Judgment 57/2006 **Cyma Petroleum (CI) Limited v Chairman of the Policy and Finance Committee of the States of Alderney – Court of Appeal (Civil Appeal 371) – 12 December 2006 and 8 March 2007**

Health and Safety at Work (Alderney) Ordinance, 2003 – appeal from decision by the Royal Court on appeal from the Court of Alderney – appeal limited to the vires of the Committee's decision and its reasonableness on health and safety grounds – whether Article 28 of the EC Treaty was engaged – held that the requirement for a 'permanent site' was not equivalent to a quantitative restriction on imports – appeal refused – leave to appeal to Judicial Committee of the Privy Council refused on 8 March 2007 (See Judgment 16/2006)

IN THE COURT OF APPEAL OF GUERNSEY

Civil 371

The 12th day of December, 2006 before Jonathan Philip Chadwick Sumption, Esquire, OBE, QC, Peter David Smith, Esquire, QC and Sir de Vic Carey.

CYMA PETROLEUM (CI) LIMITED

Appellant

and

THE CHAIRMAN OF THE POLICY AND FINANCE

COMMITTEE OF THE STATES OF ALDERNEY

Respondent

In the appeal by the Appellant from the decision of the Royal Court on 20th March 2006 dismissing an appeal from a decision of the Court of Alderney on 2nd May 2005 dismissing an appeal arising from Prohibition Notices issued on behalf of the Respondent;

THE COURT, having on 11th December 2006 heard Advocate M. G. A. Dunster and Crown Advocate R. McMahon for the respective parties thereon, this day GAVE JUDGMENT in the terms attached hereto and:-

i) DISMISSED the appeal;

ii) AWARDED COSTS in this Court to the Respondent; and

iii) Having this day heard Mr Andreas Michaelides, Director of the Appellant, who made an oral application for leave to appeal to Her Majesty in Council, ADJOURNED consideration of that application and DIRECTED that the proposed grounds of such an appeal be drawn up in writing and delivered to the Registrar of the Court of Appeal at the Royal Court House, Guernsey not later than 5.00pm on Friday 5th January 2007.

K H TOUGH
Registrar of the Court of Appeal

Approved Judgment
12 December 2006

IN THE COURT OF APPEAL
OF THE ISLAND OF GUERNSEY

CIVIL DIVISION

12 December 2006

Before:

Jonathan Philip Chadwick Sumption OBE QC (President)
Peter David Smith QC
Sir de Vic Carey

Between:

CYMA PETROLEUM (CI) LIMITED

Appellant

v

THE CHAIRMAN OF THE POLICY AND FINANCE COMMITTEE OF THE STATES OF ALDERNEY

Respondent

Advocate M G A Dunster representing the Appellant
Crown Advocate R McMahon representing the States of Alderney

Cases: -
C-254/98 *TK Heindienst* [2000] ECR 1-151
C-322/01 *Deutsche Apothekerverband v. 0800 DocMorris* [2003] ECR 1-14887
Texts: -
Health and Safety at Work (Alderney) Ordinance 2003
The Storage of Flammable Liquid in Tanks (HSG176)

JUDGMENT

SUMPTION J.A.:

1. This is the judgment of the Court on an appeal arising out of three Prohibition Notices issued on behalf of the States of Alderney Policy and Finance Committee, which is the health and safety authority for Alderney under the Health and Safety at Work (Alderney) Ordinance 2003.

2. Section 1(1) of the Ordinance imposes a duty on every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees. In particular, an employer is bound to provide and maintain plant and systems of work which are, so far as is reasonably practicable, safe and without risks to health; to make arrangements for ensuring, so far as is reasonably practicable, safety in connection with the use, handling, storage and transport of substances; and to provide and maintain a working environment which is, so far as practicable, safe and without risks to health, and adequate as regards facilities and arrangements for their welfare at work: see ss. (2)(a), (b) and (e).

3. Under Section 18 of the Ordinance, an inspector, if he considers that Section 1 is being contravened, may serve an 'Improvement Notice' requiring the contravention to be remedied. Under Section 19(2), he may serve a 'Prohibition Notice' if he is of the opinion that an activity to which Section 1 applies will, as carried on or likely to be carried on, involve a risk of serious personal injury. A Prohibition Notice must identify the factors which give rise to the risk of serious injury and identify the activities which are prohibited. It may if the Inspector thinks it appropriate, identify remedial measures which will obviate the risk. Either form of notice is provisionally valid for a limited period only, unless confirmed by the Policy and Finance Committee.

4. Section 21 of the Ordinance deals with appeals. A person on whom a Prohibition Notice is served has a right of appeal to the Court of Alderney, on the ground that the direction in the notice is either *ultra vires* or an unreasonable exercise of the Committee's powers. This is not a judicial review, but a statutory appeal. The Court of Alderney is entitled to reach its own view, on all the evidence before it, of the reasonableness of the direction in the light of the statutory criteria. There is a more limited right of appeal from the Court of Alderney to the Royal Court of Guernsey, and thereafter to this Court, but on a point of law only.

5. CYMA Petroleum was incorporated by Mr. Andreas Michaelides in 1995 to sell aviation gasoline ('Avgas') at Alderney Airport. Avgas at atmospheric pressure is a highly volatile liquid. Its vapour is flammable at all ambient temperatures liable to be encountered in Alderney. Fire or explosion may cause death or injury to those in the vicinity. Its handling therefore requires the highest standards of care.

6. The authorities in Guernsey and Alderney have generally been guided in these matters by the UK Health and Safety Executive's publication *The Storage of Flammable Liquid in Tanks* (HSG176). This publication summarises best practice in relation to the design, construction, maintenance and operation of installations used for the storage in fixed tanks of flammable liquids, including avgas but also other

liquids which are less volatile. It deals with (among other matters) the location of storage tanks; their mode of installation and construction; safe distances between tanks and other parts of the installation or neighbouring structures; the use of pipework, hoses, valves and pumps; the installation of bunding to prevent the spread of leaked liquids; and the installation and operation of fire-fighting equipment. It is important to note that HSG176 is concerned with *fixed* installations. It differentiates between storage in these installations and storage in portable containers or drums, which is covered by a different publication of the UK Health and Safety Executive. HSG176 does not assume that a fixed installation is necessarily required for all operations involving the storage of flammable liquids. But it does observe that 'generally, the storage of flammable liquids in fixed bulk tanks is preferable to storage of the same quantity in drums or similar containers, as spillage during handling is reduced.' It is a matter for the judgment of the health and safety authorities whether the particular operations do or do not require a fixed installation of the kind to which HSG176 applies, if the employer is to comply with Section 1 of the Ordinance. That must depend on a number of factors, including the characteristics of the particular flammable liquid and the nature and scale of the operation.

7. Avgas is imported to Alderney by sea. The fuel handled by CYMA was carried by ship in 23,000 litre ISO containers. From some time in 2001 or early 2002, the practice was for these containers to be discharged on arrival onto trailers and hauled from the harbour to a nearby site known as the 'Crusher Site'. There, they were used as temporary storage tanks. The fuel would eventually then be decanted from the ISO containers into fuel bowsers, which were then taken to the airport and due course used to refuel aircraft. When this practice began, there was no health and safety legislation in Alderney. In 2003, however, eight years after CYMA had begun trading and two years after it had adopted this particular mode of operation, the States of Alderney enacted the Health and Safety at Work (Alderney) Ordinance. On 4 May 2004, a health and safety inspector served an Improvement Notice under Section 18 of the Ordinance, expressing the opinion that operations at the Crusher Site contravened Section 1, because 'the temporary compound used for storage of full and empty ISO Tank Containers of avgas and the transfer of avgas from the ISO container to the aircraft refuelling bowser is totally inadequate for the purpose.' The Improvement Notice required CYMA to remedy the contravention by constructing a 'permanent storage and transfer facility' to the standard prescribed in HSG176.

8. No steps were taken to comply. So, in February 2005, Mr. Brown issued a Prohibition Notice, expressing the opinion that the decanting of avgas from an ISO container into a fuel bowser at the Crusher Site involved a risk of serious personal injury. He identified four factors as giving rise to this risk: (i) a person working at the top of the container could fall from it, (ii) the bunding around the ISO containers was inadequate since it consisted only of an alkathene sheet overlaid with hardcore, (iii) it

was not bonded to the earth so as to prevent a build-up of static electricity (an ignition source), and (iv) there were no adequate fire-fighting facilities. The notice directed that decanting from ISO containers to bowsers should cease.

9. CYMA responded to the Prohibition Notice by playing a game of cat-and-mouse, in which they altered their practices in respects which were immaterial from the point of view of safety, but took their activities outside the literal language of the prohibition. Initially, they ceased to decant avgas from the ISO containers to the fuel bowsers, but decanted it instead into a trailer-tanker. This would be parked in the Crusher Site until the fuel could be decanted into the bowsers. The change of practice led to a second Prohibition Notice in March 2005 in similar terms to the first, except that it referred to the tanker-trailer. CYMA responded to this by continuing the decanting operations from the containers to the tanker-trailer, but then removing the tanker-trailer from the Crusher Site so that it was no longer stored on site but at an unknown location somewhere else in Alderney. Mr. Brown framed a more general Prohibition Notice in April 2005. The third Prohibition Notice identified the risk of serious personal injury as arising from (i) the storage of avgas other than on a permanent site and in accordance with HSG176, and/or (ii) the decanting of avgas from an ISO container into either a tanker-trailer or a fuel bowser. This was said to be so for two reasons. First,

> ...the height from the top of the ISO container exceeds three metres and there is nothing to prevent any employee or director of the company from falling from the top of the said container. Neither are there adequate controls to protect employed persons or members of the general public from the inherent risks in storing avgas and in decanting avgas from either an ISO container or the tanker-trailer.

Secondly, there were no facilities which complied with HSG176.

10. The third Prohibition Notice required CYMA to remedy the contravention by providing a

> ...permanent site and facilities thereon which comply with guidance published by the UK Health and Safety Executive publication entitled "The storage of flammable liquids in tanks" HSG176, for the storage of avgas and the subsequent decanting of the product into bowsers.

The two earlier notices were in similar but not identical form. All three were confirmed by the Committee.

11. CYMA appealed to the Court of Alderney under Section 21 of the Ordinance. It is important when considering the judgment which the Court of Alderney later gave to bear in mind the nature of the argument in support of the appeal. Mr. Michaelides appeared in person for his company. His position was as follows:

(1) His starting point was that he had always recognised that the use of the Crusher Site was unsatisfactory, although he did not accept that it was unsafe. He regarded it as a temporary arrangement, pending the acquisition of a site at the Airport, at which he could construct more permanent facilities. He said that he had been obliged to continue using the Crusher Site for longer than he would have wished, because the States of Alderney, in its capacity as owner of the land around the Airport, and the States of Guernsey Airports Authority in its capacity as the operator of the Airport had failed to make available a suitable site at the Airport. Parts of Mr. Michaelides' evidence attempted to suggest that the Prohibition Notices were an attempt to put pressure on him in his negotiations with the States of Alderney or the States of Guernsey Airports Authority, or to drive him out of business.

(2) Mr. Michaelides disagreed with Mr. Brown's assessment of the risks associated with his current mode(s) of operation, as set out in the notices. At no point, as we read his evidence and submissions at the hearing, did Mr. Michaelides suggest that he had taken steps to eliminate the risk identified in the notices. He simply contended that there were no such risks, that his operations at the Crusher Site were safe and in particular that they presented no risk of serious personal injury.

(3) Mr. Michaelides also disagreed with the remedial measures directed in the notices. He argued that the temporary nature of his occupation of the Crusher Site did not made it unsafe. Accordingly, moving to another site for long-term occupation could not be regarded as a remedy and was irrelevant to the question of safety.

12. The Committee's position reflected Mr. Brown's reasons for issuing the notices in the first place. It was as follows:

(1) Mr. Brown robustly defended his opinion about the risk of serious injury associated with current operations at the Crusher Site.

(2) Although the difference between the parties on remedies was never clearly brought out in the course of argument, it is we think clear that they were at cross-purposes. Mr. Michaelides assumed (or professed to assume) that when the notices referred to a 'permanent' storage and tranfer facility, it meant a facility constructed on a site which CYMA could expect to occupy permanently. That was not in fact the point that Mr. Brown was making. It is clear from the context in which this remedial requirement appeared in the notices, from the reference in each case to compliance with HSG176, and from the terms of that publication itself, that the notices required the use of a facility

which was 'permanent', in the sense that it was a fixed installation complying with HSG176, as opposed to an installation dependent on mobile storage units such as tanker-trailers and ISO containers. Mr. Brown's view was that anything less than a fixed facility constructed to the HSG176 standard would be unsafe for the particular operations which CYMA was carrying out. He was not in the least concerned with the duration of CYMA's tenure of the site.

(3) Nor were Mr. Brown or the Committee concerned with the difficulties which Mr. Michaelides had encountered in acquiring a suitable site at the Airport. Their position was that that was a matter between CYMA and other public authorities. They were concerned only with health and safety at work. As they saw it, the commercial terms or economic convenience of any particular site was irrelevant. From a safety point of view, CYMA could store and decant avgas at any site in Alderney, whether or not it was at the Airport, provided that their installation there was safe.

13. We have a good deal of sympathy with the difficulties faced by the jurats in the Court of Alderney. They were a lay tribunal faced with a lengthy and discursive argument from Mr. Michaelides, which frequently wandered off into irrelevant considerations concerning his negotiations for alternative sites. Their judgment, when they came to deliver it, was short and somewhat unclear, which is unfortunate given that it is conclusive as to fact. Its meaning has been much debated before us. However, on a fair reading of their judgment, we regard the jurats as making the following principal points:

(1) They observed that it was common ground that 'the storage of avgas and the decanting operations should be carried out at a permanent site.' We read this statement as recording that it was common ground that a permanent site was desirable. We do not think that the Court regarded it as common ground that operations at the existing site were unsafe. The transcript shows that Mr. Michaelides never accepted that.

(2) The Court recorded that CYMA 'may well have addressed the other subordinate issues in the Prohibition Orders', but it accepted that 'the risks identified by the Guernsey Chief Health and Safety Officer at the "Crusher" site have not been managed to the standards required under Section 1.' This, as it seems to us, can only have meant that they found that the risk of serious personal injury existed and that its existence was a contravention of the Ordinance. What they meant by saying that CYMA 'may well have addressed the other subordinate issues in the Prohibition Orders' is far from clear. Mr. Michaelides did not suggest that he had in fact remedied the risk of serious personal injury. His point had been that no such risk existed. The Court of

Alderney plainly did not agree with that.

(3) The critical point in the Court's judgment was that CYMA had not complied with the requirement that storage and decanting operations should be carried out at a 'permanent site'. The Court considered that this direction represented a 'lawful and reasonable exercise' of the Committee's powers. This phrase is derived from the statutory grounds of appeal under Section 21. In its context, the passage is clearly a finding that it was reasonable to require CYMA to cease decanting and storage operations in Alderney until they had a permanent storage and transfer facility complying with HSG176.

(4) The Court recorded that the reason why CYMA had not constructed a 'permanent site' was that no agreement had been reached on the provision of a suitable site close to the airport. They found that a site, known as the 'Glacis site', close to the Crusher Site could be made available to CYMA on a temporary basis for the construction of a permanent facility: para. 7 of the Judgment.

(5) The Court did not in terms say what they understood a 'permanent site' to mean. But they must have been using the phrase as a synonym for a 'permanent storage and transfer facility', because that is what they found to be required by the direction in the notices: see para. 3 of the Judgment. It is clear from their observations about the Glacis site that they considered that a 'permanent site' could be constructed by CYMA on property such as the Glacis site which was only temporarily occupied by them. This indicates that they were using the expression in Mr. Brown's sense, i.e. as referring to the fixed character of the facilities there, and not to the duration of CYMA's occupation.

14. CYMA appealed to the Royal Court of Guernsey, on the ground that the notices represented an unreasonable exercise of the Committee's statutory powers, and that the decision of the Court of Alderney to the contrary was perverse, irrational or such as no properly directed decision-maker mindful of his duties could have reached. Given the statutory limitations on the right of appeal to the Royal Court to points of law, nothing less than that would have entitled the company to succeed. But CYMA did not succeed in the Royal Court, any more than they had in the Court of Alderney. The Deputy Bailiff held that on the facts found by the Court of Alderney, correctly understood, the notice was not perverse, irrational or beyond the bounds of acceptable decision-making.

15. In this Court, CYMA has reargued the point on which it failed in the Royal Court, and has taken a new point which has never previously been argued, namely

that the notice represented a measure equivalent to a quantitative restriction on imports, contrary to Article 28 of the EC treaty. Advocate Dunster has sought to support both grounds with great skill and ingenuity, but we have to say that in our judgment they are both unsustainable.

16. The starting point in considering both points is to draw attention to the very narrow limits laid down by statute for the scope of this appeal. It is an appeal which must be founded on the findings of fact made in the Court of Alderney. It is limited to points of law going to the *vires* of the Committee's confirmation of the Prohibition Notices or the reasonableness of that confirmation on health and safety grounds. We are not concerned with Mr. Michaelides' negotiations for alternative sites, but only with the lawfulness of the decision which was made about his operations at the Crusher Site.

17. Advocate Dunster's first point was that the decision of the Court of Alderney was irrational because (i) the Court upheld the direction to provide a 'permanent site' without accepting that the risk of serious personal injury described in the notices existed; and (ii) even if that risk did exist, the acquisition of an alternative site on a long-term basis was irrelevant to its safety and could not possibly remedy the risk.

18. It will be apparent from our analysis of the Court of Alderney's judgment that we think that these points depend on a misunderstanding of that Court's findings of fact. The Court did find, albeit succinctly, that the risk of serious personal injury identified in the notices existed. If it had indeed treated the prospective duration of CYMA's tenure of a site for storage and decanting as relevant to that risk, then we doubt very much whether that finding could have been supported as a rational finding of fact. But it is in our judgment clear that the Court of Alderney was referring to the permanent character of the facility and its compliance with HSG176, not to the duration of CYMA's tenure of the site on which it was located. Once these points are out of the way, one is left with a finding by the Court of Alderney that it was reasonable to require a permanent facility complying with HSG176, for the purpose of avoiding a contravention of Section 1 which would have led to a risk of serious personal injury. That is a finding of fact. It is not self-evidently absurd. Moreover, although Mr. Michaelides strenuously disputed its correctness there was evidence to support it which the Court of Alderney was entitled to accept. Their finding on the point is therefore conclusive, and disposes of this part of the appeal.

19. Advocate Dunster's second point is that the requirement that CYMA provide a 'permanent site' for its storage and decanting operations amounted to a measure having an effect equivalent to a quantitative restriction on imports. It was therefore was unlawful by virtue of Article 28 of the EC Treaty. It is common ground that Article 28 has the force of law in Guernsey under the Third Protocol of the treaty.

20. The argument is based on the case law of the European Court of Justice which lays down that a requirement that an importer selling into a community state should have a place of business in that state may operate as a quantitative restriction on imports: Case C-254/98 *TK Heindienst* [2000] ECR 1-151; Case C-322/01 *Deutsche Apothekerverband v. 0800 DocMorris* [2003] ECR 1-14887. The logic of these cases is that the importer is placed at a cost disadvantage by comparison with domestic traders, because he is made to maintain a place of business not only in his own country, but also in the country to which he is selling. The fundamental feature of all of these cases which makes the measure unlawful is that it requires the importer or some one buying from him to incur expense which is objectively unnecessary and which he would not otherwise have incurred. It is an arbitrary additional cost associated with sale from outside the country of sale.

21. There is an issue about whether the Prohibition Notices were 'measures', having regard to the fact they related only to CYMA and were not of general application. But for the sake of argument we will assume in CYMA's favour that they are. As Advocate Dunster recognised, the difficulty about the argument, even on that hypothesis, is that it stands or falls with his first argument.

22. Assume (as we have held) that the requirement for a 'permanent site' was a safety requirement relating to the character of the installation, which was reasonably required for the safety of operations at the Crusher Site. On that footing, the correct analysis seems to us to be as follows:

(1) The first point to be made is that CYMA's need of local premises does not arise from the Prohibition Notices. Avgas has characteristics (bulk and volatility) which makes it impossible to import it for supply to aircraft in Alderney without local premises where it can be stored and decanted into airfield fuel bowsers. That is an expense which is inherent in the character of the trade and the product. CYMA had an installation in Alderney even before the Prohibition Notices were issued. It would still have had to have one, even if they had never been issued.

(2) The only difference which the notices made was to require CYMA to incur extra expense in making it safe in accordance with their statutory duty under Section 1 of the Ordinance. That duty applies uniformly to all employers in Alderney. The costs associated with its performance are a universal business cost, which is no more onerous for importers as such than it is for any other employer. The mere existence of a duty to operate safely is legally incapable of being equivalent to a quantitative restriction on imports. If the safety measures were reasonable for the purpose of avoiding a risk of serious

personal injury, then it must follow, as it seems to us, that they were a necessary part of the business of importing avgas for supply to aircraft in Alderney.

(3) For the same reason it would inevitably fall within the exception in Article 30 for measures to protect public health. On this hypothesis the measures would be necessary to that end, and therefore necessarily proportionate.

23. It is only if CYMA can persuade us that the requirements of the Prohibition Notices are unrelated to the safe operation of the installation because they relate to the duration of CYMA's tenure, that the possibility can arise of their contravening Article 28. On the view that we take about the findings of the Court of Alderney, they have found that the notices were reasonable, and therefore necessary, for the purpose of protecting public health. On that view of the matter this point must fail along with the Appellants' attack on the rationality of the Committee's decision.

24. The appeal will accordingly be dismissed.

IN THE COURT OF APPEAL OF GUERNSEY

Civil 371

The 3rd day of January, 2007 before Sir de Vic Carey, sitting as a Single Judge of the Court of Appeal

CYMA PETROLEUM (CI) LIMITED

(Appellant)

v.

THE CHAIRMAN OF THE POLICY AND FINANCE COMMITTEE
THE STATES OF ALDERNEY

(Respondent)

In the matter of the application dated 20th December 2006, for extension of time within which to file proposed grounds of appeal to Her Majesty in Council;

SIR DE VIC CAREY, Judge of Appeal, DETERMINED the application on the papers, and

1. EXTENDED the said period of time for four weeks from receipt by the Appellant Company of the transcript of proceedings before the Court of Appeal on 11th and 12th December, 2006; and
2. DIRECTED that the Appellant Company shall, as soon as may be, provide an address for service within the Island of Guernsey, in accordance with Rule 18 of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964

K H TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

Civil 371

The 8th day of March, 2007 before Jonathan Philip Chadwick Sumption, Esquire, OBE, QC, Peter David Smith, Esquire, QC and Sir de Vic Carey.

CYMA PETROLEUM (CI) LIMITED

(Appellant)

v.

THE CHAIRMAN OF THE POLICY AND FINANCE COMMITTEE
THE STATES OF ALDERNEY

(Respondent)

In the matter of the oral application for leave to appeal to Her Majesty in Council, made by Mr Andreas Michaelides, Director of the Appellant, on 12th December 2006, following the dismissal on that day of an appeal arising from Prohibition Notices issued on behalf of the Respondent;

THE COURT, having considered proposed grounds of appeal lodged on behalf of the Appellant on 8th February 2007, this day ISSUED its decision and REFUSED the said application for leave to appeal to Her Majesty in Council.

K H TOUGH
Registrar of the Court of Appeal

