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Albion Chambers REGULATORY NEWSLETTER

Fly-tipping and littering

How to reduce this waste of taxpayers' money

According to the Daily Mail, more than a million cases of fly-tipping were reported to local councils last year, as incidents of illegal waste dumping rose for the fourth year in a row. The Mail ascribes this rise in fly-tipping to increases in the cost charged to householders by councils for collecting bulky waste, and council cost reduction through less frequent collections. It would appear that householders have taken to dumping items that will not fit into wheelie bins, in the local pub car park or beauty spot, to avoid incurring additional charges at the recycling centre.

In addition to fly-tipping, general littering is "blighting our communities and spoiling our countryside" according to Environment Minster Thérèse Coffey. It seems that many of us are not even waiting until we get home to try to jam our take-away wrappers and smaller unwanted items into our already overflowing black bins and are throwing them from our cars instead.

The reality, it would seem, is that for many local authorities, councils, businesses and individual land owners, the scourge of fly-tipping and general littering is becoming more than a minor nuisance. Of the 1,002,154 reported instances of fly-tipping in 2016/2017, 5,637 were reports of disposed animal carcasses, 1,598 were reports of the discarding of clinical waste and 3,166 involved the illegal dumping of items contaminated with asbestos. The issue is clearly one of public health and safety rather than merely unsightliness.

Clearing up fly-tipped waste cost local councils a staggering £57.7 million last year in addition to enforcement-action costs amounting to £16.9 million over the same 2016-2017 financial period. Figures from DEFRA, published in October 2017, show that the overall cost to the taxpayer of clearing city streets and country lanes of litter is £800 million per year. The figures published by DEFRA do not include items discarded on private land, and the associated costs borne by private landowners for clearance and enforcement.

What then are the responsibilities of local authorities, county councils and others in respect of litter and fly-tipped waste on land for which they are responsible and what, if anything, can be done to reduce the instances of littering and fly-tipping?

The Environment Protection Act 1990 (EPA 1990) imposes duties under section 89(1) and (2) on certain landowners and occupiers to keep specified land clear of litter and refuse. County councils and district councils are duty bodies and "litter authorities" for the purposes of the legislation, and are obliged to maintain their land (or land for which they are responsible) to defined acceptable cleanliness standards. These standards are set out in The Code of Practice on Litter and Refuse issued by the Secretary of State under section 89 of the EPA 1990.

If a Litter Authority fails to meet its obligations, as set out under the EPA 1990, it can be taken to court and a Litter Abatement Order (LAO) issued. This requires the Litter Authority to clear publicly-accessible land of litter within a specified time period. A Litter Authority that fails to comply with an LAO can be fined up to £2,500 and a further £125 daily fine for each day that it fails to comply with the LAO.

Fly-tipped items must be removed by duty bodies from land maintained by them (or from land for which they are responsible). Larger deposits of waste and deposits of potentially hazardous waste generally fall to be dealt with by the responsible duty body, though the incident may be investigated and enforcement action taken by the Environment Agency if deemed serious enough.

Duty bodies such as county councils and district councils have no legal obligation generally to remove waste fly tipped on private land. Land owners themselves may, however, become liable for "knowingly permitting" unlawful waste activities if they fail to address the problem on their own land or turn a blind eye. Local councils have the discretion to investigate fly-tipping when it occurs on private land but in practice, due to pressure on resources, it would seem that they are unlikely to do so.

Under section 59 of the EPA 1990, however, a duty body may serve and enforce a notice on the occupier of land requiring the occupier to remove material fly-tipped in contravention of section 33. A person upon whom a notice is served may appeal against the order to the Magistrates' Court within 21 days, but is liable to a fine on conviction (and an ongoing daily fine) if he fails to comply with the notice.

Powers to address fly-tipping and littering through enforcement and prosecution exist in different pieces of legislation though the EPA 1990 is likely to be the first port of call. Section 33(1)(a) of the EPA 1990 provides that it is an offence to knowingly cause or knowingly permit waste to be deposited on land otherwise that permitted by and in accordance with a licence. Under section 33(8) of the EPA 1990 any person, company or other legal entity that is found guilty of an offence under section 33 may be liable on conviction on indictment to a custodial sentence of up to five years imprisonment or an unlimited fine or both.

Nothing in the section defines the authorised enforcing agency so it would appear that anyone, including private individuals, can bring a prosecution under the section. Section 35 of the EPA 1990 also provides for the prosecution of a person who controls or is in a position to control the use of a vehicle if that vehicle has been used in fly-tipping. Sections 34B and 34C of the EPA 1990 gives both the Environment Agency and duty bodies the power to seize vehicles, trailers and plant suspected of being involved in fly-tipping incidents.

In addition to powers of prosecution under section 33 of the EPA 1990, local authorities are empowered under section 33ZA to issue fixed penalty notices for fly-tipping of up to £400. The present powers to deal with those who throw smaller items of litter from their vehicles or drop them in the street will be increased. The maximum on the spot fine will almost double next year from the present £80 to £150 and will also be able to be imposed on the owner of a vehicle from which litter is thrown, rather than on the litterbug him or herself - useful if that person is not readily identifiable. The alternative to the fixed penalty system is prosecution under section 87 or the EPA 1990.

Although the powers of enforcement are readily available to deal with the perpetrators of fly-tipping and littering, the challenge will remain to identify those involved and effectively prosecute those caught. Installing CCTV cameras in those areas where fly-tipping and littering is prevalent is one option, but investigations must be Police & Criminal Evidence Act 1984 compliant if they are to be used effectively to prosecute and surveillance must comply with the Regulatory Investigation Powers Act 2000 (RIPA).

Some local councils have taken to 'naming and shaming' those involved in fly-tipping or littering on council-owned or controlled web pages or on social media. The extent to which this is likely to be an effective deterrent is up for debate, as is whether a local authority may find itself on the wrong end of litigation brought by an aggrieved accused who has been wrongly blamed. It seems that the most appropriate method to reduce fly-tipping and littering will be properly funded and targeted investigations collecting evidence that can be used in court followed by publicity following the securing of convictions.

Simon Cooper

Binning the law

Environmental legislation after Brexit

Environmental law is an area where Brexit has created huge uncertainty: the vast majority of the UK's environmental law and policies are based on European laws. The UK's legal framework in areas from pollution to conservation has been driven by the European Union for many years, and withdrawal from the Union may have a profound effect on our environmental legislation, policies and practice.

In a recent case, referred to by the Environment Agency as the largest ever hazardous waste investigation, the significant effect of European law on definitions of waste was highlighted. In that case, I represented a director of Churngold Recycling Ltd, a company which sought to turn hazardous waste into safe aggregate material, a product which could be sold. The company was convicted on the basis that the many thousands of tons of material which it supplied as an aggregate had not been transformed: it remained waste. Delivering the 'aggregate' to the customer thus amounted to depositing waste, which is prohibited by a UK statute, the Environmental Protection Act 1990.

Waste is defined broadly in the Environmental Protection Act as any substance or object which the holder discards or intends or is required to discard. This definition seems simple enough: vegetable peelings which we put in the bin are waste because they are discarded. At the other end of the scale, lorry-loads of unwanted chemicals removed from a factory to a specialist chemical waste site are also waste, again because they are discarded. The simplicity of the definition is, however, deceptive. It is not possible to tell whether an item is waste by looking at it, as the same item can change in a moment from non-waste to waste. A battery which is sold in a shop is plainly not waste, but once it is used and thrown away it becomes waste, and hazardous waste at that. A newspaper on a kitchen table is not waste, but the same newspaper is waste if it is thrown from a car window. Not only that, in the age of recycling, one man's waste is another man's profit. Making an object criminal with reference to a state of mind is not unknown in our law (a kitchen knife in the home can become an offensive weapon if taken out of the home with criminal intent), but it is an unwieldy and complex concept, particularly when the court needs to determine whether a company was discarding material.

One particularly complex area was explored in the Churngold case: can hazardous waste ever be transformed into a product, which can then be sold? If so, then a waste company could not only avoid the expense of paying to dispose of hazardous waste, but could actually make money out of it. The question cannot be answered without reference to the sources of UK Environmental law: the European Waste Framework Directive, and European Court of Justice interpretations of the definition of waste. The Directive sets out criteria for determining whether waste has been transformed into a product, which includes whether the waste has undergone 'recovery', whether there is a market for the new substance, and whether the new substance will harm the environment. The Environment Agency attempts to impose clarity and hard edges in its guidance to businesses about turning waste into product, but in doing so makes legal errors, most notably in trying to extract principles of general application from case-specific decisions of UK courts. There remains far more fluidity in the concept of waste becoming a product than the Environment Agency currently acknowledges. The Churngold case explored some of those areas, although ultimately all of the experts concluded that the material remained waste because no proper testing had been put in place to ensure that it was of appropriate quality to be used as aggregate.

Will Brexit mean more clarity for companies which wish to know whether they are depositing waste or legally selling a product? The possible outcomes of Brexit on environmental law ranges from 'no change' to 'all change'. In broad terms, there are three potential outcomes:

- The UK could develop its own laws and policies;
- The UK could continue to be bound by EU waste management legislation;
- The UK could retain current EU waste management legislation but not be

bound to implement future legislation.

Withdrawal from the EU would, in theory, give the UK Government greater freedom to set its own environmental standards. Is that a freedom which the Government is likely to exploit? The Government's stated current position, in the Great Repeal Bill White Paper, is to freeze the current legal position by keeping EU environmental laws in place 'wherever practical and sensible'. There are provisions for continuity of European case law, which have been welcomed by the professional body for the waste sector as providing certainty and clarity in the short term.

The longer-term picture remains out of focus. In a report called 'Cutting Red Tape: Review of the Waste Sector' (March 2016) the Government identified that many businesses found the European definition of waste to be 'arbitrary' and lacking transparency. The solution settled on in that report, before the Brexit wildcard was played, was to 'amend domestic guidance to revise and clarify the definition of waste'. It may be thought that the obvious solution now would be to codify a clearer definition of waste in new national legislation. This would bring a number of significant difficulties. The first is the challenge of drafting anything more simple than the current EU directive: it is notoriously difficult to produce a clear-edged definition of waste. Second, waste is a huge EU export industry, with about 10% of UK municipal and commercial waste exported to other EU member states. Although it could, in theory, be possible to have one definition for waste that is kept within the borders of England and Wales, while retaining a different EU definition for waste that is exported, that approach would be convoluted and even less clear than the current position.

These challenges are replicated throughout environmental legislation, not least because there are many international agreements which bind the UK, and which will continue to bind us after Brexit. Whichever approach the UK Government takes once the Great Repeal freezing period thaws, it seems unlikely that simplification and clarity will materialise. Changing hazardous waste into a product is likely to remain an area of conflict between the industry and the Environment Agency for many years to come.

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