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CO/4370/2007

Neutral Citation Number: [2007] EWHC 2610 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 11 October 2007

B e f o r e:

MR JUSTICE JACKSON

Between:

THE QUEEN ON THE APPLICATION OF

**(1) SPCMA SA
(2) CH ERBSLOH KG
(3) LAKE CHEMICALS AND MINERALS LIMITED
(4) HERCULES INCORPORATED**

Claimants

v

**THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL
AFFAIRS**

Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr D Vaughan QC and Mr D Scannell (instructed by Cumberland Ellis LLP, London
W1CR 4QR) appeared on behalf of the **Claimant**
Mr C Vajda and Miss v Sloane (instructed by the Treasury Solicitors) appeared on behalf
of the **Defendant**

J U D G M E N T
(As Approved by the Court)
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MR JUSTICE JACKSON: This judgment is in six parts, namely, part 1, introduction, part 2, the facts; part 3, the present proceedings; part 4, matters which have been agreed, subject to the approval of the court; part 5, the claimants' claim in respect of Articles 5 and 6(1); part 6, conclusion.

95. Part 1: Introduction

1. This is an application for permission to proceed with judicial review proceedings and an application to refer certain questions to the European Court of Justice. The claimants in these proceedings are: (1) SPCM SA, a company incorporated in France; (2) CH Erbsloh KG, a company incorporated in Germany; (3) Lake Chemicals and Minerals Limited, a company incorporated in the United Kingdom; (4) Hercules Incorporated, a company incorporated in the United States of America.
95. 2. The first claimant is a holding company established in France, which, through its various subsidiaries, is a leading manufacturer of water-soluble polymers used in the municipal industrial and wastewater treatment industries, as well as in a wider range of specialist applications.
95. 3. The second claimant, an undertaking established in Germany, is a distributor and wholesaler of speciality and industrial chemicals, including preparations and polymers. It supplies chemicals and additives to manufacturers of domestic products: adhesives, paints, textiles, detergents and waste-water treatments, amongst other products.
95. 4. The third claimant, a company incorporated in England, carries on business as an importer into the EU of speciality chemicals, including polymers and preparations. The fourth claimant is a holding corporation established in the USA with many principal consolidated subsidiaries in the EU, for example, in Germany, Italy, France and the Netherlands. The company supplies chemicals, namely water - and organo-soluble polymer-based products, to a variety of speciality chemical markets through its Acqualon group, which is a functional division within the group.
95. 5. The defendant is the Secretary of State for the Environment, Food and Rural Affairs. In the skeleton arguments, and in oral argument, the defendant is referred to as Defra, and I shall use that abbreviation.
95. 6. These proceedings concern the validity and the interpretation of Regulation (EC) No 1907/2006 of the European Parliament and of the Council. When that regulation comes into force Defra will be the government department responsible for enforcing it in the United Kingdom.
95. 7. Mr Garry Dougherty, to whom I shall refer in the course of this document, is a regulatory scientist employed by the Health and Safety Executive, who has done much work for Defra in relation to the issues arising in this case.
95. 8. After these brief introductory remarks I shall now turn to the facts.

95. Part 2: The facts

95. 9. On 18 December 2006, Regulation (EC) No. 1907/2006 of the European Parliament and of the Council was made pursuant to Article 95 of the Treaty establishing the European Community. This regulation concerns the registration, evaluation, authorisation and restriction of chemicals. It is commonly referred to as "the REACH regulation" or "REACH". I shall adopt that terminology.

95. 10. In a helpful explanatory memorandum the European Commission provided the following synopsis of the REACH regulation:

95. "In a nutshell, REACH consists of the following elements:

95. - Registration requires industry to obtain relevant information on their substances and to use that data to manage them safely.

95. - Evaluation provides confidence that industry is meeting its obligations and prevents unnecessary testing.

- Risks associated with uses of substances with properties of very high concern will be reviewed and, if they are adequately controlled, or if the socio-economic benefits outweigh the risks and there are no suitable alternative substitute substances or technologies, then the uses will be granted and Authorisation.

- The Restrictions procedure provides a safety net to manage risks that have not been adequately addressed by another part of the REACH system.

The Agency will manage the technical, scientific and administrative aspects of the REACH system at Community level, aiming to ensure that the REACH system functions well and has credibility with all stakeholders."

95. 11. I shall now read out the provisions of REACH which are relevant to the issues before the court. Article 1 provides:

95. "1. The purpose of this Regulation is to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation.

95. 2. This Regulation lays down provisions on substances and preparations within the meaning of Article 3. These provisions shall apply to the manufacture, placing on the market or use of such substances on their own, in preparations or in articles and to the placing on the market of preparations.

95. 3. This Regulation is based on the principle that it is for manufacturers, importers and downstream users to ensure that they manufacture, place on the market or use such substances that do not adversely affect human health or the environment. Its provisions are underpinned by the precautionary principle."

95. Article 2.9 provides:

95. "The provisions of Titles II and VI shall not apply
95. to polymers."

95. Article 3 provides:

95. "For the purposes of this Regulation:

1) 95. Substance: means a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition;

95. (2) Preparation: means a mixture or solution composed of two or more substances;

95. (3) ...

95. (4) ...

95. (5) Polymer: means a substance consisting of molecules characterised by the sequence of one or more types of monomer units. Such molecules must be distributed over a range of molecular weights wherein differences in the molecular weight are primarily attributable to differences in the number of monomer units. A polymer comprises the following:

95. (a) a simple weight majority of molecules containing at least three monomer units which are covalently bound to at least one other monomer unit or other reactant.

95. (b) less than a simple weight majority of molecules of the same molecular weight. In the context of this definition 'monomer unit' means the reacted form of a monomer substance in a polymer;

95. (6) Monomer: means a substance which is capable of forming covalent bonds with a sequence of additional like or unlike molecules under the conditions of the relevant polymer-forming reaction used for the particular process;"

95. Article 5 provides:

95. "Subject to Articles 6, 7, 21 and 23, substances on their own, in preparations or in articles shall not be manufactured in the Community or placed on the market unless they have been registered in accordance with the relevant provisions of this Title where this is required."

95. Articles 6(1) provides:

95. "1. Save where this Regulation provides otherwise, any manufacturer or importer of a substance, either on its own or in one or more preparation(s), in quantities

of 1 tonne or more per year shall submit a registration to the Agency.

95. 2. For monomers that are used as on-site isolated intermediates or transported isolated intermediates, Articles 17 and 18 shall not apply.
95. 3. Any manufacturer or importer of a polymer shall submit a registration to the Agency for the monomer substance(s) or any other substance(s), that have not already been registered by an actor up the supply chain, if both the following conditions are met:
95. (a) the polymer consists of 2% weight by weight (w/w) or more of such monomer substance(s) or other substance(s) in the form of monomeric units and chemically bound substance(s);
95. (b) the total quantity of such monomer substance(s) or other substance(s) makes up 1 tonne or more per year".
95. 12. Title 2 of REACH comprises Articles 5 to 24 and relates to the registration of substances. Title 3 of REACH contains provisions for data sharing and restriction of tests on animals. Title 3 comprises Articles 25 to 30.
95. 13. As set out above, Article 2.9 exempts polymers from the provisions relating to registration and evaluation. This article is referred to in the current litigation as "the polymer rule". I shall continue the use of that term.
95. 14. The provisions of REACH, with which this court is concerned, will come into force on 1 June 2008. The regime introduced by REACH will be very different from, and much more onerous than, the current regime covering dangerous substances. There has been some debate between counsel as to precisely how great the difference will be, but this is not a topic into which I need venture.
95. 15. Following promulgation of the REACH regulation, the claimants became concerned about the likely effect of the regulation on their respective businesses. The claimants had three particular concerns about the provisions of the REACH regulation, which I would summarise as follows:
- 1) 95. There are inconsistencies between the provisions relating to polymers and monomers. Furthermore, Article 6.3 has no proper scientific basis.
 - 2) 95. The words in Article 6.3, "that have not already been registered by an actor up the supply chain" are unclear. There are several possible different interpretations of this exception.
 - 3) 95. Articles 5 and 6.1 are invalid because they are discriminatory and disproportionate.
95. 16. In order to obtain a resolution of these issues, which were causing concern, the claimants commenced the present proceedings.
95. Part 3: The present proceedings

95. 17. By a claim form issued in the Administrative Court, on 25 May 2007, the claimants applied for: (1) the annulment of Article 5, Article 6.1 and Article 6.3 and/or (2) declarations as to the correct interpretation of Article 6.1 and 6.3. The claimant applied for an extension of the time limit imposed by CPR 54.5. The claimants also applied for a reference to the European Court of Justice of the questions concerning the validity and interpretation of Articles 5, 6.1 and 6.3.
95. 18. On 28 June 2007, Walker J, after considering the matter on paper, directed that there be a "rolled-up" hearing in order to deal with the application for permission and the application for a reference to the European Court of Justice. That hearing took place on Tuesday, 9 October, which was the day before yesterday. The argument lasted all day. Mr David Vaughan QC and Mr David Scannell represent the claimants. Mr Christopher Vajda QC and Miss Valentina Sloane represent Defra. I am grateful to all counsel for the excellence of their various skeleton arguments and of their oral submissions. I am also grateful for the spirit of co-operation, which has prevailed throughout these proceedings. That co-operation has generated substantial savings in time and costs for the benefit of the parties on both sides.
95. 19. I shall first deal with the various matters which have become agreed, subject to the approval of the court. After that I shall turn to the one outstanding issue between the parties.
95. Part 4 : Matters which have been agreed subject to the approval of the court.
95. 20. The first matter upon which the parties are agreed is that the claimant should be granted the necessary extension of time for commencing judicial review proceedings. Under rule 54.5(2) such an agreement is not effective unless the court approves. In the present case, in my judgment, there are good grounds for extending time. A prodigious amount of work was required, including the preparation of expert evidence about polymers and monomers, before the claim form could be issued. The questions raised by these proceedings are important and it is in the public interest that they should be resolved. No one has been prejudiced by the delay, not least because the relevant provisions of REACH will not come into force until June 2008. I therefore grant an extension of time of ten weeks for the commencement of this action. By my arithmetic, and subject to counsel's confirmation, an extension of ten weeks should suffice for the claimants' purposes.
95. 21. The second matter, which is now agreed, is that all four claimants have standing to bring these proceedings. Having read the evidence concerning the nature of the claimants' businesses and their activities, I endorse that agreement and hold that all four claimants are entitled to bring this claim in the Administrative Court.
95. 22. The third matter, which is agreed between the parties, is that the claimants should have permission to bring their various claims in respect of Article 6.3. Mr Vajda accepts that there are difficulties about the inter-relationship between the polymer rule and Article 6.3.
95. 23. The next matter, which is agreed, is that a question along the lines proposed by

the claimants concerning the validity of Article 6.3 should be referred to the European Court of Justice. On the basis of counsel's submissions, I am satisfied that there is a serious issue concerning the validity of Article 6.3, and that this is a matter which should be referred to the European Court of Justice. The precise formulation of the question is under discussion between the parties. The final draft will be subject to the approval, and possibly a little tinkering, by this court. For present purposes, however, I give an indication that a question along the lines proposed by counsel for both parties will be referred to the European Court of Justice.

95. 24. I come next to the interpretation of the words in Article 6.3, which read, "that have not already been registered by an actor up the supply chain". In their claim the claimants put forward three possible interpretations of that phrase. In their written outlined submissions Defra dispute all three interpretations and put forward their own exposition of what that phrase means. During the hearing on Tuesday there was, in effect, a three-way dialogue between both leading counsel and the court, during which a consensus emerged. That consensus is that the phrase bears the following meaning, "that have not been already registered by someone who is an actor in the present supply chain." Both parties are content with that formulation of what the phrase means. I too consider that this formulation is correct.

95. 25. Accordingly, having given permission for this head of claim to proceed, the court will now grant, by way of final judgment, a declaration that that is the meaning of the phrase. I request counsel to co-operate in drawing up the order in this regard.

95. 26. In paragraphs 20 to 22 of their written outline submissions Defra set out three examples of how this part of Article 6.3 would be applied in practice. The claimants agree with the answers which Defra give in those three examples. I place this matter on record. If the parties so wish, paragraphs 20 to 22 of Defra's outline submissions can be placed as an appendix to this judgment, if and when it is transcribed.

95. 27. It can be seen from the foregoing that all matters in issue at the present hearing have been resolved, except for the claimants' claim in respect of Articles 5 and 6.1. I must now turn, therefore, to that issue.

95. Part 5: the claimants' claim in respect of Articles 5 and 6.1

95. 28. The claimants contend that Articles 5 and 6.1 in their present form are unlawful because they are disproportionate and discriminatory. Accordingly, the claimants request that this court grant permission for judicial review proceedings, and that this court refer the following question to the European Court of Justice:

95. "With reference to the requirements in relation to preparations, in particular Articles 5 and 6(1) which require manufacturers and importers of preparations to register and supply technical dossiers in the ordinary event for each substance contained in the preparation, is such a requirement unlawful as being contrary to Community law, being discriminatory or lacking in proportionality?"

95. 29. Defra, on the other hand, contend that this part of the claimants' case is

unfounded. Accordingly, permission should not be granted for this head of the judicial review claim to proceed and the proposed question should not be referred to the European Court of Justice.

95. 30. I would summarise the claimants' arguments, as they have emerged in the course of exchanges of written submissions, in support of this head of claim as follows:

- 1) 95. Importers will have immense difficulty in complying with these provisions. One preparation may contain many substances. An importer may neither know nor be able to ascertain what all those substances are.
- 2) 95. Where one preparation contains many substances, the costs of compliance falling upon importers will be immense.
- 3) 95. As a consequence of Articles 5 and 6.1 some preparations will come off the market and some importers will go out of business.
- 4) 95. The above burdens are disproportionate to the object being achieved by Articles 5 and 6.1. That same object could be achieved by giving companies a choice between registering a preparation or registering its constituent substances.
- 5) 95. Articles 5 and 6.1 in their present form are discriminatory. They impose a much greater burden upon community importers than upon (a) manufacturers or (b) importers purchasing from a manufacturer within the EU. There is no objective justification for this difference in treatment.

95. 31. In addressing these arguments I must begin by examining the objectives of REACH. The principal purpose of REACH is to ensure a high level of protection of human health and the environment. This is to be achieved by requiring the registration and evaluation of all substances manufactured or sold in significant quantities within the EU. There are repeated references to substances throughout the recitals of REACH. Indeed, Title 2 of REACH, comprising Articles 5 to 24, is entitled "Registration of substances".

95. 32. The reason why REACH focuses upon substances is that these are, so to speak, the lowest common denominator. These are a finite number of substances which fall under the regime. At the moment there are approximately 100,000 substances on the EU market. Of those, approximately 30,000 substances are used in such volume as to require registration under REACH.

95. 33. The burden of compliance with REACH, which will fall upon the chemical industry, will undoubtedly be substantial. That burden has been assessed by the Commission in an Extended Impact Assessment. This assessment acknowledges that some substances will come off the market and (at least by implication) that some businesses will close down. This substantial burden upon industry is confirmed by the evidence that the claimants have filed: see, for example, the report dated July 2005

prepared by KPMG on the impact of REACH. This helpful report must be read bearing in mind that it was prepared before the "one substance one registration" provisions were incorporated into REACH.

95. 34. Although the costs of registering and evaluating substances under the REACH regime will be huge, those costs will be finite and are the subject of estimates. If the focus of REACH were to switch from substances to preparations, this picture would change. The number of possible preparations is almost infinite. The number of registrations would increase. All manner of problems would arise, as outlined in the second witness statement of Mr Dougherty. Preparations which contain the same substances, but in different proportions, would require separate registration and evaluation. It would be difficult to ascertain the long-term effects of a preparation which contains a noxious substance, but in very small proportion. If adverse effects of a preparation are detected, it may not be possible to tell which of the constituent substances is responsible, and so forth.
95. 35. I see considerable force in the points made by Mr Dougherty in his second witness statement. A regime based upon the registration of preparations as an optional alternative to the registration of substances would be fundamentally different from REACH and would not achieve the objectives of REACH.
95. 36. A further flaw in the claimants' case concerns animal testing. One of the objectives of REACH is to minimise the amount of animal testing which is required: see, for example, recitals 33, 47 and 49 of REACH. If the registration and evaluation of preparations is allowed, the amount of animal testing will substantially increase.
95. 37. I turn now to the discrimination argument. As previously stated, Articles 5 and 6.1 of REACH will impose substantial burdens upon all chemical manufacturers and importers within the EU. To the extent that REACH gives rise in practice to varying costs burdens for different types of business, this does not amount to unlawful discrimination. The varying practical impact arises from a uniformly applied rule. That rule is justified to achieve the objectives of REACH. The claimants have not identified any practicable alternative method of achieving those objectives: see the reasoning of the European Court of Justice in R (on the application of International Air Transport Association, European Low Fairs Airlines Association) v The Department of Transport, case C-344/04; [2006] ECR I-403 at paragraphs 78 to 100, in particular, paragraphs 94 to 98.
95. 38. Let me now draw the threads together. I readily accept that Articles 5 and 6.1 of REACH will impose substantial burdens upon companies such as the claimants. However, on the evidence before the court I do not regard it as arguable that those burdens are disproportionate so as to render Articles 5 and 6.1 unlawful. Nor do I regard it as arguable that those provisions are unlawful by reason of being discriminatory. This court readily defers to the European Court of Justice on questions concerning the validity of EU instruments. On the other hand, a national court should not refer any question of validity to the European Court of Justice where the claimants' case is unfounded. (see Foto-Frost v Hauptzollamt v Lübeck-Ost Case C314/85, 1987 ECR 4199 at Part 14 on page 4230; R v International Stock Exchange of the United

Kingdom and the Republic of Ireland Ltd, Ex parte Else [1993] QB 534 at page 545; R v the Secretary of State for the Environment, Transport and the Regions, ex parte International Air Transport Association [2000] 1 Lloyd's Rep. 242 at pages 250 to 251; R (on the application of International Air Transport Association and European Low Fairs Airlines Association) v The Department of Transport Case C-344/04 [2006] ECR I-403 at paragraphs 29 to 30; R (on the application of the International Association of Independent Tanker Owners and Others) v Secretary of State for Transport [2006] EWHC 1577 at paragraph 4.

95. 39. In the present case I am satisfied that the claimants' attack upon the validity of Articles 5 and 6.1, in their present form, is unfounded. Accordingly, I decline to refer this question to the European Court of Justice. Having reached these conclusions, I refuse the claimants' application for permission to proceed with their third head of claim.

95. Part 6: Conclusion

95. 39. For the reasons set out in Parts 4 and 5 above, the decision of this court may be summarised as follows. The claimants are granted a ten-weeks extension of time for commencing these proceedings. In relation to the first head of claim this court grants permission to proceed with the judicial review claim and will refer the proposed question to the European Court of Justice.

95. 40. In relation to the second head of claim, this court grants permission to proceed with the judicial review claim and also gives final judgment in the form of a declaration, as set out above. In relation to the third head of claim, this court refuses permission to proceed with the judicial review claim. Thus the third head of the claimants' claim comes to an end.

95. 41. I will leave the drafting of the court's order in the capable hands of counsel, but will be available to resolve any specific drafting issues which may arise.

95. 42. MR VAUGHAN QC: On that basis we will produce the first draft and send it to counsel for Defra for them to approve it. They will come back if there is a problem on that. I suspect there is not. I think we accept their question on monomers and polymers is probably better than ours, as it were. We will accept the drafting of that, so there is not an issue of that. What there is to do is draft the order of the court separately and there is an order of reference. There are probably two things. The document then goes off to Luxembourg and we will, I suspect, not come back to your Lordship on that either.

95. 43. MR JUSTICE JACKSON: I am very grateful for that indication. I am going to be sitting in the Administrative Court until the end of next week. The following week I shall be away on leave. If it is possible to get any documents to me for initialling before the end of next week I would be particularly grateful.

95. 44. MR VAUGHAN QC: We will do that. We asked for expedition of the whole case, so it is our fault (?), and it has been granted effectively. It has been dealt with

expeditiously. We will get that done by then. Your Lordship asked if we would like the examples annexed to the judgment; the answer is yes. I think they are very helpful examples because it will let people see the form of the paragraphs and the skeleton, or as it were setting out the effect--

95. 45. MR JUSTICE JACKSON: I suggest that if one or other party chooses to order a transcript of the judgment you annex to the judgment paragraphs, I think it is, 22, 23 and 24 of the outline submissions of Defra. Then, if you like, when I have approved the judgment I will initial those paragraphs.
95. 46. MR VAUGHAN QC: That would be very helpful. I think it is the eating of the pudding which is the important thing rather than what the pudding says, as it were. Then I think the conventional order is the costs to be reserved in this sort of thing until the matter comes back from Luxembourg and it is all dealt with at the same time.
95. 47. MR JUSTICE JACKSON: Ought I to order you to pay Defra's costs of the third head of claim?
95. 48. MR VAUGHAN QC: It will be difficult to resist that on that matter, yes.
95. 49. MR JUSTICE JACKSON: I appreciate that they are less than the costs of the polymers, and so on. I will say – and I am sure Miss Sloane will forgive me for not calling on her -- claimants to pay Defra's costs attributable to the third head of claim to be assessed on the standard basis, if not agreed.
95. 50. MR VAUGHAN QC: Then on the second head the whole thing developed in the course of the whole matter.
95. 51. MR JUSTICE JACKSON: We had better say costs of all other issues reserved.
95. 52. MR VAUGHAN QC: In my calculation ten weeks is sufficient. I think it is nine weeks we took. We took between 18 March and the 25th.
95. 53. MR JUSTICE JACKSON: I worked out that ten weeks would give you a couple of extra days, unless my arithmetic is wrong.