

CLT SCOTLAND
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AGRICULTURAL UPDATE
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Agricultural subsidies

Dickie v The Scottish Ministers, SLC/29/03, Scottish Land Court, 5 May 2005

The first case under the Agricultural Subsidies (Appeals) (Scotland) Regulations 2000 (SI 347/2000). An earlier stage in procedure is reported at 2003 SLCR 1. The background is that the applicant bought cattle at Thainstone Mart. He mistakenly believed that the Mart would automatically electronically intimate the movement of the cattle to the British Cattle Movement Service. The Mart only gave such intimation where the purchaser asked it to do so. Mr. Dickie did not ask them to do this, and he did not intimate the movement himself. The Scottish Ministers required his subsidy to be repaid. Mr. Dickie did give intimation following this demand but The Scottish Ministers insisted upon repayment and Mr. Dickie eventually abandoned his appeal. The reason for this appears to be a recognition that strict compliance with the IACS Regulations was necessary and a failure to comply with the terms of the Regulations (and an inability to bring oneself within one of the permitted *force majeure* exceptions) meant that subsidy has to be repaid or withheld. Although entirely unsuccessful in the appeal process the court decided to make no award of expenses due to or by either party. The reason for this was that the appeal to the court highlighted deficiencies in how the Ministers dealt with Stage 2 of the appeal process. That procedure had not been properly followed (see the findings of the Court at 2003 SLCR 1 and also *Messrs Gray & Co (Muirfield) v The Scottish Ministers*, SLC/204/04, 8 December 2004 (unreported)). The Court decided that as these matters would require to have been dealt with at some point and that this aspect of the case was what would have caused the Ministers greatest expense then there should not be any finding of expenses awarded against Mr. Dickie.

The Scottish Land Court has recently been considering two other challenges to decisions of The Scottish Ministers relating to decisions to withhold subsidies. As at the date of writing, no decisions have been issued.

Agricultural Tenancies

The Explanatory Memorandum accompanying the Agricultural Holdings (Scotland) Act 2003 was published in January 2006.

South Lanarkshire Council v Taylor, 2005 SC 182

Owner of a horse riding centre had a lease with the local authority to use three specified areas of ground at Lanark Racecourse for grazing horses. The lease was entitled a 'monthly grazing lease' Clause 4 of the lease stated that the tenant 'must vacate any or all of these grazing areas within 24 hours notice to permit other events to take place'. The tenant accepted that there had been occasions where possession had been given up of some of the lease subjects due to particular events having taken place, but there was a factual dispute between the parties as to how frequently this had ever happened or had been anticipated, what events had been involved and how long any such interruption had taken place for. The landlord raised an action for removal and succeeded before Sheriff Stewart in arguing that the agreement was not a lease at all but was a revocable licence which had been terminated. The basis for this argument was that Clause 4 of the agreement meant that she did not have a right to exclusive possession of the subjects because she could be required to make way entirely or in part for other users as permitted by the landlord.

Held: It was going too far and too fast to say that, merely because of the terms of Clause 4, it could not be established that the defender's occupation did have the characteristics of a tenant under a lease. The reservation by the landlord of a limited right in the subjects, or a limitation in the nature of the use put, was not necessarily inconsistent with the relationship of landlord and tenant. The appropriate course was to allow a proof before answer.

Smythe v Halley, SLC/264/04, Scottish Land Court, 3 March 2005

A notice to quit part of a farm stated that it was 'given with a view to the use of land ... for the following purpose, namely the planting of trees, in terms of Section 29(2)(e) of the Agricultural Holdings (Scotland) Act 1991. The tenant served a counter notice requiring that section 22(1) of the 1991 Act apply. The landlord applied to the Scottish Land Court for consent to the operation of the notice to quit. The application stated that the landlord required the land for the planting of trees. The court refused consent.

Held: The notice to quit did not comply with the requirements of Section 24 of the 1991 Act because it failed to specify the ground which was being relied upon for the consent of the court when application was made for its consent. The landlord's submission that the tenant could work out that there was only one ground which could possibly be relied upon (Section 24(1)(b) – sound management of the estate), and therefore adequate notice of the ground had been given, was not accepted. It was not practical or fair to assume that a tenant would have enough legal knowledge to work out which ground applied. In any event it was possible on the facts of the case that more than one ground could apply. It was not possible to amend or adjust the application to add in the required words. The application had to be properly made to the court within a statutory time limit. The application made did not comply with the statutory requirements. The tenant's plea that the application was not competent was sustained.

Palmer's Executors v Shaw, SLC/111/01, Scottish Land Court, 22 July 2005

This decision deals with the proof following on from the finding of the Inner House that the irritancy notice served on the tenant for non-payment of rent was a valid notice. The court held that rent was not properly due at the date which formed the basis for the irritancy notice. The reason for this was the court's conclusion that the landlord was in breach of its own obligations to provide stock-proof fencing in respect of two fields on the farm. The court found that the need to make the fencing stock-proof had been identified in July 1997. After that there followed three years of effort on the part of the landlord to reach agreement with the tenant about the type of fencing to be put in place. There were a number of other issues between the parties as well. The landlord eventually instructed the work to be done in 2000 after a silage crop was harvested. The tenant complained that delays by the landlord prevented him being able to put stock in the fields that summer, which was why they were given over to arable silage.

Comment: This case serves as a warning to landlords not to get too bogged down in negotiations with a tenant over how the landlord's obligations are fulfilled. At paragraph 88 of the findings-in-fact the court stated: *'We cannot accept [the tenant] as a credible witness What we do learn from his manner of giving evidence is that he is capable either of deliberate evasion and untruth or of an inability to recollect fact from imagination or to distinguish sense from nonsense. We have no doubt that he would be capable of appearing to agree something on one day and asserting something quite different the next. It is unnecessary for us to say whether this would necessarily be wilful conduct although we do know from his initial false references to taking advice of advisers that he sees no harm in dishonesty where appropriate to his own ends.'* In light of these comments the landlord's agent was unsurprisingly disappointed to have lost on the merits. The reason for doing so was a finding by the court that the lease explicitly allowed the landlord to decide what fencing was put in place, and at the end of the day the landlord did that, but only after having let matters continue unresolved for three years. The lesson to be learnt is that if a landlord is at risk of being found to be in default through a failure to act, it is better to do what is considered necessary without trying to satisfy an unreasonable tenant than to delay in order to reach a compromise. The reasonable behaviour by the landlord in trying to reach agreement will not help the landlord in these circumstances if it results in a continuing default in the landlord's obligations.

Trustees of Cawdor Scottish Discretionary Trust v MacKay, SLC/183/04, Scottish Land Court, 12 September 2005

An application to the Scottish Land Court for declarator that the landlord had validly resumed from the holding a cottage and attached ground. The landlord had indicated an intention to resume the cottage in 2002. After lengthy negotiations Resumption Notices were issued in early 2003. These were followed by further negotiations. In January 2004 the tenant served a notice of diversification in respect of various properties, including the cottage. The landlords served a fresh resumption notice in February 2004 and applied to the Land Court in September 2004. The tenant served a further notice of diversification in March 2005. The cottage was not being used by the tenant and at the time of the hearing had not been used for at least ten years. The

cottage was currently being sub-let to a family for residential use. The family were not engaged in any agricultural activity.

Held: The lease gave an open power to resume, and expressly provided for resumption of a cottage not occupied by a farm worker for three months. The farm was run very effectively without the use of the cottage, and if it was removed there was still another cottage in reserve for potential use. There were no plans for the cottage to be used and the trend in farming was to reduce labour requirements. Any need for additional employees is not automatically linked to a need for accommodation due to car ownership and a trend for people to seek security of a home which is not dependant on employment.

Comment: The tenant's case for resisting resumption was based very much on the terms of a report from an independent expert. The report said that the resumption of the cottage would have a serious economic adverse impact on the farm business. The court observed that this was 'quite at variance with the facts'. The expert admitted in court that he had not seen the terms of the lease and he did not indicate that he had regard to the case law on the subject. He said that he was setting out the facts honestly, but attempting to put things at their highest for the client in the same way he would as if trying to support a planning application. The court commented that this approach has the potential to be misleading as the conclusion expressed was not based on an independent expert judgement.

The tenant ran a second line of defence that he had a statutory right to diversify. The court held that a right of resumption was equivalent to a prohibition on the use of land which was struck at by Section 39(2) of the Agricultural Holdings (Scotland) Act 2003. The tenant also relied on Section 39(3) of the 2003 Act. There was a question as to what the proviso in Section 39(3) was intended to refer to. The court decided that the Section did not assist the tenant however it was construed because either (i) a sub-let of the cottage as a residence by the family occupying it was not ancillary to any use of the cottage by the tenant, or (ii) the sub-let of the cottage was not ancillary to the purpose of the farm lease.

Fenchurch Residential Ltd v First Secretary of State, [2005] EWHC 3014 (Admin), (Crane J), 24 November 2005

The claimant applied for planning permission to demolish existing buildings on the site and build 40 residential dwellings. Bulls were kept on the site for the production of semen to be used in artificial insemination (which took place elsewhere), and the buildings on the site were used predominantly for the storage of the semen. The planning authority refused permission for the proposed development. On appeal, an inspector held that the keeping of bulls on the site constituted an agricultural use, therefore the site was not "previously developed land". The inspector further concluded that the proposed development was not appropriate under the relevant planning policy.

Held: In so far as the decision of the court was determining whether the land was agricultural land, the keeping of bulls for the production of semen could be classified as the keeping of livestock. The keeping of such bulls bore all the hallmarks of agriculture. Whilst the bulls did not produce a product specifically set out in the definition of "agriculture" in Section 336 of the Town and Country Planning Act 1990, they were kept, fed and cared for in order to produce a kind of product, namely semen.

Comment: The definition of "agriculture" in Section 336 of the 1990 Act is:

"'agriculture' includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and 'agricultural' shall be construed accordingly."

This definition is very similar to that used in the Agricultural Holdings (Scotland) Act 1991. Discussion in this case as to what does or does not constitute "agriculture" could therefore be of some relevance to any case where the definition is under consideration in a Scottish agricultural holdings case.

Well Barn Farming Limited v Backhouse, [2005] EWHC 1520 (Ch), (Paul Morgan QC), 14 July 2005

On the evidence, a previous owner of a piece of farm land had granted a licence to occupy the land to a farmer, for which the farmer had given consideration in the form of a right to cut back wood on another piece of land owned by the farmer. It was held that although the subject matter of the arrangement was of slight importance it could not be explained by any other arrangement. The limited time frame involved was also not relevant. The arrangement had contractual consequences. By virtue of Section 2 of the Agricultural Holdings Act 1986 the licence had created a tenancy from year to year.

Comment: Although the law on leases differs between Scotland and England, many commentators express the view that the main consequence is that arrangements which are considered to be licenses in England may be considered leases in Scotland. Importantly, in Scotland one of the essential requirements for a lease is that there is a consideration, but that consideration need not be money. A lease is a contract. Therefore if the court holds that the arrangement between the parties involves passing of a contractual consideration, all other things being equal this is likely to lead to the parties arrangements being held to be a lease. A Scottish court could well have reached the same result in terms of finding that the farmer had security of tenure as an agricultural tenant.

Crofting

Crofting Reform Bill

Introduced into Scottish Parliament on 2 March 2006. This Bill proposes to re-vamp the Crofters Commission, giving it new general duties and broadening the existing particular powers and duties of the Commission. It makes provision for the creation of new crofts in the crofting counties on the application of the landlord, or in an area outwith the crofting counties (to be designated by statutory instrument) on the application of the landlord or the tenant. The right to contract out of the crofters right to buy and the right to assign the croft is to be made binding on statutory successors. Although not in the published Bill, it is proposed that a new "proper occupier" definition will be added to the Bill. This would mean that owner occupied crofts would no longer be treated as vacant crofts and the owners would only be required to re-let crofts if certain conditions were not met.

Diversification

See **Agricultural Tenancies** - *Trustees of Cawdor Scottish Discretionary Trust v MacKay*, SLC/183/04, Scottish Land Court, 12 September 2005

Environment

Newcastle Upon Tyne Council v The Barns (NE) Ltd, [2005] EWCA Civ 1274, (Court of Appeal), 11 October 2005

Local authorities are entitled under Section 80(1) of the Environmental Protection Act 1990 to serve an abatement notice where it is satisfied that a statutory nuisance exists, or is likely to occur or recur in its area. Under Section 81(5), if the local authority is of the opinion that proceedings for the offence of not complying with an abatement notice would be an inadequate remedy then they can take proceedings in court in order to secure the abatement of the nuisance. The local authority had started an action against landowners alleging that the collection and burning of waste on their land amounted to a statutory nuisance and sought an order under s.81(5) prohibiting any repetition. The judge found that Section 81(5) was silent on the subject of abatement notices, that there were cases where serving an abatement notice would be futile and that there was no requirement in the instant case to serve such a notice. *Held*: The 1990 Act contained a series of provision intended to be consecutive steps when dealing with a statutory nuisance: (i) service of an abatement notice; (ii) where there was no compliance, either prosecution or self-help by the local authority requiring the wrongdoer to compensate the local authority for its expenses; (iii) as a last resort, action in the High Court for an injunction under s.81(5). Section 80(1) imposed a duty on a local authority to serve an abatement notice once it was satisfied that a statutory nuisance existed. If Parliament had intended to empower a local authority to apply to the High Court without first serving an abatement notice then clear provisions to that effect would be expected.

Comment: In Scotland any prosecution would be in the sheriff court. Appeals against notices are made to the sheriff by summary application. The Section 81(5) application is made to “any court of competent jurisdiction”, which would be either the sheriff court or the Court of Session.

Alford v Department for the Environment, Food and Rural Affairs, [2005] EWHC 808 (Admin), (Brooke LJ, David Steel J), 5 May 2005; [2005] 36 EG 278

Regulation 19 of the Environmental Impact Assessment (Uncultivated Land and Semi-natural Areas) (England) Regulations 2001 requires a “project” on uncultivated or semi-natural land to obtain a screening decision or grant of consent beforehand. A project is defined in Regulation 2(1) as: (a) the execution of construction works or other installations or schemes; or (b) other interventions in the natural surroundings and landscape, involving the use of uncultivated land or semi-natural areas for intensive agricultural purposes. The appellant owned a farm that had apparently been

abandoned by its former tenants for some six years. The farm was grazing moorland, with no evidence of it previously having been cropped or the soil improvements through additional fertiliser. The appellant applied farmyard manure and calcified seaweed to four fields with a view to making the grass edible for cattle. Boundary walls and fences were also repaired and made stock proof. The appellant had been convicted on four charges of carrying out projects on land without obtaining a screening decision or consent, contrary to Regulation 19.

Held: The 2001 Regulations were intended to implement Council Directive 85/337/EEC (as amended). That Directive had a wide scope and a broad purpose but it was not intended to catch a project which was only concerned with bringing land back to a normal level of agricultural productivity. Unless the productivity of uncultivated land for agricultural purpose was intensified above the normal level, an increase in the productiveness of such land did not come within the definition of "intensive agricultural purposes" under the reg.2(1).

Comment: In Scotland the equivalent Regulations are The Environmental Impact Assessment (Uncultivated Land and Semi-Natural Areas) (Scotland) Regulations 2002 (SSI 2002/06). It would seem that increasing the productivity of the uncultivated land would not require a screening decision or consent unless productivity was intensified above the "normal" level.

Animal Welfare

The Animal Health and Welfare (Scotland) Bill

This was introduced to the Parliament on 5 October 2005. It has recently been considered by the Environment and Rural Development Committee of the Scottish Parliament. It is in three parts: Part 1 contains provisions on animal health; Part 2 contains provisions on animal welfare; and Part 3 contains general provisions. The law on farm animal welfare derives substantially from EU law and the Bill does not amend or extend the existing law. What is likely to be of major significance are the changes brought in by Part 1. A new schedule 3A is introduced into the Animal Health Act 1981. This gives Scottish Ministers the explicit power to slaughter animals in the event of an outbreak of 5 types of disease: cattle plague; pleuro-pneumonia; foot and mouth disease; swine fever; and diseases of poultry. These powers are wider than the existing legislation, permitting slaughter "with a view to preventing the spread of foot and mouth disease" for example. Where a disease is species specific, eg in the case of swine fever, the new power would be restricted to allow the slaughter of any pig (rather than any animal). The Schedule also gives Ministers a much wider power to slaughter any animals, birds, or amphibians whether or not they are affected with the disease, have been contact with affected animals, have been exposed to the disease or have been vaccinated against it. This power is designed to allow the slaughter of wildlife, if that was a route by which a disease was being spread. Section 2 of the Bill would give Ministers an explicit power to slaughter vaccinated animals. This would be used in order to regain EU or other international disease-free status following an outbreak. If vaccinated animals had to be slaughtered for another reason this could be done under the powers in section 1. Section 6 of the Bill would give Ministers a wider power to vaccinate animals than they currently have.

Keam v Department for the Environment, Food and Rural Affairs, [2005] EWHC 1582 (Admin), (Stanley Burnton J), 28 June 2005

Regulation 3(2) of the Welfare of Farmed Animals (England) Regulations 2000 requires that owners and keepers of animals shall take all reasonable steps - (a) to ensure the welfare of the animals under their care; and (b) to ensure that the animals are not caused any unnecessary pain, suffering or injury. Schedule 1, Paragraph 5 requires that any animals which appear to be ill or injured - (a) shall be cared for appropriately without delay; and (b) where they do not respond to such care, veterinary advice shall be obtained as soon as possible. The appellant had been paid by a livestock dealer to provide a herd of cattle with food and accommodation. The appellant had been ill and unable to look after the cattle personally, and he had employed another farmer to feed and herd the cattle in his place. DEFRA Inspectors found that one of the cows was lame and had been so for a week. The appellant was charged and convicted of failing to take all reasonable steps to ensure that an ill animal was cared for appropriately and without delay.

Held: On a further appeal from the Crown Court, it was said that where a livestock keeper employed an independent contractor to take care of his animals and did no more, it was a matter for a trial court as to whether the keeper had taken all reasonable steps. In most cases a court would expect the keeper to ensure that the independent contractor was competent and to take steps to ensure that the independent contractor was doing what he ought to. In many cases, simply to appoint an independent contractor would not amount to the taking of all reasonable steps. However the fact that an independent contractor had failed to take all reasonable steps did not necessarily involve criminal conduct on the part of the keeper who had contracted him. The test whether an individual had taken all reasonable steps was an objective one.

Comment: The issue for the court was what was meant by the obligation on an individual to “take all reasonable steps” to ensure that the conditions under which animals were kept complied with the requirements of the Regulations. The court’s decision means that no criminal offence is committed by an individual who takes all reasonable steps to ensure the welfare of an animal, even if in fact he fails to ensure the welfare of the animal. Therefore a keeper of animals is not vicariously liable for the failings of an independent contractor if the keeper can show that he had taken the reasonable steps indicated by the court. In Scotland the equivalent Regulations are to be found in the Welfare of Farmed Animals (Scotland) Regulations 2000 (SSI 2000/442).

Glyn (trading as Priors Farm Equine Veterinary Surgery) v McGarel-Groves, [2005] EWHC 372 (QB), (Forbes J), 17 March 2005

The owner of a championship dressage horse consented to its treatment on the basis that her own vet attended the treatment in order to make sure that the horse was properly treated and not endangered. The vet did attend but did not know what drugs were being administered because the labels were in French. The animal subsequently had to be put down. When the vet sued for his fees the owner counterclaimed for damages against the vet supplying the treatment and her vet. It was common ground that the vet supplying the treatment had been negligent because there had been no clinical justification for the treatment provided.

Held: The vet who had been instructed to observe was under a duty to take reasonable steps to clarify and understand what was being observed. He had failed to do this and was therefore also negligent. He was liable for 15% of the total losses.

Human Welfare

Ball v Street, [2005] EWCA Civ 76, (Court of Appeal), 4 February 2005

A farmer sustained a severe eye injury while adjusting a haybob machine hired from another farmer. He sued for damages based on an alleged breach by the machine's owner to maintain the machine in efficient working order and good repair under Regulation 5(1) of the Provision and Use of Work Equipment Regulations 1998. The judge found that the Regulations applied as the machine's owner was engaged to provide his services including the use of his machine, but there had been no breach of any obligation to maintain the machine. Both parties appealed.

Held: The finding that use of the machine on the day of the accident, whether or not it was to be separately charged, was part of an overall commercial arrangement was plainly justified on the evidence. Furthermore the machine's owner fell within Regulation 3(3)(b) of the Regulations as a person who had "control to any extent" of work equipment and the way in which it was used, and he fulfilled the requirement of Regulation 3(4) that such control was in connection with the carrying on of his trade or business. An exemption under Regulation 3(5) did not extend to a person who hired equipment, or who "lends" it in the sense that he simply hands over temporary physical control in circumstances where the opportunity and duty of maintaining the equipment in safe working order remained with him. There was abundant proof that the mechanism of the machine had failed and that the failure resulted in injury. The machine was not in good repair nor was it in an efficient state, and that failure caused the accident. The fact that the type of accident was not foreseeable was not relevant as Regulation 5 imposed an absolute obligation to maintain the work equipment. Damages were assessed on the basis of 75% against the machine's owner and 25% against the farmer as it was conceded that the farmer had been in breach of his own co-existing breach of statutory duty.

Comment: Accidental injury involving farm machinery is a frequently referred to hazard. This case confirms that the strict liability which is created under the Provision and Use of Work Equipment Regulations 1998 applies even if the accident was as a result of something going wrong which could not be foreseen. It also confirms that where one farmer hires out equipment for use by another farmer, the owner of the equipment is responsible for the state of the equipment supplied.

Fuel Duty

Clark (trading as Andrew Clark Plant Hire) v HM Revenue & Customs, (EO00913), VAT & Duties Tribunal (Edinburgh), (T Gordon Coutts QC, Chairman), 15 July 2005

Mr Clark hired out plant also engaged in agricultural contract work. He provided a neighbouring farmer with a tractor and trailer, digging machine and other equipment for the purpose of digging drains and laying pipes. The farmer did not hire the tractor, or the excavator. The driver was not an employee of the appellant, but was a self

employed subcontractor, engaged to drive the tractor and digging machine. The work at the farm was finished in a day and a half and the farmer then asked the driver to go to another farm, some 9 miles away, to repair a field drain there which the farmer had damaged. That work was not specially requested from the appellant and at the time the appellant knew nothing of the expedition to Draffin. The farmer was ultimately invoiced for the 2 days work. When the vehicle returned to Mr Clark's premises it was impounded and the fuel was ascertained to be red diesel. Customs considered that an offence had been committed. They originally wanted to assess for the appellant's entire consumption of red diesel but eventually accepted that the tractor was used for agricultural work on the land. They continued to make an assessment on the basis of journeys from the appellant's base to the lands worked, on the view that what was being done at that stage was haulage and not agricultural work.

Held: The use of an agricultural tractor, with a trailer to transport materials and a digger on a public road to get to locations where the machinery was employed for agricultural purposes, was a use which was solely for the purposes of agriculture and was not haulage. As that agricultural vehicle normally used rebated fuel and there was no evidence that it had taken in rebated fuel for the special purpose of using the vehicle on the public road, it was not appropriate to impose a penalty under the Section 13(1)(b) of the Hydrocarbon Oil Duties Act 1979.

Rural Crime

R v Gale, [2005] EWCA Crim 286, (Court of Appeal), 9 February 2005
Section 34(1) of the Food Safety Act 1990 provides that no prosecution for an offence under the Act which is punishable under section 35(2) of the Act shall be begun after the expiry of (a) 3 years from the commission of the offence, or (b) 1 year after its discovery by the prosecutor. A county council (the prosecuting authority) received information that illegal slaughtering of animals was to take place at a farm. On 7 December 2001 it obtained a warrant and the farm kept under observation for 5 days. On 12 December the premises were entered and an outbuilding was found to contain a pen holding live sheep, a rack system from which eviscerated sheep carcasses were hanging and blow torches and gas cylinders. Mr Gale admitted that he had been slaughtering sheep that day and that he had no licence to do so. The purpose was to produce a meat known as a 'Smokie', being the singed carcass of the sheep or goat prepared for human consumption and sold unlawfully for substantial profit. Following a ruling that the offence was not time barred Mr Gale pled guilty. He subsequently appealed on the basis that the offence was time barred as the information, which was laid on December 12, 2002, was laid more than a year after the offence was discovered.

Held: The offence was charged as an offence committed on December 12, 2001 and could not have been discovered, for the purposes of s.34(1)(b) of the Act, before that date. There was not sufficient evidence until December 12, 2001 to establish knowledge that could amount to "discovery", there was merely suspicion.

Human Rights

Fadeyeva v Russia, (Application No. 55723/00), European Court of Human Rights, (C L Rozakis P), 9 June 2005

In 1990 the Government of the Russian Federation adopted a programme “On Improving the Environmental Situation in Cherepovets”. The programme stated that “the concentration of toxic substances in the town's air exceeds the acceptable norms many times” and that the morbidity rate of Cherepovets residents’ was higher than average. It was noted that many people still lived within a previously established sanitary security zone around the town’s steel-plant. Under the programme, the steel-plant was required to reduce its toxic emissions to safe levels by 1998. The programme listed certain specific technological measures to attain this goal. The steel-plant was also ordered to finance the construction of 20,000 square metres of residential property every year for the resettlement of people living within its sanitary security zone. In 1992 the boundaries of the sanitary security zone around the plant were redefined. The width of the zone was reduced to 1,000 metres. On 3 October 1996 the Government of the Russian Federation adopted Decree no. 1161 “On the Special Federal Programme 'Improvement of the Environmental Situation and Public Health in Cherepovets' for 1997-2010” (in 2002 this programme was replaced by the Special Federal Programme “Russia's Ecology and Natural Resources”). Implementation of the 1996 programme was funded by the World Bank. The second paragraph of this programme stated as follows:

“The concentration of certain polluting substances in the town's residential areas is 20-50 times higher than the maximum permissible limits (MPLs)...1 The biggest 'contributor' to atmospheric pollution is Severstal PLC [the owners of the by now privatised steel plant], which is responsible for 96 per cent of all emissions. The highest level of air pollution is registered in the residential districts immediately adjacent to Severstal's industrial territory. The principal cause of the emission of toxic substances into the atmosphere is the operation of archaic and ecologically dangerous technologies and equipment in metallurgic and other industries, as well as the low efficiency of gas-cleaning systems. The situation is aggravated by an almost complete overlap of industrial and residential areas of the city, in the absence of their separation by sanitary security zones.”

The Decree further stated that “the environmental situation in the city has resulted in a continuing deterioration in public health”. In particular, it stated that over the period 1991-1995 the number of children with respiratory diseases increased from 345 to 945 cases per thousand, those with blood and haematogenic diseases from 3.4 to 11 cases per thousand, and those with skin diseases from 33.3 to 101.1 cases per thousand. The Decree also noted that the high level of atmospheric pollution accounted for the increase in respiratory and blood diseases among the city's adult population and the increased number of deaths from cancer.

Ms Fadeyeva complained that the operation of a steel-plant in close proximity to her home endangered her health and well-being. She brought an action against the steel works, seeking resettlement outside the sanitary security zone in an environmentally-safe area. In April 1996, a town court found that she had the right to be resettled at the local authority's expense. The court made no specific resettlement order, but required the local authorities to place her on a "priority waiting list". Subsequently an execution warrant was issued, but the enforcement proceedings were discontinued on the ground that there was no "priority waiting list" for people living in the zone to obtain new housing. Ms Fadeyeva was put on the general waiting list for new

housing. Thereafter, she brought new proceedings against the local council, seeking her immediate resettlement in accordance with the judgment of April 1996. The court found that, as she had been put on the general waiting list, the judgment of April 1996 had been executed, and accordingly dismissed her action.

Held: The Court noted at the outset that the environmental consequences of the steel-plant's operations did not comply with the environmental and health standards established in the relevant Russian legislation. In order to maintain the operation of an important enterprise of this type, the Russian legislation, as a compromise solution, had provided for the creation of a buffer zone around the enterprise's premises in which pollution may officially exceed safe levels. Therefore, the existence of such a zone was a condition *sine qua non* for the operation of a dangerous enterprise – otherwise it must be closed or significantly restructured. The situation complained of fell to be examined under Article 8 of the European Convention on Human Rights as Ms Fadeyeva's health had deteriorated as a result of her prolonged exposure to the industrial emissions from the steel-plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made her more vulnerable to various diseases. Moreover, there could be no doubt that it adversely affected her quality of life at home. Accordingly the actual detriment to Ms Fadeyeva's health and well-being reached a level sufficient to bring it within the scope of Article 8(2). The continuing operation of the steel-plant in question contributed to the economic system of the region and, to that extent, served a legitimate aim within the meaning of Article 8(2). Although the situation around the steel-plant called for a special treatment of those living within the zone, the respondent State did not offer her any effective solution to help her move from the dangerous area. Furthermore, although the polluting enterprise at issue operated in breach of domestic environmental standards, there was no information that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels. The State had failed to strike a fair balance between the interests of the community and Ms Fadeyeva's effective enjoyment of her right to respect for her home and her private life. Accordingly there had been a violation of Art.8 of the Convention. Ms Fadeyeva was awarded 6,000 euros (EUR) for non-pecuniary damage.

Comment: Although the facts of the case are very strong and therefore might not seem to be of general application, the importance of the case is the demonstration that a continued failure by the state to regulate an environmentally polluting industry can give rise to an action against the state under Article 8. This case is a continuation of a developing ECtHR case law on Article 8 rights and interference with those rights as a result of environmentally harmful activities (see also *Lopez Ostra v Spain*, (1990) 20 EHRR 277; *Guerra v Italy*, (1998) 26 EHRR 357; *Hatton v UK*, (2002) 34 EHRR 1; *Taskin v Turkey*, (Application No. 46117/99), European Court of Human Rights, (G Ress P), 10 November 2004). The nub of the criticism made by the Court in this case is two fold. By permitting the harmful polluting activity to continue the State then ought to have taken special measures to protect those who continued to be affected, but they had failed to do so. Secondly, there was no indication that the State were prepared to work out and apply measures which would reduce the polluting activity to an appropriate level.