework

9. Regulatory law in England and Wales is contained almost exclusively within specific legislation. That legislation rarely gives rise to private law remedies (one notable exception is s73(6) Environmental Protection Act (**"EPA"**) 1990). Instead, the provisions largely impose criminal liability on those in breach, and provide for the relevant regulatory bodies to be able to prosecute those breaches. Ordinarily then, if an individual is in search of a private law remedy, he or she would need to look to the common law.

### *Regulatory Bodies*

10. The Department for Environment, Food and Rural Affairs has broad responsibility for environmental policy in England, assisted by the new Department of Energy and Climate Change. It advises ministers on environmental policy, negotiates EU directives and other legislation on behalf of the UK Government, prepares consultation papers on draft legislation, and prepares secondary environmental legislation, including statutory guidance and regulations. Its role is key; over 80% of environmental legislation in the UK is secondary legislation transposing EU directives or supplementing EU regulations.

11. Other government departments will also have a mandate which covers some environmental issues. So, for example, the Department for Business, Innovation and Skills deals with the impact from Europe of "extended producer responsibility" such as the obligations setting out how to deal with waste batteries, motor vehicles and electronic equipment.

12. In terms of regulators, the principal system is set out in the Pollution Prevention and Control Act ("**PPC**") 1999. That Act broadly categorises

industries and installations, with the Environment Agency shouldering responsibility for large industries (known as Part A1 installations), and Local Authorities dealing with smaller industries, desribed as Part A2 and Part B installations.

13. The Environment Agency was created as a public body corporate by the Environment Act 1995, and took over functions previously dealt with by the National Rivers Authority, HM Inspectorate of Polluction, and the waste regulation authorities. It is a non-departmental public body, making it less powerful than environmental enforcement agencies in other jurisdictions (such as the US Environmental Protection Agency, which has express rule-making powers specifically delegated to it by Congress). Instead, it implements and enforces secondary legislation drafted by DEFRA (although it may publish guidance). Its principle aim is set out at s. 4(1) Environment Act 1994 as to *"protect or enhance the environment, taken as a whole, so as to make the contribution towards attaining the objective of achieving sustainable development."*

14. The Environmental Protection Act is principally regulated by local authorities, as set out above, but also by Natural England, another non-departmental government body.

15. As well as those bodies, much of the day-to-day regulation has been devolved to national assemblies, although this has not occurred in a uniform manner. For example, whilst Scottish and Northern Irish national assemblies have the power to pass primary legislation concerning environmental issues, Wales may only pass secondary legislation. Economic powers have not been devolved at all and so fiscal measures such as landfill taxes cannot be altered by the regional assemblies.

16. A complete overview of all the statutes and statutory instruments addressing the regulation of environmental issues is beyond the scope of this note. Matters such as air pollution, climate change, flood defences, habitat conservation, environmental risk insurance and so on are each subject to their own particular regimes. However, there are four key areas that commonly fall to be considered in environmental claims, which will be outlined briefly here. Those are:

    a. Waste Management;

    b. Water;

    c. Contaminated Land; and

    d. Statutory nuisance under Part III EPA.

### *Waste Management*

17. One of the biggest problems in waste management is defining what is meant by "waste." The Waste Framework Directive 2008/98/EC (**"WFD"**), which has been transposed by the Waste (England and Wales) Regulations 2011, defines waste as *"any substance or object which the holder discards or intends or is required to discard."* This definition gives rise to complex issues on which both the European Court of Justice and national courts have offered further guidance. The complexity is hinted at throughout the WFD; for example, Article 5 deals with the issue of when a production residue might be considered a by-product, and therefore not waste, in the course of a manufacturing process. Considerations include whether further use of the production residue is certain, lawful, and can be made without any further processing.

18. Prior to 2007, waste management was dealt with under a licensing scheme set out in ss 35-43 EPA 1990. However, since 2007 it has formed part of

the Environmental Permitting Regime, which is currently set out in in the Environmental Permitting (England and Wales) Regulations (**"EPRs"**) 2010, as amended. The regime also covers pollution prevention and control, industrial emissions, and – since April 2010 – water discharge.

19. The EPRs stipulate that certain activities which might affect the environment are regulated activities, and provide a system under which anyone wishing to carry out any of those activities must apply for a permit. Only the person who has control over the operation of a regulated facility may obtain or hold an environmental permit. Applications for permits, appeals against regulatory decisions, and the amendment and surrender of permits are all dealt with in the EPRs. Permits are not time limited, but regulators are obliged to regularly review them. Regulation 38 EPRs sets out various offences, all of which are punishable by a fine or a term of imprisonment. Those offences include operating a regulated facility without a permit, keeping false records, misleading the regulator, and failing to comply with notices served by the regulator.

20. In addition to the Permitting Regime, anyone producing, transporting or disposing of waste is subject to other duties imposed by the Waste (England and Wales) Regulations 2011, and by EPA 1990.

21. Section 34 EPA 1990 imposes upon everyone in the waste chain – from production to disposal – a duty of care. That includes a duty to prevent others in the chain from committing an offence in relation to that waste, to prevent the escape of waste from the duty holder's control, and to ensure when waste is transferred to another, the recipient is a fit and proper person. Regulations 12-14 and 35 of the Waste (England and Wales) Regulations 2011 also provide that undertakings dealing with waste must

avoid mixing waste, ensure that all transfers of waste are properly documented, and so on.

22. Section 33 EPA 1990 sets out various criminal offences in relation to waste management. In general, it is an offence to keep or manage waste or deposit it on land without a permit, or in a manner likely to cause pollution of the environment or harm to human health. It is also an offence to breach the conditions of a permit, or to otherwise breach the general duty of care imposed by s. 34. Those offences are, again, punishable either by a fine or by a term of imprisonment.

23. There are different rules in relation to substances classified as Hazardous Waste, which are dealt with under the Hazardous Waste (England and Wales) Regulations 2005 and the Hazardous Waste (Wales) Regulations 2005. Hazardous waste cannot be removed from premises unless the regulator is notified, and all parties involved in the production, transportation and receipt of such substances must complete consignment notes. Hazardous waste cannot generally be mixed with other substances, and it must always be properly packaged and labelled. Failure to comply with the Hazardous Waste Regulations is, yet again, an offence punishable by a fine, or a term of imprisonment. In addition to hazardous waste, numerous other items, such as motor vehicles, electrical equipment, and batteries each gives rise to their own peculiar considerations, as do matters such as waste incineration, waste packaging, and landfill sites.

### *Water*

24. Since 2010, water discharge activities and groundwater discharge activities have, like the issue of waste management, been governed by the EPRs. A water discharge activity includes the discharge of poisonous or noxious

matters, sewage, and so on into inland water, freshwater, coastal waters etc. A groundwater discharge activity includes the discharge of a pollutant that results in the direct input, or can lead to the indirect input, of that pollutant into groundwater. Undertaking any of these activities without obtaining a permit under the EPRs is a criminal offence, and all of the other offences set out at Regulation 38 EPRs also apply here.

25. Prior to the introduction of the EPRs, the discharge of water was regulated by the Water Resources Act ("**WRA**") 1991, which set out various criminal offences at s. 85. Offences relating to the discharge of water are now dealt with under the EPRs and the relevant provisions of the WRA have been repealed. However, the WRA remains relevant; not least because it represents an attempt to codify the system of water regulation that had, prior to 1991, been contained in 20 different pieces of legislation. The WRA therefore provides many of the "building blocks" on which later regulations are founded, such as setting out the functions and powers of the Environment Agency, and providing that the relevant Secretary of State should prescribe a system of classifying and quality-controlling waters covered by the Act.

26. The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 are also significant in that they transpose the Water Framework Directive 2000/60/EC, and accordingly commit the UK to achieve certain water quality goals by 2015. The ultimate aims of the Water Framework Directive are to prevent and reduce pollution, promote sustainable water usage, and to mitigate flood and drought problems. Member states must "aim" to achieve "good" water status, and doing so involves monitoring both chemical and ecological status to differing degrees, depending on whether the relevant water is surface water, groundwater, or an artificial water body. There is clearly some difficulty

with this imprecise language. In *Commission v Luxembourg* case 32/05 [2007] Env L. R. 467, the European Court of Justice attempted to clarify the position by ruling that the Directive imposes *"precise obligations to be implemented within the precise timescales in order to prevent deterioration of the status of all bodies of surface water and groundwater,"* but did not address the fact that numerical indicators or specific targets had not been set, leaving the position to remain somewhat ambiguous.

### *Contaminated Land*

27. The legal landscape relating to contaminated land is largely governed by the EPA 1990 (as amended by the Environment Act 1995), the Contaminated Land (England) Regulations 2006, and the Environmental Damage (Prevention and Remediation) Regulations (**"ED Regulations"**) 2009 (which in turn implement the European Environmental Liability Directive). This mix of primary and secondary legislation is also supplemented by ministerial guidance.

28. The key provisions are set out at Part IIA EPA, which provides, broadly, for land contamination to be identified and remedied. It aims to address environmental damage such as damage to species, habitats, surface water and so on.

29. Contaminated land is defined at s.78A(2) as any land which appears *"to be in such a condition, by reason of substances in, on or under the land, that: (a) significant harm is being caused or there is a significant possibility of such (i.e. significant) harm being caused; or (b) significant pollution of controlled waters is being caused or there is a signficant possibility of such pollution being caused."*

30. However, the mere presence of contaminants does not mean the land is necessarily "contaminated land" within the meaning of the EPA. Instead,

harm is assessed by reference to the current use of the land. The question of what constitutes "significant" harm should be answered by reference to guidance issued by the Secretary of State.

31. An operator must take all practicable steps to prevent damage to land (or further damage to land, if some damage has already occurred). If a regulator thinks environmental damage has occurred, it can serve a remediation notice on the operator, setting out measures that must be taken to ameliorate the relevant harm. The legislation also goes one step further, empowering the regulator to carry out remediation itself and recover the cost from the relevant parties.

32. Under the EPA, whilst the act of contaminating the land may not in and of itself constitute a criminal offence, a failure to comply with a remediation notice issued by the regulator *is* a criminal offence, punishable by a fine or a term of imprisonment (s. 78M EPA). The thrust of the legislation is, put simply, to compel those who pollute to bear the costs of cleaning up, with the aim of discouraging polluting activity altogether.

33. All of this stems from the fundamental "polluter pays" principle which is a core element of European environmental law. The principle was initially set out by the Organisation for Economic Cooperation and Development as early as 1972, and was expressed as follows: *"the polluter should bear the expenses of carrying out the measures deciced by public authoritieis to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and / or consumption."* That principle was expressly included in the Rome Treaty at Article 174(2), and subsequent legislation has confirmed that the principle extends not just to the polluter paying for the cost of remediation, but also for the costs of implementing a policy of

prevention (see *R v Secretary of State for the Environment and another, ex p Standley and Metson* [1997] Env LR 589).

34. However, in practice, liability for remediation of contaminated land under the EPA is a complex issue, largely by reason of its servitude of this key principle.

35. Once land is found to be contaminated, the EPA identifies two "liability groups" of parties who may be required to pay for remediation (s. 78F EPA). Primarily, the regulator should pursue the "Class A liability group" – defined as those who caused or knowingly permitted the relevant contamination. Knowing permitters are defined as those who are aware of the contamination and who have the ability to prevent or remove it. If the regulator is unable to identify anyone in the "Class A liability group," however, then it may instead pursue the "Class B liability group," which is defined as owners or occupiers of the land. These individuals can be pursued regardless of whether they knew about the contamination.

36. The EPA also sets out complex rules on the allocation and exclusion of liability as between those who might be asked to pay. The upshot is that liability cannot be excluded so as to render noone in either liability group liable, but parties can agree to apportion liability between themselves. In addition, remediation can be required in relation to damage that occurred long before the statute came into force.

37. The oddities of this system have been highlighted on a number of occasions. For example, in the case of Brofiscin Quarry in Wales, an abandoned quarry was used as a landfill in the 1960's and 70's. It lay unsued for 30 years, until it was designated as a "special site" in 2005. The cost of remediation was estimated to be £100m. However, the owner of the quarry, who would potentially be liable for those costs under the EPA, was

not a large corporation but an elderly lady who had inherited the quarry from her father in his will.

### *Statutory Nuisance under Part III Environmental Protection Act*

38. Part III EPA sets out a regime for dealing with a number of specific nuisances. Those nuisances are defined at s. 79 EPA and include the emanation from premises of smoke, fumes, gas, dust, insects, artificial light, noise and so on. The act complained of must be *"prejudicial to health or a nuisance"* in order to constitute a statutory nuisance.

39. Once an act constitutes a statutory nuisance, there are two avenues of redress. One is available to local authorities and one to private individuals.

40. Local authorities are under a duty to ensure areas under its control are inspected regularly in order to identify statutory nuisances. It must also take reasonably practicable steps to investigate any complaint of statutory nuisance made to it. If a nuisance is identified, a the local authortiy shall serve an abatement notice pursuant to s. 80 EPA. The notice should be served on the person who is responsible for the nuisance, unless the nuisance arises from a structural defect in the building or the person responsible cannot be found – in which case, the notice may be served on the owner of the premises. Note the similarities between this approach and the approach to Class A and Class B liability groups in relation to contaminated land, as discussed above.

41. Failure to comply with an abatement notice without reasonable excuse is a criminal offence, punishable by a fine. If the nuisance is minor, the local authority can issue a fixed penalty notice and the person suspected of committing an offence can choose to pay a fixed penalty in exchange for the local authority agreeing not to prosecute. At the other end of the

scale, if the local authority believes that criminal penalties would provide an inadequate remedy, it may take proceedings in the High Court seeking an injunction or damages, notwithstanding it will have technically suffered no loss.

42. An individual aggrieved by a nuisance is not, however, limited to complaining to his or her local authority. Instead, under s. 82(1) EPA, he may complain directly to a magistrates' court (provided he has given the person about whom he is complaining proper notice of his intention to do so pursuant to s. 82(6) EPA). The magistrates' court itself may then consider whether there is a nuisance, and / or whether it is likely to reoccur. If it is satisfied of such matters, it can order the abatement of the nuisance, and / or prohibit the recurrance of the nuisance. It may also fine the party responsible. Again, failure to comply with an order of the magistrates' court without reasonable excuse is an offence punishable by a fine.

## The Common Law

43. If the remedy sought is a private law remedy, those seeking compensation will ordinarily invoke common law rules of liability. The causes of action most often relied upon are those of nuisance, negligence, or what is known as the rule in *Rylands v Fletcher*. This paper will consider each briefly in turn.

### *Negligence*

44. Generally speaking, a claim in negligence depends on the claimant demonstrating that the defendant owes him a duty of care, that the defendant has acted in breach of that duty, and that the duty has caused the claimant harm or loss of some kind.

45. The concept of identifying a duty of care was first established in *Donoghue v Stevenson* [1932] AC 562. In that case, the claimant had gone to a café and drunk some ginger beer, which had contained a decomposed snail. The claimant's friend, and not the claimant, had purchased the ginger beer, so the claimant could not sue in contract as she was not a party to the sale. The House of Lords had to consider whether the operator of the café owed a duty of care to the claimant, notwithstanding the lack of a contractual relationship. Lord Atkin formulated what has been described as "the neighbour principle," stating *"you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."*

46. Identifying a duty of care in English law is approached incrementally. There are some situations where it is accepted a duty of care must be owed – for example, by a doctor to his patient, or by a solicitor to his client. The courts will identify novel duties of care where the harm caused is foreseeable, the relationship between the parties is proximate, it is fair, just and reasonable to impose such a duty, and where it is an incremental rather than radical step away from existing duties which have been established.

47. There are cases concerning environmental issues where a duty of care has been established. For example, in *Scott-Whitehead v National Coal Board* (1985) P&CR 263, it was held that a water authority was under a duty of care to warn riparian occupiers of the adverse effects of operating a discharge consent. However, broadly speaking, identifying a duty of care is likely to be difficult, for two reasons. First, in *Murphy v Brentwood District Council* [1991] 1 AC 398, the House of Lords demonstrated some reluctance to find public bodies liable for negligence in the exercise of their duties. Second, those affected must act quickly; any negligence claims

arising out of historical pollution or contamination are likely to face difficulties because a duty of care must be owed to specific persons.

### *Nuisance*

48. The law of nuisance is concerned with the unlawful interference with a person's use of or enjoyment or land, or of some right in connection with it. A person may be liable in nuisance if he owns or occupies land and behaves in a way so as to cause foreseeable injury, loss or damage by creating a nuisance. The injured party must have a legal interest in the land; merely being the occupant of property is not, without more, sufficient (*Hunter v Canary Wharf* [1997] AC 655).

49. A claim in private nuisance will always involve a balancing exercise between each party's right to reasonable user of his land. So, for example, in *Dennis v Ministry of Defence* [2003] Env LR 34, the claimants lived close to an RAF base used for the training of Harrier jets. The noise made by the jets was noted to be "fearsome" and the claimants claimed they could not use their land for commercial purposes, such as hosting conferences, because of it. The Ministry of Defence argued that the operation of the base was in the national interest. The High Court achieved a balance between both parties' rights by upholding the claimants' claim, but by awarding damages, rather than an injunction preventing the base from operating.

50. Assessing the balance between each party's reasonable user of land is a difficult and delicate exercise. It is, however, governed by a number of principles. The "locality" doctrine, for example, dictates that the nature and character of the surrounding area is significant; *"what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey"* (*St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642). The nature, duration and intensity of

an alleged nuisance will also be significant; there must be some appreciable harm before a claim is made out, and a temporary or isolated event is unlikely to satisfy this criterion. Whether or not the alleged nuisance offered some public benefit – as was argued in the *Dennis* case considered above – is also a relevant factor.

### *The Rule in Rylands v Fletcher*

51. The rule in *Rylands v Fletcher* ((1868) LR 3 HL 330) is a peculiar branch of the law of private nuisance. In that case, the defendant constructed a reservior on his land. The construction contractors failed to identify and block off mine shafts, so that water from the reservoir entered those shafts and flooded the mine, which belonged to the claimant. The claimant's claims for negligence and nuisance could not succeed on the law as it then stood. However, a new rule was established, stated to be that *"a person who for his own purposes brings onto his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."*

52. The House of Lords did state, however, that the use of the land had to be "non-natural" use – a term which has come to mean *"some special use bringing with it increased danger to others and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community"* (*Rickards v Lothian* [1913] AC 263). This has been extended to cover any use which offers some public benefit, no matter how dangerous – even including the manufacture of explosive shells (*Read v Lyons* [1947] AC 156).

53. The case of *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264 was a case brought both in private nuisance and under the rule in *Rylands v*

*Fletcher*. The defendant used solvents in its tanneries, and there were often spillages onto the land. The solvent eventually found its way into an aquifer from which the claimant company abstracted water. The only way for the claimant company to avoid the entry of the solvent into the water was to close down its borehole and arrange for a new supply. It sued the defendant leather works accordingly. The House of Lords, however, found in favour of the defendant, focusing on the fact that it did not consider the contamination was foreseeable. Their Lordships were clearly reluctant to extend the rule in *Rylands v Fletcher* to form any kind of doctrine of strict liability for particularly hazardous activities – reasoning which supports the earlier findings in *Read v Lyons*. Generally, it is now said that, for a successful claim to be brought under this rule, a defendant's uses must be extraordinary and give rise to an extraordinary degree of risk (*Transco v Stockport Metropolitan Borough Council* [2003] UKHL 61).

54. Any common law claim, therefore, is likely to raise complex issues of foreseeability and causation, and will depend on the particular factual background against which the relevant harm has occurred. Familiarity with the extensive case law and a forensic examination of the facts will be crucial for success.

## GROUP ACTIONS

55. A full assessment of the features of large scale disputes concerning environmental matters is beyond the scope of this introductory note. However, the following provides for a brief overview of relevant matters.

56. The Civil Procedure Rules (the "**CPRs**"), by which litigation is conducted in England & Wales, allow for certain cases involving multiple parties to

proceed as 'group litigation', proceedings known in certain jurisdictions as class actions.

57. No specific provision was made for this in the CPRs until May 2000, though it was possible (and remains so, under CPR r.19.6 and r.19.7) to bring representative actions and the courts had developed methods of practice to manage large scale multi party disputes, such as the larger pharmaceutical claims (e.g. the Benzodiazepine litigation in the 1990s).

58. Such actions are now case managed by means of Group Litigation Order, which may be granted under Part 19 CPR. Over the intervening years there have been a large number of GLOs granted and a significant number of high profile cases which have proceeded pursuant to them: such as the (current) PIP silicone breast implant litigation, the Toxic Sofa litigation, the MMR Vaccine Litigation, the Abidjan Personal Injury Group litigation – an environmental claim, known as the "Trafigura" case.

59. Members of Henderson Chambers have, among them, considerable experience in handling such disputes having represented parties in a significant number of those cases, including environmental claims such as the Trafigura case.

60. The terms "group action", "GLO", "multi-party action/situation" do not describe the substantive nature of the claim: they merely denote that there are a large number of claims giving rise to common issues which, for reasons of administrative efficiency, are best co-ordinated and tried together.

61. Part 19 CPR (specifically, CPR 19.10-15 and PD 19B) does not provide a comprehensive code for the management of group actions. It simply

establishes a flexible procedural framework within which group litigation could be managed in the discretion of the court.

62. The procedures for multi-party claims have the following broad objectives:

    a. To promote access to justice where large numbers of people have been affected by another's conduct, but where the individual losses are so small that individual actions are economically unviable;

    b. To provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;

    c. To achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.

63. In simple terms, such group procedures are appropriate when there are (or are likely to be) a number of claims giving rise to common issues of fact or law. While considerable number concern personal injury claims arising from disasters, industrial disease, medical treatment or the use of defective products, group actions are well suited to environmental claims where a number of claimants (who, for example, may occupy a geographical area affected by environmental pollution) are together bring claims in this jurisdiction.

64. The salient parts of the CPR and accompanying practice direction are as follows:

    a. A GLO will be made in cases which give rise to "common or related issues of fact or law" (CPR.19.10);

b. An application for a GLO may be made by either a Claimant or a Defendant or by the Court of its own initiative (PD 19B, para 4). It must also be made in accordance with CPR 23;

c. In considering whether to apply for a GLO, the applicant should consider whether any other order would be more appropriate. In particular he should consider whether, in the circumstances of the case, it would be more appropriate for (1) the claims to be consolidated; or (2) the rules in Section II of Part 19 (representative parties) to be used (PD 19 B, para 2.3);

d. The written evidence in support should include a summary of the nature of the litigation, the number and nature of the claims issued, the number of parties likely to be involved, the common issues of fact or law that are likely to arise in the litigation and the existence of subgroups within the claims (PD 19B, paragraph 3.2).

65. In the High Court in London, the application should be made to the Senior Master in the Queen's Bench Division or to the Chief Chancery Master in the Chancery Division; outside London an application in the High Court should be made to the presiding Judge or a Chancery Supervising Judge of the Circuit. For claims that are likely to proceed in a specialist list, the application should be made to the senior Judge of that list.

66. The consent of the President of the Queen's Bench Division or the Chancellor of the High Court in the Chancery Division is required before a GLO is made and a Master will normally be assigned to deal with the group directions in the early stages.

67. There is no prescribed GLO form and the amount of detail and information that it should contain will vary. It may be made before or after claims are issued. An amendment to the Practice Direction (PD 19B, para.6.1A) now makes it clear that individual claimants must issue their

own claim form (and pay the issue fee) before their claim can be entered on a group register (following dicta of Lord Woolf in *Boake Allen Ltd v Revenue and Customs Commissioners* [2007] UKHL 25; [2007] 1 W.L.R.)

68. Generally, the GLO application should be limited to the following matters:

    a. The GLO issues: it should identify the claims to be managed as a group;

    b. Venue: e.g. the name of the Managing Court and relevant Judge or Master;

    c. A direction that all members of the group will be bound by all decisions and directions made in the group action;

    d. Possibly the establishment of a 'register' of Group Claimants.

    e. Possibly directions for publicising the claim.

69. All other matters are better addressed at the first directions hearing when they can be properly debated. For example, it is not uncommon for matters such as venue to be contested. But it may be necessary to insist on a hearing to ensure that the GLO itself is satisfactory, that the issues are suitably delineated and to ensure that more wide ranging directions are not made on the basis of inadequate information.

70. These procedures may appear to be relatively formal. In practice, however, they have introduced a degree of informality that can lead to alarming consequences for the unwary. Courts at all levels seem increasingly willing to engage in correspondence with the parties in order to assist them. This can lead to decisions being taken or indications being given on the basis of inadequate information and on the assumption that the directions sought are uncontroversial.

71. A GLO is usually made very early in the life of these cases – and is generally made at one of the preliminary directions hearings. These initial hearings assume great importance because:

    a. The orders made – such as the identification of the common issues and the definition of the qualifying criteria - will materially shape the outcome of the litigation. For example, if a common issue is tried as opposed to a series of lead cases the result could be different;

    b. Due to the number of parties involved, even seemingly innocuous court orders can have significant implications both in terms of costs and the subsequent progress of the action – potentially reducing the costs efficiency associated with group actions;

    c. The parties have an opportunity to educate the trial judge who will often have been appointed at an early stage about the issues in the case and gain his trust and confidence;

    d. Regular directions hearings tend to be the only effective way of ensuring that the conduct of the case is disciplined and previous orders are complied with;

    e. The fate of many group actions has been determined by the orders made at these hearings. It is interesting to note with hindsight the turning points which resulted in the case not proceeding or settling.

72. At this early stage, the parties will have to consider the pros and cons of directions on a range of matters of strategic importance to the litigation overall.

73. **Establishment of a Register of Claimants:** a register serves two primary purposes:

    a. It is an administrative tool that enables the court and the parties, throughout the course of the action, to have ready access to basic

information about the group – in other words, the names of Claimants, their date of issue, date of discontinuance and funding status etc;

b. It facilitates the operation of any costs sharing order that may be made. If individual claims are settled or discontinued, the costs liability will be determined by reference to the time when they were officially in the group (i.e. on the register).

74. **Entry Requirements:** an important concern in all group actions is how to ensure that the group which may consist of people who have responded to advertisements, consists of viable claims. The short answer to the problem is to make the entry criteria, or the obligations imposed on Claimants once they have joined the group, sufficiently robust to allow the parties to understand the individual issues that arise in their cases. Judges often require the Claimants to issue their own claim and serve a schedule of information sufficient to assure the parties and the court that they are properly part of the group.

75. The form the entry requirements take gives rise to strategic considerations, particularly for Defendants. On the one hand, it is important to ensure that the group is not inflated by Claimants with weak claims. Further, if the entry requirements are too, low settlement and finality become harder to achieve because the number of Claimants may increase quantum to unacceptable levels and make it easier for future Claimants to come forward;

76. **Size of the group:** claimants must show that they form a sufficiently significant cohort to justify the making of a GLO. In one environmental claim, *Austin & Ors v Miller Argent* [2011] EWCA Civ 928 the Court of Appeal held that, at the date of the GLO application hearing, it was not clear that a sufficient number of claimants seriously intended to proceed with the action. Only two claimants had ATE insurance (with a limit of

£50,000) and it was found "*far more than two claimants are necessary to constitute a viable group action*".

77. **Pleadings, trial of issues and trial of lead cases:** these three matters tend to be closely linked. There are essentially two approaches that are commonly adopted:

    a. Generic pleadings with individual claimants serving schedules in which they adopt those parts of the master pleading relevant to their claim; or

    b. Individual pleadings where a few cases are selected and pleaded. The selected cases may then become the lead cases.

78. Claimants tend to prefer an issue-led approach to group actions, by use of master pleadings in which the allegations and issues are set out in general terms. Though it has been found (*Tew and others v BoS (Shared Appreciation Mortgages) No 1 plc and others* [2010] EWHC 203 (Ch)) that it would be wrong to allow GLO issues to be phrased in such a way as to exclude individual circumstances from the scope of the litigation, that to do so would not be an accurate way of describing the litigation and would amounted to a form of pre-judgment of some issues.

79. **A Cut-Off Date:** to try and achieve finality and a degree of discipline, it is normally necessary to seek a cut-off date by which Claimants have to join the group. This is one of the matters that the Court should consider under the CPR 19.13(e) and PD 19(b), paragraph 13. The main advantages of a cut-off date are that the parties and Court will know the size and the scope of the litigation, orders can be made with which the members of the group must comply or be subjected to sanctions, lead cases can be selected which are truly representative of the group and it can be easier for

Defendants to settle the claims. But the potential disadvantages include delay, publicity (a disadvantage to defendants).

80. Establishing the Costs Regime: the mechanics by which liability for legal costs in the group action is apportioned between the participants is complex and beyond the scope of this note. However, following the Court of Appeal's decision in *Sayers & Others v. Merck & Co Inc & Others* and the introduction of CPR 48.6A the general rule is that any order for costs against group litigants imposes several (rather than joint) liability for an equal proportion of common costs unless the court orders otherwise. Further, any such order will render a group litigant liable for any costs that he personally has been ordered to pay, individual costs (as opposed to common costs) of his or her claim, and an equal proportion of the common costs and a share of any common costs incurred before they joined the group litigation.

81. In large scale environmental cases, Claimants give careful consideration to consider how they may fund their claims. The importance of was recently considered by the Court of Appeal in *Austin & Ors v Miller Argent* [2011] EWCA Civ 928, in which it was unclear whether funding was in place to cover the Claimants' own costs, or those of the Defendant and costs insurance (ATE) could not be obtained by the Claimants. These features led to the conclusion that the GLO application was premature and the Court of Appeal did not disturb that finding.

82. Historically, most large mass tort claims were funded by legal aid. In recent years the Claimants' lawyers have made use of Conditional Fee Agreements, but following significant changes to the rules relating legal costs in April 2013 it remains to be seen how large scale environmental claims will be funded. Funding from litigation funding businesses is

increasingly available. The Claimants' lawyers often have the formidable task of co-ordinating large numbers of litigants with limited funding and this can have an impact upon case management.

83. Whether settlement is an option and, if so, how it can be achieved will be an important early consideration. In unitary actions it should be relatively easy to make a cost/benefit evaluation at an early stage to obtain a final settlement. But the main impediments tend to be:

    a. At the commencement of the action the number of claimants, their identity and the value of their claims may well not be known;

    b. There can be no guarantees that any settlement will be final. On the contrary, settlement may well provoke publicity and bring forward further claims; and

    c. The potential value of the claim and significant costs element, in view of the large number of potential group members, may lead to the entrenchment of the positions of the parties.

84. These common problems are not insurmountable particularly a key benefit is to reduce the legal costs associated with the conduct of a significant number of unitary actions. Structured settlements using forms of ADR may assist, such as the use of an independent expert to determine the quantum of representative cases, or the agreement of a system of tariffs

## CONCLUSIONS

85. The regulatory framework within which environmental issues are policed is complex and is subject to regular revisions and amendments, both from Europe and domestically.

86. The common law position perhaps offers more clarity, but claims will be highly fact-sensitive, and courts have generally tended to guard against casting the liability "net" too widely.

87. Accordingly, large, high-value environmental claims will necessarily invoke a myriad of competing legal issues. In addition to that complexity, where claimants or defendants in those claims are international companies, there is clear potential for issues of jurisdiction, parent company liability and group litigation to arise.

88. Anyone involved in such litigation must therefore invariably be prepared to address those issues, should the need arise.

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