

# Judicial Communications Office

Tuesday 6 September 2011

## **COURT OF APPEAL CRITICISES DEPARTMENT OF THE ENVIRONMENT IN INCINERATION CASE**

### Summary of Judgment

The Court of Appeal today declined to interfere with a decision not to stay a prosecution against Norbrook Laboratories Limited for the operation of incineration units without a permit. The Court, however, was critical of the conduct of the Department of the Environment for Northern Ireland (“DoE NI”) in relation to its guidance on the matter.

The Pollution Prevention and Control Regulations (NI) 2003 (as amended by the Waste Incineration Regulations (NI) 2003) give effect to the European Waste Incineration Directive. This provides that no person shall operate an incineration plant except under permit. Guidance had been issued by the DoE NI in November 2003 which stated that the Department considered that “small non-technical units which burn waste materials” were not included in the scope of the Waste Incineration Directive but that the precise legal requirements could only be determined by the national or European Courts. The Court of Appeal heard that the managing director of the company which provided Norbrook with the incinerators had written to the Department for Environment, Food and Rural Affairs (“DEFRA”) seeking advice on whether the Waste Incineration Directive applied to the incinerators in question. He did not receive a reply. In 2003 Norbrook received an assurance from the incinerator providers that the ones it was purchasing were exempt from the licencing requirements under the Directive and the Regulations. In 2004, the UK Environment Authorities including the DEFRA and the DoE NI, however, ruled that incinerators of the type installed at Norbrook are technical units and therefore subject to the licensing requirements.

Norbrook Laboratories Limited (“Norbrook”) was convicted in 2010 of operating incinerating machines at three sites in Newry without a permit between September 2004 and February 2005. The incinerators were being used to incinerate non-toxic waste such as polythene, wood and cardboard. Norbrook argued that guidance issued by the DoE NI was deliberately misleading and that the criminal proceedings should therefore have been stayed as an abuse of process of the court.

The Court of Appeal examined the principles governing the exercise of the jurisdiction to stay a criminal case as an abuse of process. Case law states that the determination of whether a stay is appropriate is a discretionary decision, that such a decision is wholly exceptional and that there is an expectation that a trial should proceed in the absence of exceptional reasons. The case law also makes it clear that it is unwise to attempt to categorise the forms which abuse of process may take.

The Court of Appeal then considered whether this case should have been stayed. Norbrook considered that the incinerator company had received an implied representation from

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DEFRA that its incinerators were exempt by virtue of the fact that it had not replied to its inquiries. The Court of Appeal stated that any implied representation would have to be clear and unambiguous if it was to be relied upon: “[In this case,] the absence of a response could not be interpreted as a positive representation and the fact that the approach in the guidance was based on pragmatism and a measure of deception rather than principle and the failure to communicate that fact could not alter the position”. The Court also heard that the DoE NI had written to Norbrook some months before the prosecution was launched indicating that the incinerator units required licences. In addition, the guidance expressly indicated that the precise legal requirements could only be determined ultimately by national or European Courts. The Court of Appeal considered that for these reasons, the argument that there was an implied representation upon which Norbrook could rely cannot be sustained.

The Court accepted that there was a difference in treatment between the way in which Norbrook were prosecuted for the use of the incinerator units and those operating small waste oil burners were not. It stated that it was now clear that small waste oil burners were in fact subject to the Directive and the fact that the guidance suggested they were not represented a failure on the part of the authorities to implement the Directive. The Lord Chief Justice, delivering the judgment of the Court, said that such a failure left the UK open to infraction proceedings in the European Court of Justice and was, therefore, in itself unlawful as a matter of European law.

The Court of Appeal heard that the DoE NI has conceded that the decision to issue guidance in E&W and NI purporting to exclude these incinerators from the operation of the licencing system was made on the basis that there were likely to be problems with enforcement of the Directive. The Court accepted that the Guidance was “deliberately misleading” in light of the submissions by the DoE NI that it did not disclose the true reasons for the suggestion that the incinerators were outside the remit of the Directive. The Lord Chief Justice, in concluding that this was not a case which should be stayed as an abuse of process, commented that it would be wrong to leave this case without “deploring the conduct” of the DoE NI in issuing a guidance document which it knew misrepresented the requirements of the Directive in relation to incineration. The Lord Chief Justice commented that the Department is obliged to promote compliance with the law and “its conduct in this instance was shameful”.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website ([www.courtsni.gov.uk](http://www.courtsni.gov.uk)).

ENDS

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