

**B E T W E E N:-**

**BADGER TRUST**

**Claimant**

**-and-**

**THE WELSH MINISTERS**

**Defendant**

---

**CLAIMANT'S SUPPLEMENTARY SKELETON ARGUMENT**

**For hearing 22-23 March 2010 (1½ days)**

---

1. This supplementary skeleton responds to those points arising from the Defendant's skeleton for which a response is appropriate at this stage.
2. Paragraph references are to the paragraphs of that skeleton unless stated otherwise.

**The Randomised Badger Culling Trial ('RBCT')**

3. Paragraphs 18-19 seek to distinguish what the Defendant is proposing from what was done in the RBCT to imply that some different outcome will follow from its proposals. However, in announcing the Order (4 November 2009 press release), the Defendant had specifically explained that [Tab C page 65]:

“Modelling work commissioned by the Welsh Assembly Government have designed a programme that takes into account the problems highlighted by previous trials.”

4. And [Tab C page 31]:

“Based on the RBCT approach of caged trapping, the Central Science Laboratory (CSL) was commissioned to produce an individual based spatial stochastic badger/cattle/TB model to analyse the effect of different badger culling strategies in Wales.”

5. As explained in paragraphs 78-79 of the Claimant's skeleton the report of that very modelling – making a fair and informed comparison between the options - had then concluded that [Tab A7 p36]:

“This modelling exercise suggested that at least 40% of healthy badgers need to be immunized each year to eradicate bovine TB in

the badger and that vaccination of badgers is a viable alternative to badger culling for the control of bovine TB in cattle." [underlining added]

6. And thus [Tab A7 p39]:

"The most recent model commissioned by the Welsh Assembly also included output comparing the effects of each control strategy on the incidence of cattle herd breakdowns.

While the model cannot predict the time until benefits can be seen with each approach, the differences in reductions in cattle herd breakdowns between the cull only, vaccinate only and combined method without perturbation were minimal and unlikely to be detectable in the field. All three of these options resulted in a reduction in CHB of between 5% and 10% over 10 years.

There are assumptions and uncertainties within the majority of models to examine future outcomes of disease and potential management strategies, and the models reported here are no exception. **However, all three models are based on all the most up-to-date scientific evidence on bovine TB dynamics in badgers and cattle and the potential efficacies of the suggested control options. ....**" [emphasis added]

7. In other words, the Defendant's modelling had taken into account the previous trials and was based on the most up to date scientific evidence at the time. And yet it predicted differences between strategies (particularly between vaccination and non-selective culling) which were not likely to be detectable in the field.

#### Ground 1 – Information at the DEFRA meeting

8. Paragraph 29 says that Ground 1 relies "entirely" on Rosie Woodroffe's witness statement. That is simply wrong.
9. The essential background to Ground 1 is in the information provided under the Freedom of Information Act by DEFRA [Tab C12 p78] which confirms the existence and content of the meeting of 22 September 2009, along with the minutes of that meeting [Tab A7 p466].
10. Insofar as Dr Woodroffe adds to that, she does so in response to the Defendant's Dr Glossop and, if her evidence is not to be admitted on the point, then plainly nor should Dr Glossop's.

11. Indeed, the same is true of the Defendant's wider (but unspecific) objection (paragraphs 30-31) to Dr Woodroffe's evidence which makes factual points in the same way as Dr Glossop's seeks to do<sup>1</sup>.
12. Paragraphs 32-35 accept that the Minister needed to be told about the salient facts which give shape and substance to the matter (and thus presumably any material change in it). But they say that the new information was "detail" and "merely tended to confirm the hypothesis in the 2008 paper that 'the benefits ... will dissipate ...'" such that the Minister did not need to be told about what was revealed at the 22 September 2009 meeting. However, that is to wrongly focus on the information which the Minister *took into account* as opposed to what she took from it and thus *the basis for her actual decision* as it was then explained.
13. In particular, as the statements set out in paragraph 24 of the Claimant's skeleton (and not disputed by the Defendant), the Defendant proceeded to take its actual decision (i.e. as evidenced by its explanation for the actual decision) on the basis that the impact of culling was maintained on a continued basis.
14. That (as the Defendant does not dispute) was clearly contradicted by the new information.
15. Moreover, the (erroneous) understanding that the benefits would indeed continue was not "detail" being, indeed, included in the Defendant's key press announcement of 4 November 2009 [Tab C p65] explaining the basis of its decision.
16. The claim (paragraph 35) that the new information "did not add to the salient facts which gave shape and substance to the matter that she was considering" is clearly unsustainable. The Minister had plainly proceeded on the basis that the benefits *would* continue. She should have been told that was no longer correct and take into account that key new information. But she was not told and thus did not do so.
17. In paragraph 36, the Defendant says that a fair reading of the submission to the Minister makes clear that the 9% figure was referring only to **confirmed** cattle herd breakdowns. Even if that was the case, that was not how the Minister actually understood the position. See thus how she explained the position in January 2010 [Tab C7 page 477]:

---

<sup>1</sup> For example, Dr Woodroffe corrects [Tab A10 p5 para 14] an unsupported claim made by Dr Glossop [Tab A7 p20 para 49] as to the impact of foot and mouth on the RBCT which the Defendant persists in relying on in paragraph 18 of its skeleton. (It in fact made no difference to the reliability of the RBCT results).

“Our aim is to achieve at the very minimum very similar benefits to the RBCT, which was a 9% overall reduction in TB two years after the last cull take place.”

18. That is also how the Defendant understood it when responding to this Claim (“the overall incidence of cattle herd breakdowns had been reduced by 9%” [Tab A5 p3 para 7 and para 18).
19. So it is plain that the Defendant in fact proceeded on the misunderstanding that the reduction in *all* cattle herd breakdowns in question was 9% when, in fact, that reduction (as opposed to the reduction in confirmed breakdowns) was only 6%. (Thus, the benefits were erroneously exaggerated by about 50%.)
20. But, in any event, the court now has the true picture as it was known when the Order was made, namely that, contrary to the understanding stated by the Defendant in describing its decision, and as is not disputed, the benefits (which did not even appear for several years) were only 6% and only lasted for 2½ years rather than “continuing”.

Ground 2 – eliminate or substantially reduce

21. The Defendant maintains its argument that a requirement to “eliminate or substantially reduce” is satisfied by any reduction that is “more than trivial”.
22. Indeed, it is forced to that position by the fact that the advisors to the Minister recognised that the benefits were:
  - (1) “low” [Tab A7 p35]
  - (2) “modest” [Tab A7 p319 and p336] and
  - (3) “small” [Tab A7 p171].
23. None of the advisors said that the reduction would be “substantial”.
24. Low, modest and small effects of culling are not *elimination or substantial reduction* of disease.
25. In any event, as per Dr Woodroffe’s statement Tab A10 at para 10, RBCT culling in fact caused no absolute reduction in TB, only a slow down in the increase in bovine TB. This much was set out in the 2008 paper [Tab C11] which the Minister studied [para 44 of Dr Glossop’s witness statement at A7].
26. Paragraph 38 then says that the statutory context which justifies the “substantial = more than trivial” approach is section 21 AHA1981 itself. That context indicates, so it is said, that parliament’s intention was to prioritise the control of disease. But section 21 must plainly be seen in its wider context

(including thus the PBA 1982 and WCA 1981), particularly given that it is relied on (as above) to make lawful what parliament has considered sufficiently objectionable (killing badgers) to make it an offence. The context is a presumption against killing badgers with an exception which allows for it in narrowly defined circumstances.

27. Paragraph 39 says it would be surprising if parliament had not intended it to be possible to make an order for the destruction of a “small number .... that would result in a 50% reduction...” thus recognising the need (as per Ground 6<sup>2</sup> considered further below) to consider the balance between the extent of destruction and the extent of any benefit.

### Ground 3 – the necessity test

28. The Defendant does not dispute (Claimant’s skeleton paragraph 73) that the Minister needed to consider whether the order was “necessary” to achieve the actual benefit which would be achieved, namely a short-lived slowing of the rate of disease increase.
29. Nor, however, does it dispute that she did not consider it on that basis (Claimant’s skeleton paragraph 74). Indeed, the Defendant notably fails to respond to the Claimant’s submission that the Minister did not reach her conclusion on the correct factual basis. In particular, as above, although the Defendant argues in response to Ground 1 that the Minister did not need to be told about the new information from the DEFRA seminar, it does not actually dispute the correctness of that new position. And what is plain is that the Minister did not take it into account. It is also plain, as above, from what the Defendant said about the basis for its decision that she proceeded on the basis that benefits constituted an absolute reduction in TB, which would continue. She thus proceeded on the basis of misunderstanding or ignorance of established and relevant facts<sup>3</sup>
30. Paragraph 47 instead complains that the Claimant has not referred to passages in Dr Glossop’s report to the Minister which the Defendant emphasises as identifying uncertainty surrounding vaccination as an alternative to non-selective culling. But all of that had been taken into account in the modelling which the Defendant had specifically commissioned to compare alternative strategies. As above, that modelling had specifically said that vaccination is a viable alternative and emphasised that its conclusions on “all three models [including thus vaccination] are based on all the most up-to-date scientific evidence on bovine TB dynamics in badgers and cattle and the potential efficacies of the suggested control options.”

---

<sup>2</sup> The Defendant treats Ground 6 as being limited to the Bern Convention. It is not, as paragraph 100 of the Claimant’s skeleton makes clear.

<sup>3</sup> See thus, for example, E & R –v- Secretary of State [2004] EWCA Civ 49 [AuthoritiesTab13]

31. It is also notable that the November 2009 press release (which publicly stated the actual basis for the decision, rather than simply being part of the advice which fed into it) says that [Tab C10 p66]:

“... Vaccination is a risk reduction measure and the use of vaccine in badgers could contribute to the control of bovine TB...”

32. The caveats in Dr Glossop's advice were thus not reflected in the independent expert modelling which the Defendant has specifically commissioned to compare options, nor, critically, were they part of the reasons actually given publicly for the decision itself.

33. The contention in paragraph 48 that vaccination was not a reasonably practicable alternative at the time of the decision under challenge, is thus not consistent with the basis on which the Defendant actually proceeded at the time (as above). In any event, it simply fails to grapple with the fact that the Minister proceeded on the basis of misunderstanding or ignorance of an established and relevant fact.

Bern Convention and Ground 6 independently of the Bern Convention)

34. The Defendant disavows the Bern Convention.

35. But at the time, its Programme Board recognised that [Tab A8 p89]:

“The lawfulness of any badger control strategy must be assessed in light of the requirements of the Bern Convention 1979 (the Convention), the Wildlife and Countryside Act 1981 (WCA) and the Protection of Badgers Act 1992 (PoBA).”

36. And that:

“The Convention is an international treaty, which is binding upon the parties to it (including the UK). The requirements of the Convention are largely transposed into domestic law by the WCA and the PoBA (see below). Any decisions of the Welsh Ministers in respect of badger culling (whether taken under the WCA, PoBA or otherwise) must be assessed in light of the Convention obligations.”

37. Also [Tab A7 –p90]:

“... any breach or potential [breach] of the obligations under the Convention could....

- lead to a successful JR claim (on the basis that it is unreasonable or unlawful for the Welsh Ministers to do something that breaches the international obligations of the UK).”

38. In any event, paragraphs 26-27 of the Defendant's Skeleton now identify section 21 of the AHA1981 as being the entirety of the relevant legislative

background. Paragraph 51 then says that the AHA1981 was not enacted to give effect to the Bern Convention. However, the Defendant relies on section 21 as making the cull lawful. It presumably thus relies on the Order as taking effect under section 6(c) of the Protection of Badgers Act 1992 [Tab E p10] to prevent the killing of badgers which it contemplates being an offence under that Act. The PBA 1992 and the WCA 1981 are relied on by the UK as enacting the Bern Convention. It cannot be right that provisions (and the procedural requirements within them) enacted to give effect to the Convention can be sidestepped in that way by another legal route without that other legal route also being understood as enacting the Convention.

39. As for the ambiguities in the AHA1981 (which must be resolved to give effect to the Bern Convention), they arise in the understanding of the words “necessary”, “eliminate or substantially reduce” and in the need (within section 21) to undertake the balancing exercise which is described in Ground 6, considered below.
40. The Claimant is not asking the Court to “enforce the Convention”. It is asking the Court to construe the domestic legislation to give effect to it as explained by Carnwath LJ in Morgan [22]. The issue therefore is whether the Minister correctly understood and applied the requirements of section 21 and exercised her discretion to make an Order in the light of the Bern Convention.
41. It is notable that the Defendant does not dispute that what is permitted by the Order would be in breach of Article 8 Bern unless saved by Article 9.
42. Paragraph 53(2) rejects the submission that Article 9 requires the beneficial impact of destruction to outweigh the extent of that destruction. In particular, it rejects reliance on the resolution from the Bern Standing Committee to the effect that a balancing exercise is required. It does so because the resolution was dealing with the definition of “serious” (as in “serious damage” in Article 9(1) bullet point 2). But that is not an answer here because the Defendant is itself relying on precisely that bullet point (namely “the prevention of serious damage to crops, livestock, forests, fisheries, water and other forms of property”) for Article 9(1) purposes. So even if there might not be a need for a balance if exclusively other limbs of Article 9(1) were being relied upon, there was that need here. But it was not done.
43. Notably, as above, the Defendant characterises Ground 6 (the need to balance benefits and destruction) as only referring to the Bern Convention. In fact it arises under section 21 in any event. Section 21 creates a power to make an order destroying badgers (which is normally a criminal offence). As above, the Defendant rejects (as it has done before) the need to undertake a balancing exercise (and does not claim to have done one). In particular, it rejects the proposition that the beneficial impact of destruction of badgers

must outweigh the extent of the destruction. But that balance is plainly (at least) a material consideration which must be evaluated and taken into account. And it cannot be correct that the power to make an order under section 21 can be exercised to allow make what would otherwise be a criminal offence not such when that would do more harm than good.

David Wolfe

MATRIX

19 March 2010