



e-law

Better law for the environment

May/June 2020 | Issue 118



Welcome to the May/June edition of e-law.

I hope you are all keeping well at this troubling time.

As promised in the last edition, the theme of this edition is Covid-19 and the environment. We have therefore tweaked our e-law themes for the rest of the year to take account of this addition.

We have been very lucky to secure two excellent pieces on the theme of the pandemic.

Firstly, we are very grateful to Stephen Tromans QC of 39 Essex Chambers, for his piece [The World After Coronavirus, any lessons from the past?](#) which revisits some of the work of the Royal Commission on Environmental Pollution in the early 1980s, as environmental law was beginning to be recognised in the UK. It finds a number of parallels with our current situation, namely: severe economic challenges and the response to them; public attitudes as reflected in political leaders and the need for international co-operation. Many thanks to Stephen for this thought provoking piece.

Our second themed piece, from Ned Westaway and Esther Drabkin, barristers at Francis Taylor Building, [Covid-19 and the business of the courts and tribunals in environmental cases](#), provides a very helpful and thorough overview of the arrangements made for hearings in the various courts in light of the pandemic. Thanks so much for this incredibly useful summary.

In addition we have been kindly granted permission by Synchronicity Earth to republish it's blog piece [Health and biodiversity Part I: wild diseases](#) by Nina Seale. This fascinating piece investigates the relationship between health and biodiversity as the COVID-19 pandemic has put both our health systems and our relationship with nature in the spotlight.

Our [environmental law headlines](#) also include Covid-19 developments, including developments in the areas of climate change and chemicals.

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In addition this edition, [Aarhus Compliance Committee turns up the heat on legal costs](#), Carol Day and Will Rundle provide summary findings resulting from the Aarhus Convention Committee's report on the UK Second Progress Review, following the 2009 finding of the Aarhus Convention Compliance Committee that the UK was in breach of Article 9(4) (the requirement that environmental claims be 'not prohibitively expensive') of the Aarhus Convention and the subsequent adoption of Decision VI/8 setting out the steps required for UK compliance with Article 9(4). This excellent article reflects on the UK's longstanding non-compliance and highlights concerns over future proposals for judicial review in England and Wales.

Best wishes

Sophie Wilkinson

Sophie Wilkinson
UKELA e-law Editor

E-law editorial team

Sophie Wilkinson, Editor – Sophie is an environmental law specialist at LexisPSL with 13 years' experience, including 11 years' experience in private practice. She moved to LexisNexis from Shoosmiths LLP where she was a Senior Associate. Prior to this Sophie trained at Browne Jacobson LLP and spent 6 years at Eversheds LLP.

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Words from the Chair



From the Spring equinox to almost Midsummer's Day we have found ourselves in the most strange, unsettling, and – for many – challenging, of times. And whilst lockdown is easing in some respects, it is still uncertain how long the restrictions (in some form or other) will really last. What

I find encouraging is the talk not just of 'going back to normal' but the debate and discussions around what a 'new normal' could look like. Indeed many advocates are using this as an opportunity to open up the space to think about how to [#build back better](#).

In his article, Stephen Tromans QC, looks at how we can learn from the past as we consider the kind of 'new normal' that will benefit us all. Perhaps with more time to reflect during this lockdown period we have taken the time to ask ourselves what we really want our lives to be like, and not just in the context of 'returning to work'. A liminal space has opened up for us to be creative, dream big, and look at what the building blocks of a new and better life could be.

I was invited to speak on a webinar recently led by the fitness industry. A strange fit at first, you might think (as did I!) but as the other speakers presented on their topics (including James Wilkes who played a leading role in the development of the series [The Game Changers](#)), and I listened to them talk about 'prevention being worth more than the cure'; about 'strengthening our immune systems to build resilience to fight disease'; about 'improving our diet and environment to improve our health'; a rather neat segue opened up for me to riff off these perspectives to draw parallels between human health and planetary health.

You will read later in this edition the article by my colleague Nina Seale at [Synchronicity Earth](#) on our health, the health of the planet, and how degrading and destructive activities causing habitat loss are exacerbating the conditions in which zoonotic diseases, such as COVID-19, develop and thrive. When we think about what we want our 'new normal' to look like, and how to build back better, there is such a tremendous opportunity to focus our efforts on building the planetary immune system, strengthening the health of the environment, and ensuring that future pandemics like these are prevented.

As for UKELA and how we have been keeping busy these past few weeks, I am so pleased that so many of you have already signed up to our online Annual Conference – we have numbers rivaling those that we would usually have at the in person conferences,

which is superb. I am very much looking forward to the sessions and hearing from so many excellent speakers and of course connecting with you, albeit via the screen. Additionally, it has been really fantastic joining in our webinars and having the opportunity to learn more about a range of topics from Young UKELA's 'the basics' seminar to the wildlife trade and COVID-19 to opportunities to tackle the climate crisis in the recovery from the pandemic.

Thank you all for your continued support and enthusiasm for UKELA's events programmes, and I hope that in a small way it helps you to feel connected to others in the association. At this time of isolation I have certainly felt that our community is more important than ever.

You will have all had the notice of the upcoming Council elections, so please do take a moment to read the information about the candidates (soon to be sent out to you) and vote for those you would like to see sitting on Council. The Trustees are fantastically hard working and dedicated to UKELA's aims and mission, and of course serving you so that you get the most out of your membership. It is such a delight and joy to work with them, and in these last few months they have all gone above and beyond the call of duty to ensure we can make the best of the challenging times.

I would like to take a moment to thank two Council members who are stepping down this year at the end of their terms.

James Burton of 39 Essex Chambers has served on Council for eight years and in that time has given so much to UKELA. 39 Essex Chambers has been a main sponsor of the Annual Conference for many years now, has hosted numerous events and seminars for us generously offering up the fantastic event space to us. Many of you will also know James has been a driving (or is that cycling) force of the Re-Cyclist crew, leading the charge for many a route-planning-pub-session and organizing the logistics of the rides. Let it be known, however, that James has never, not once, worn a piece of lycra and is proud to have served his time on UKELA Council lycra free. James we will miss you and your banter, but hope that in the not too distant future we might all meet up again to chat about STRAVA stats and debate over hill inclines, preferred Sustrans routes, and of course whether those who ride Bromptons can ever truly call themselves cyclists.

Charles Banner QC (Charlie) has served on Council for four years and has equally demonstrated dedication and commitment to UKELA in that time. Landmark Chambers has also been a main sponsor of our Annual Conference and thanks to Charlie's good work has also

offered up their event spaces to host numerous UKELA events. Charlie has also led the London meetings planning group to deliver a wide ranging series of events over the years, bringing a wonderful array of speakers together to share their expertise on topics made all the more interesting by Charlie's expert chairing of panels! Many of you will also know that Charlie has been on the Garner Lecture planning team and I am sure you will agree these lectures are an absolute highlight in the UKELA calendar. Thank you also Charlie for travelling such long distances to attend Council meetings and for your insightful and valuable contributions to our decision-making. You too will be missed!

Some of you might have watched one or two of the ['in conversation with'](#) videos that we have been publishing. Thank you to all of those so far who have shared with us such interesting stories of how they have been managing in lockdown: thank you James Pereira QC, Estelle Dehon, Colin Reid, Anne Johnstone, and Stephen Sykes. We have a few more lined up in the coming weeks but do get in touch if this is something you might like to be a part of!

I would also like to say a massive thank you also to UKELA's Vice Chair, Simone Davidson, and her colleagues at Lexis Nexis for producing the podcast on [COVID-19 and the regulator's response](#). Co-hosted by Mark Davies of Six Pump Court, the interview includes perspectives from Peter Kellett, Director of Legal Services at the Environment Agency, Richard Broadbent Principal Solicitor at Natural England, and Terry A'Hearn CEO of the Scottish Environmental Protection Agency.

I am thoroughly looking forward to connecting with you on the 25th and 26th June for our online Annual Conference and thanks to those of you who have given your time and technical expertise to ensure it is a success. We are delighted that Ramboll is supporting us with the events landing page, and that 39 Essex Chambers is sponsoring the event again this year. I know that Sarah Holmes, Conference Chair, and Alison Boyd and the staff team are extremely appreciative of all of the support that has been given.

Until then, I hope that you and yours continue to stay well and healthy.



Kirsty Schneeberger MBE
UKELA Chair

UKELA news

Council Elections

Watch out for details coming your way shortly for the annual elections to UKELA's Council. We have 6 candidates for 2 spaces on Council, so do cast your vote. The results will be announced at the AGM.

AGM

The AGM of the association will take place on Thursday 25th June at 5.30pm. This will be during the annual conference. For the first time ever, our AGM will be held online as a Zoom meeting. You will receive details of how to join nearer the time. In the meantime, you will be invited to vote for the 3 resolutions (approval of the minutes; adoption of the annual accounts and re-appointment of the reporting accountants) via electronic means. This voting opportunity will run alongside the voting for the Council elections and will be administered on UKELA's behalf by Civica. Voting for the resolutions will continue during the AGM itself.

Annual Report and Accounts 2019

Our annual accounts for the year ending 31st December 2019 are now available for you to read on our website.

Students news

UKELA moot competition 2020

The Junior and Senior Moot competitions were held online on 6 May in our first Zoom Moot! Technology was, on the whole, kind to us and we managed to complete both the semi-finals and finals successfully. The winners of the Dame Frances Patterson (Junior) Moot were Jennifer Edwards and James Heald (Bristol University of Law). Our Lord Slynn (Senior) Moot winners were Joe Broadway and James Harrison (BPP Bristol). Thanks go to our semi-finals judges Thea Osmund-Smith, Gayatri Sarathy and Howard Leithead, to Richard Kimblin QC for acting as our finals judge, to Nina Pindham our Moot master and to Emma Lui for all of her help in organising and helping to judge the skeleton arguments with the Moot master. Our winners receive prizes from our generous sponsors, No 5 Chambers and Law Text. Well done to everybody who took part; it was an extremely high standard and a lot of effort clearly went into the preparation and delivery.

UKELA student members' Facebook group

Want to link up with fellow UKELA student members to share your views and have discussions during this time of social distancing? If so, please join our [UKELA Student members' Facebook group](#)!

Student publication opportunity

Interested in co-authoring a hot topic article with an environmental professional? UKELA provides an opportunity for students to publish their work in e-law, our members' journal which is circulated to over 1400 practitioners. Students are invited to email a short abstract of up to 500 words to [Sophie Tremplin](#) or [Beatrice Petrescu](#), our student advisers. If selected, the Editorial Board will endeavour to pair students with a supervising practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. The theme of the next issue is food, farming, land use and net zero, expected to be published in August 2020.

UKELA events

Lunchtime Legal Update: 10 June 2020

Please join the UKELA South West Committee for a short talk on a topical area of environmental interest, intended to fit neatly into your lunch hour.

Our speaker is Lorrae Hendry, Managing Associate at Womble Bond Dickinson, who will be giving a short presentation on the 'Decarbonising Transport: Setting the Challenge' consultation paper, released at the end of March.

Join us for a bitesize update on environmental law, easy to digest with your lunchtime sandwiches.

[Register](#) now to secure your place.

Protection of badger setts – Where law and science clash: 15 June 2020

Join us for a talk by Roseanna Chinery MSc (Wild Animal Biology) and MSc (Building Surveying) and Crispin Agnew QC.

This talk summarises the research and conclusions reached in Roseanna and Crispin's article:

Agnew, C. and Agnew, R.C., 2016. Protecting badger setts—Where law and science clash. Environmental Law Review, 18(1), pp.8-24

To book your place and to find out more, please go to the [website](#).

UKELA Annual Conference: 25-26 June 2020

Join us for sparkling content from expert professionals from across the environmental law field. We have six plenary sessions to tempt you, along with our keynote speaker, Lord Carnwath and after dinner speaker, Paul Rose.

This event is not to be missed! For more details about the programme and social aspects of the conference, take a look at our [dedicated pages](#).

This exciting event is free to members so [book](#) your place now!

UKELA diary dates

Annual Scottish Conference: 24 September 2020

This year's annual Scottish conference will take place online. Join us for a half day seminar looking at the hot topics across Scotland. Full details of our programme of expert speakers and how to book your place coming soon. In the meantime, please keep the day free.

Non-UKELA events

The UK Earth Law Judgments Project – invitation to on-line workshop: 1 July 2020

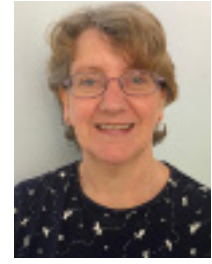
The UK Earth Law Judgments Project seeks to reimagine and rewrite significant cases in UK law (including English, Scots and Northern Irish law) from an ecocentric perspective. It builds on the work of feminist judgment projects in a number of jurisdictions, and the recent Wild Law Judgment Project led by Australian scholars. The project aims to engage academics from a range of backgrounds, as well as legal professionals and the broader public.

Introductory workshop on 'Judgment writing from an Earth law perspective', 1 July 2020

This half-day workshop will introduce those interested in writing judgments and commentaries to the idea of alternative judgment writing, to explore the vision for the UK Earth Law Judgments Project and to provide an opportunity for networking. It will include talks from the leaders of the Australian Wild Law Judgment Project and the UK project leads. If you wish to participate in the project as a judgment writer, commentary writer, artist or to be involved in some other way, and would like to join the workshop on July 1st, please provide a brief (maximum 300 word) outline of your field of expertise or interest and how you would like to contribute to the project and include a brief biography (max 100 words). The deadline for expressions of interest is Monday 22nd June. Participants will be notified by Wednesday 24th June.

Please see the [website](#) and send submissions to [Dr Helen Dancer](#) and [Dr Bonnie Holligan](#).

The e-law 60 second interview



**Alison Boyd, Operations Director
UKELA**

What is your current role?

I'm the Operations Director for UKELA.

How has your workload been affected by the Covid 19 crisis?

It's increased and changed drastically in the last 2-3 months. We have had to move our entire offer online, including our annual conference. This was from a standing start. Looking back at emails from around the middle of March, it hardly seems believable that we were still wondering whether we would be able to make it to Plymouth for the conference. How quickly everything changed!

I am very proud of the way my team has responded to the challenge – from setting up webinars and online meetings, to coming up with new initiatives such as our 'Interviews with the Chair' series, everyone has really risen to the challenge, be they members of the staff team, trustees or all UKELA's many, many other volunteers in the regions and working parties. Thank you to them all. I hope there is something of interest for everyone.

We have also kept our everyday work going – it's not all about Covid! So, Elly-Mae has been working hard on keeping membership income buoyant, Paul has been co-ordinating our response to the Environment Bill via the auspices of our new Governance and Devolution Group (the successor to the Brexit Task Force) and Louise has been making sure our social media presence is strong and varied.

What are your working arrangements?

I work from home. The whole team does and always has. Currently I am sharing my dining room office with my son who is a journalist and is also home working for the time being. The cats keep us company.

What has been your biggest technical challenge?

Learning how to use Zoom and the myriad of other new platforms and initiatives we have set up in very short order. There is nothing like a crisis to focus one's attention! At least my CV will have some new entries now.

Do you think this is going to change the way you work in the future?

Definitely. There will be much less travel in the medium term, not just for me but for my team and our members. I have to admit that this is something I really miss – whilst many of you are probably not missing at all the daily commute, I do love hopping on the train and heading out across the UK to meet up with you all at events and meetings. Webinars and online meetings are really great, but they are no substitute for getting out and about to meet our members, trustees and the rest of the UKELA family.

In the longer term, UKELA is committed to making sure that online options are always available for the events we run – I think this is a really positive outcome. Our events should be accessible to all of our members, regardless of their location or circumstances.

Do you have any top tips for surviving in lockdown?

Quizzes! I've been taking part in family quizzes, scavenger hunts and quizzes with friends. It's fun. I've also rediscovered my love of knitting and sewing (you may find me sporting a rather natty home made face mask if you happen to be in Sainsbury's...)

Do you think we will ever return to normality?

I'm not sure what normal is, but I don't think we want to return to how the world was in January of this year. This crisis will, I hope, bring about positive change in the way we treat our planet and help us to learn to appreciate the simpler things in life.

What worries you most about the current crisis?

That too many people think it's a one-time event. It's here to stay and we must all adapt accordingly.

What gives you most cause for optimism about the current crisis?

That there seems to be a real drive for change. I hope that drive sticks from the very top down.

What is the first thing you are going to do when we are out of "lockdown"?

See my daughter, because I miss her. And get a haircut!

Environmental law headlines

A selection of recent environmental law news and updates prepared by the teams at [Lexis®PSL Environment](#) and [Practical Law Environment](#).

Permission refused for judicial review of government decision to proceed with HS2 rail project (High Court)

[Practical Law Environment](#)

In *R (Packham) v Secretary of State for Transport and others* [2020] EWHC 829 (Admin), the High Court refused judicial review challenges to the government's decision to proceed with the HS2 rail project. HS2 is a new high-speed rail link to be constructed between London, Birmingham, Manchester and Leeds, and will be delivered in two phases under the High Speed Rail.

In autumn 2019, the Secretary of State for Transport announced an independent review of whether, and how, the HS2 project should proceed (Oakervee review). During the review, the Secretary of State also ordered that removal of ancient woodland for HS2 should be stopped. In February 2020, the Prime Minister announced that the government had decided to proceed with the HS2 rail project and the report of the Oakervee review was published.

On 27 March 2020, Chris Packham (claimant), a well-known television personality and environmental campaigner, applied for permission to proceed with judicial review of the decision by the Secretary of State for Transport (first defendant) and the Prime Minister (second defendant) to proceed with the project. The claimant also applied for an interim injunction to prevent clearance works in six ancient woodlands on the HS2 route.

The claim was brought on four grounds:

- The first defendant fundamentally misunderstood the publication process of the Oakervee review report and had failed to take account of the alleged departure of the process from the review's terms of reference.
- The Oakervee review report failed to address the non-climate change environmental impacts of HS2.
- The Oakervee review report and the defendants' decision failed to address HS2 Ltd's expectation that carbon emissions during construction would be higher than the forecast range. Additionally, it failed to address the effect of the project on greenhouse gas emissions leading up to 2050, in accordance with commitments under the UN Convention on Climate Change (UNFCCC) Paris Agreement and the Climate Change Act 2008.
- The first defendant breached an undertaking or promise that the Oakervee review would be carried out in accordance with its terms of reference because of the way in which the review

was carried out. Given the major and widespread environmental damage the project would cause, it was unfair for that legitimate expectation to have been breached.

The High Court considered both the merits of the judicial review challenge and the claim for an interim injunction together as it was not practicable to distinguish the test for whether permission to bring judicial review proceedings should be granted and the first part of the test for an interim injunction. Both of these tests are whether the claimant has a realistic prospect of success.

The court dismissed all four grounds of the claim as unarguable on the basis that the claim did not have a realistic prospect of success. In addition, the court said that, even if the claimant did have a realistic prospect of success, the balance of convenience test for an interim injunction favoured the continuation of the ancient woodland clearance works. The court considered that:

- In making the High Speed Rail Act, Parliament had already decided that Phase One of HS2 should proceed notwithstanding the irreversible damage that the works would cause to ancient woodland. There was a strong public interest in ensuring that activities sanctioned by Parliament were not stopped by individuals merely because they did not personally agree with them.
- Granting an injunction would delay the clearance works beyond the period when works could safely be carried out to minimise the effect on protected species of birds and bats. That could mean that these works could not be carried out before October 2020, which would have a knock-on effect on other parts of the project.

It is reported that Chris Packham is applying for permission to appeal the High Court's refusal. This is partly on grounds that the Oakervee review report failed to take into account its net zero carbon commitments, particularly under the UNFCCC Paris Agreement.

For a full analysis of the court's reasons for dismissing the application, see [Legal update, Permission refused for judicial review of government decision to proceed with HS2 rail project \(High Court\)](#).

Publication of the new circular economy plan

[LexisPSL Environment](#)

On the 11 March 2020, the European Commission adopted a new Circular Economy Action Plan (CEAP) as part of the [European Green Deal](#).

The Commission launched its first CEAP in 2015. By 2018, all 54 actions contained in the plan had been delivered or were in progress. On 4 March 2019, the European Commission adopted a comprehensive report on the implementation of the first CEAP. The report presented the main achievements under the first CEAP and pointed out future challenges to achieving a climate-neutral, circular economy where pressure on natural and freshwater resources as well as ecosystems is minimised. These future challenges are addressed in this new CEAP.

The key measures presented in the new CEAP aim to:

- Make sustainable products the norm in the EU.
- Empower consumers and public buyers.
- Focus on the sectors that use most resources and where the potential for circularity is high, such as electronics and ICT, batteries and vehicles, packaging, plastics, textiles, construction and buildings, food, water and nutrients.
- Ensure less waste.
- Make circularity work for people, regions and cities.
- Lead global efforts on circular economy.

Highlights of the CEAP include:

- A revision of the EU waste legislation aimed at halving municipal waste by 2030, including new targets to reduce packaging, and 'mandatory essential requirements' for all packaging placed on the market. The Commission's aim is to make all packaging placed on the EU market reusable or recyclable in an economically viable way by 2030.
- A 'Circular Electronics Initiative' to promote longer product lifetimes through reusability and reparability, as well as upgradeability of components and software to avoid premature obsolescence. This will include a 'right to repair' for products like smartphones and computers, by 2021.
- Promoting circular textiles, with EU guidance on the separate collection of textile waste, which EU countries will have to ensure by 2025.
- Mandatory requirements on the use of recycled plastics in areas like packaging, construction materials and vehicles. Restrictions are envisaged on the intentional adding of microplastics.
- A Strategy for a Sustainable Built Environment' to promote circularity principles throughout the whole lifecycle of buildings. This will include green criteria for public procurement in construction.

- New rules to improve the collection and recycling rates of all batteries and ensure the recovery of valuable materials, sustainability requirements for batteries, and the level of recycled content in new batteries.
- A new EU-wide target on food waste reduction as part of the EU Farm-to-Fork Strategy.
- Updating existing resource use indicators, reflecting the interlinkages between circularity, climate neutrality and the 'zero pollution ambition'.

It is anticipated that at least some of these measures will apply to the UK, as technology companies are unlikely to make goods to a different standard for the smaller British market. Whether or not the UK will follow all EU standards as part of the UK-EU free trade agreement currently being negotiated remains to be seen.

The EU biodiversity strategy for 2030 and the Farm-to-Fork Strategy were published on 20 May 2020. See: [LNB News 21/05/2020 13](#).

For more information on the new CEAP, see: [LNB News 11/03/2020 24](#) and News Analysis: [New circular economy action plan published](#).

Natural Capital Committee advises replacing biodiversity net gain with environmental net gain for 2050 net zero target

[Practical Law Environment](#)

The government's 25-year plan to improve the natural environment sets out how the government will seek to embed a "net environmental gain" principle for development. The plan indicates that the government wants to expand current biodiversity net gain approaches to achieve wider natural capital benefits (including flood protection, improved water quality and improved air quality). The current policy is that the planning system should provide biodiversity net gains where possible.

The Natural Capital Committee (NCC) previously published advice and recommendations on environmental net gain to the government and considered that the current planning policy on net gain and the government's proposals for biodiversity net gain through the Environment Bill 2019-20 fall short of the goals set out in the government's 25-year plan.

On 6 April 2020, the NCC published a report advising the government on using nature-based interventions to reach the UK's net zero carbon target by 2050. The report makes nine recommendations, including that:

- The government's existing siloed approach to climate change should be replaced with a more co-ordinated approach and the net zero target should be viewed in the broader context of the 10 goals of the 25-year environment plan.

- The biodiversity net gain requirements in the Environment Bill 2019-21 should be urgently replaced with environmental net gain requirements. This would ensure that these requirements apply to all nationally significant infrastructure and to the marine environment. The passage of the Bill is currently suspended due to the COVID-19 pandemic.
- The government should develop a holistic strategy to reach net zero, which should include changes in energy, transport, housing, infrastructure, industry and the use of land and sea. Nature-based interventions should not be used as an alternative to reduce carbon emissions across all sectors.
- The 10 goals of the 25-year environment plan should be factored into the price of carbon to ensure that it is not valued above other services or public goods provided by nature.

The report follows the Committee on Climate Change's January 2020 advice to the government on land use and agricultural policy for achieving UK 2050 net zero carbon (see [Legal update, Committee on Climate Change advice on land use and agricultural policy for achieving UK net zero carbon](#)) and the NCC's May 2019 recommendations on environmental net gain (see [Practice note, National Planning Policy Framework \(NPPF\): interaction between planning and environmental regimes: Biodiversity net gain proposals](#)).

For more information on the recommendations, see [Legal update, Natural Capital Committee advises replacing biodiversity net gain with environmental net gain for 2050 net zero target](#).

Consultation on extending climate change agreements

[LexisPSL Environment](#)

On the 16 April 2020, the Department for Business, Energy & Industrial Strategy (BEIS) opened a [consultation](#) on extending and potentially reforming the Climate Change Agreements (CCA) scheme.

The scheme was initially set to run until 31 March 2023. The two-year extension was announced by the Chancellor during the Spring Budget, and new applications to join the CCA scheme are being accepted until 30 September 2020, though approval will depend on the outcome of the consultation. Operators who wish to enter into a CCA must apply first to their sector association.

The government has proposed implementing the extension through the addition of a new two-year target period (1 January 2021—31 December 2022), and by extending the certification of participants eligible for reduced CCL rates to 31 March 2025.

The government is also seeking comments on potential changes to the eligibility criteria, rules and

processes of future CCA schemes, though these are not set to materially change during the extension period.

The consultation was released alongside a [report](#) evaluating the impact of the second CCA scheme, which started in 2013 and is set to run until March 2023. The key findings included:

- A high participation rate, with 80-100% of businesses in most eligible sectors participating.
- A low underperformance rate, with almost all participants having taken action to improve their energy efficiency.
- A positive view of the scheme among CCA participants, with 92% reporting they were likely to continue in the scheme and participate in any future schemes.

The report also found that, in general, electricity use on CCA sites was at least 4% lower on average when compared to similar sites not participating in the scheme.

The consultation closes on 11 June 2020. For more information, see: [LNB News 17/04/2020 57](#).

Coronavirus (Covid-19) and climate change

[LexisPSL Environment](#)

The ongoing coronavirus (COVID-19) pandemic has caused major disruptions to the normal functioning of government departments and committees. This has unfortunately resulted in delays to key events and publications regarding action on climate change in the UK, including:

The 26th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP26)

On 1 April 2020 the government [announced](#) that COP26 was being postponed to 2021. COP26 was set to take place in November 2020 and was to be hosted by the UK in partnership with Italy. Both countries, alongside the COP Bureau of the United Nations Framework Convention on Climate Change (UNFCCC), felt the pandemic had made it impossible to host an 'ambitious' and 'inclusive' event within the year. The new date for the event of 1-12 November 2021 has recently been announced.

COP26 will remain focused on increasing climate ambition, building resilience to climate change and lowering emissions in line with the commitments in the Paris Agreement. In her comment on the announcement, COP25 President, Minister Carolina Schmidt, expressed her determination that Parties to the UNFCCC should still submit ambitious nationally determined contributions communicating their post-2020 climate actions.

For more information, see: [LNB News 02/04/2020 14](#) and [LNB News 29/05/2020 12](#).

The Scottish Climate Change Plan update

Also on 1 April 2020, the Scottish Climate Change Secretary Roseanna Cunningham [announced](#) that the Scottish government would not be publishing the Climate Change Plan update at the end of April.

Cunningham has chaired the working group for updating Scotland's Climate Change Plan since its [creation in January](#). In April, this group was set to lay before Parliament an addendum to Scotland's 2018-2032 Climate Change Plan which would bring the plan in line with Scotland's commitment to become climate-neutral by 2045 as set out in the [Climate Change \(Emissions Reduction Targets\) \(Scotland\) Act 2019](#).

Cunningham emphasised the government's commitment to tackling the climate emergency but stressed that it was unfeasible to publish the update as scheduled. The Climate Change Secretary also said that she had written to the Committee on Climate Change (CCC) with a request for expert advice on how the eventual Climate Change update could support a 'green' economic recovery for Scotland.

For more information, see: [LNB News 01/04/2020 46](#).

The CCC's advice to the government on the level of the Sixth Carbon Budget (2033-2037)

On 14 April 2020, the CCC [announced](#) that it would be updating its 2020 Work Programme and delaying the publication of its advice to government on the Sixth Carbon Budget from September to December 2020.

Carbon Budgets are published by the CCC in line with the requirements of the Climate Change Act 2008 and provide ministers with advice on the volume of greenhouse gases the UK can emit during a given period. The Sixth Carbon Budget, which covers the period 2033-2037, will set the path to the UK's new net-zero emissions target in 2050.

The CCC noted that delaying the publication of the advice would give them time to 'reflect on the impacts of the crisis' in their analysis.

The CCC confirmed that the Third UK Climate Change Risk Assessment evidence report was still scheduled for publication in the summer of 2021, although this date will be kept under review, and that it would be continuing preparations for COP26.

The annual progress report to Parliament, scheduled for June 2020, will now include advice on how the government can support an economic recovery post-COVID-19 which is in line with the transition to net zero and the need to increase the UK's resilience to climate change. The report will still include the statutory assessment of the UK's progress in reducing emissions.

The CCC's initial advice on what steps the government should be taking when rebuilding the economy once the pandemic subsides was included in letters to the Prime Minister and First Ministers in Scotland, Wales and Northern Ireland [published](#) on 6 May 2020. These letters set out six key principles to ensure a stronger, cleaner and more resilient economy. For more information, see: [LNB News 06/05/2020 19](#).

For more information, see: [LNB News 15/04/2020 26](#)

Covid-19 and chemicals

LexisPSL Environment

Both the European Chemicals Agency (ECHA) and the International Council of Chemicals Associations (ICCA) have highlighted the importance of chemicals in responding to the pandemic, particularly by enabling the creation of essential medical equipment including personal protective equipment and disinfectants. These organisations have also taken steps to help countries better deploy chemicals in their national and international responses to COVID-19.

The ICCA

The ICCA praised the role of chemistry in a letter [published](#) on the 21 April 2020, in which it called on G20 leaders to 'foster a globally co-ordinated response' to the pandemic.

The ICCA offered five key recommendations which, if implemented on an international scale, could help fight the pandemic and position the global economy for recovery. The recommendations were as follows:

- 1 Designating chemical manufacturers and downstream value chains as essential businesses.
- 2 Co-ordinating globally and regionally with industry to ease supply chain constraints.
- 3 Facilitating supply chains for products essential for combatting coronavirus as well as the value chain materials comprising those products.
- 4 Committing immediately to a standstill and rollback of trade-distorting measures on products essential for battling coronavirus.
- 5 Supporting suppliers of small- and medium-sized enterprises manufacturing products essential for combatting coronavirus and the value chain materials comprising the products in order to bolster supply chains and trade flows.

For more information, see: [LNB News 28/04/2020 46](#).

ECHA

ECHA has also taken steps to address the issues arising from the coronavirus pandemic, which is causing disruptions to the work of businesses that report to it as well as an increased demand for disinfectants, which are biocidal products regulated by ECHA. They have also published [a dedicated web page](#) for COVID-19 related updates.

In light of the disruption to normal business activity during the pandemic, ECHA has extended certain deadlines until the end of May 2020, including those relating to invoice payments and the deadline for companies to submit data concerning the export and import of hazardous chemicals through ePIC under the Prior Informed Consent Regulation ((EU) 649/2012). In such cases, the concerned companies have been contacted directly by ECHA. For more information, see: [LNB News 01/04/2020 59](#) and [LNB News 05/05/2020 16](#).

The planned extension to completeness checks for REACH registration dossiers has also been postponed from April to October 2020. Following this new date, content within chemical safety reports will also be considered as part of a completeness check under Article 20 of the REACH Regulation (Regulation (EC) 1907/2006). Plans for other improvements to this process have not been affected. For more information, see: [LNB News 08/04/2020 20](#).

In order to address the issue of increased demand for disinfectants, ECHA has temporarily streamlined the procedure for getting biocidal products to market in the EU. As disinfectants are regulated under the Biocidal Products Regulation (Regulation (EU) 528/2012) (BPR), they must technically be authorised before being placed on the market, however, during the COVID-19 pandemic the following applies:

- A fast-track technical equivalence procedure has been established for companies manufacturing biocidal products already authorised under the BPR who wish to use a new source of propan-1-ol or propan-2-ol in production. The information requirements in this fast-track procedure are less onerous than in the standard technical equivalence procedure.
- The evaluation procedure for suppliers of biocidal products or active substances used in biocidal products who wish to be added to the list of active substances and suppliers under Article 95 of the BPR has also been streamlined. Evaluations of Article 95 applications for disinfectants will begin before fees are paid, though final decisions will still be issued after payment of fees
- Two reports have been published by ECHA regarding active substances for disinfection purposes which are approved or under review, in order to provide information to companies and ease the work of national authorities:
 - recommended requirements for active chlorine released from sodium hypochlorite, hydrogen peroxide and peracetic acid. For more information, see: [LNB News 16/04/2020 77](#).
 - recommended compositional requirements for propan-1-ol and propan-2-ol

Although certain aspects of compliance with chemical regulation are managed by the national enforcement authorities of Member States and therefore cannot be unilaterally amended by ECHA, national authorities have also reacted to the situation by relaxing requirements on manufacturers and suppliers of biocidal products. For further information, see: [LNB News 01/04/2020 59](#).

European Commission

On the 9 May 2020 the Commission published its [strategy](#) on reducing the risks associated with producing and using chemicals. Despite the coronavirus pandemic, this publication follows the timeline laid out in the European Green Deal.

According to the Commission, the pandemic 'increases the urgency to step up action in the chemicals area' in order to protect the health of citizens, support the socio-economy recovery of the European chemicals industry and promote the EU's 'strategic autonomy' for essential chemicals.

For more information, see: [LNB News 12/05/2020 17](#).

Government confirms domestic RHI extension and consults on closure of non-domestic RHI and future support for low carbon heat

[Practical Law Environment](#)

On 28 April 2020, the Department for Business, Energy and Industrial Strategy (BEIS) published a notice on extending the domestic renewable heat incentive (RHI) scheme until 31 March 2022 and introducing a third allocation of tariff guarantees under the non-domestic RHI scheme. Tariff guarantees, which took effect for the non-domestic RHI in May 2018, allow RHI applicants to secure a tariff rate before an installation is commissioned and fully accredited by Ofgem, or before biomethane has been produced for injection into the grid.

Installations that want to take advantage of the new allocation of tariff guarantees will need to submit evidence of the financial close of their projects (stage 2 information) before the non-domestic RHI closes to new applicants on 31 March 2021. However, installations will be able to submit commissioning evidence (stage 3 information) up to 31 March 2022. The government also intends to set new tariff guarantee budget headrooms for the 2021-22 and 2022-23 financial years. BEIS will make an announcement on setting headrooms for individual technologies or groups of technologies in due course. The notice also provides that BEIS will extend the commissioning deadlines for projects currently holding a tariff guarantee until at least mid-March 2021.

Questions or comments concerning the notice had to be made to BEIS by 19 May 2020.

Also on 28 April 2020, BEIS published two consultations on:

- Closing the non-domestic RHI scheme to new applicants from 31 March 2021 and on future-proofing the scheme while payments continue to be made.
- Future support for low carbon heat, which proposes to replace both RHI schemes with a Green Gas Support scheme to increase the amount of biomethane from anaerobic digestion that is injected into the grid and a Clean Heat Grant to cover the high upfront capital costs of installing heat pumps and, in limited circumstances, biomass.

The consultations close on 7 July 2020.

In addition, BEIS also published a response to its October 2018 consultation on urban biomass, which confirms that it will not exclude new biomass installations in urban areas on the gas grid from RHI support.

The government intends to make regulations to reform the RHI schemes in 2021. The government will also publish stakeholder bulletins during the consultation period to give further detail on the Green Gas Support and Clean Heat Grant schemes. Regulations will be needed to introduce these new support schemes but BEIS does not specify a timeframe for this in the consultation.

BEIS will publish a consultation on the Green Gas Levy to fund biomethane support in due course. For more information, see [Legal update, Government confirms domestic RHI extension and consults on closure of non-domestic RHI and future support for low carbon heat](#)

Covid-19 and the environment

The world after Coronavirus, any lessons from the past?

Stephen Tromans QC



At a glance

- This article begins by revisiting some of the work of the Royal Commission on Environmental Pollution in the early 1980s, as environmental law was beginning to be recognised in the UK.
- The article finds a number of parallels with our current situation as we get to grips with being outside the EU and with the ongoing health and fiscal challenges of the pandemic.
- The parallel themes are: severe economic challenges and the response to them; public attitudes as reflected in political leaders; and the need for international co-operation.
- The above three themes go to the heart of the national and global dilemmas which will for better or worse dictate the future of human society and the environment.

I began working in the field of environmental law in the early 1980s: well, not so much a field at that stage as a rather barren rocky outcrop. It was a landscape largely unrecognisable to UKELA members who have grown up since then. The law was rudimentary and under-enforced. The effects of the law of the European Union (or European Community as it was then) had scarcely begun to make an impact. The most influential and authoritative body providing advice was the Royal Commission on Environmental Pollution, or RCEP. The tenth report of the RCEP (Tenth Report) was published in February 1984, some years before the founding of UKELA, and just as I was starting to write articles on environmental law and developing a short course on the subject for Cambridge undergraduates. The Tenth Report, entitled *'Tackling Pollution, Experience and Prospects'*,^[1] provided an open-ended review of the past twelve years of work of the RCEP, by way of taking stock and looking forward. It provides a useful and interesting reminder of what the priorities were back then, now almost 40 years ago.

The RCEP had achieved a significant success with its ninth report, *'Lead in the Environment'*,^[2] when the government accepted its recommendations for phasing out lead in petrol, which at that point was a very serious urban air pollutant. Other reports had covered what were major and seemingly difficult problems of the 1970s and 80s: the industrial pollution of the UK's estuaries and coastal waters, such

as the Mersey, Tees and Thames;^[3] air pollution control, with acid rain beginning to be recognised as a transboundary source of pollution;^[4] nuclear power and the environment, in particular the problem of radioactive waste;^[5] and oil pollution of the sea, in particular from the operations of tankers.^[6] By one means or another these problems have been addressed – or in the case of radioactive waste disposal, are a work in progress.

In the Tenth Report, issues of concern identified by the RCEP included confidentiality (the CBI were still vehemently opposing disclosure of information to the public on discharges to rivers and the sea, with the public having no real need to know, and the risk of information being deliberately distorted by 'alleged extremists'.^[7] The discharge of raw sewage into Britain's bathing waters and onto its beaches was a major cause for concern, though the UK's method of identifying 'bathing waters' had strangely resulted in the omission of Blackpool, Brighton and Eastbourne from the list prepared for the purpose of the Bathing Water Directive 76/160/EC.^[8] Emission of nitrogen dioxide from vehicles was just on the cusp of becoming a concern, with pressure starting to build within the European Community for air quality improvements and the development of air quality standards, though the RCEP noted that tighter limits on vehicle emissions were likely to involve the introduction of technology not then used in Europe.^[9] The report included a necessarily tentative discussion (in view of the then relatively rudimentary state of scientific knowledge) of greenhouse gases and climate change, noting that the social and economic consequences of a substantial change in climatic patterns 'if not recognised and planned for in time, could be very great indeed, as could the measures that would have to be taken internationally to reduce CO₂ emissions if the greenhouse effect proved to be significant.'^[10] The RCEP also very presciently noted that the governments of a relatively small number of countries (which it identified as those with major coal reserves) held the key to international measures to reducing anthropogenic greenhouse gas emissions. Less presciently, China was not among them.

Readers might be wondering what the point of this historical rambling is. Much has of course changed

since 1984. We know now, all too well, the risks of greenhouse gas induced climate change. The UK's heavy polluting industries – already in decline in the early 1980s – largely no longer exist. The coast and rivers are generally much cleaner. Threats which were thought to have been serious, such as ozone depletion and oil pollution of the sea, have to a large extent been successfully addressed by international effort and technological advance. However new threats have emerged, notably the presence of plastics and other long-lived substances in the environment. Globalisation, not the phenomenon in the 1980s that it is today, has become a major factor in environmental threats, with post-industrial countries such as the UK effectively out-sourcing its pollution – and to a great extent its waste disposal – to less developed nations. The public interest in the environment has grown, though it is probably still patchy, and (as the RCEP noted in the 1980s) to a large extent formed by mainstream media. It has been, however, encouraging to see the explosion of concern by young people for their future and that of their environment.

That was then (the start of 2020, when news reports began to emerge of a new virus in China). Now is the surreal world of now, with large parts of the world's population confined to home, with airlines standing idle, air and water in many places cleaner, wild goats roaming the streets of Llandudno, and the mother and father of all economic problems facing all governments and society.

As 'normality', whatever that form may take, starts to reassert itself, it is intriguing to speculate how this is going to play out. The optimistic view might be one of change towards a more sustainable and equitable way of life. The pessimistic view would be one of a society bent on getting back to business as usual, with wrecked economies allowing little consideration for environmental 'constraints', and intolerance of environmental activists seen to be obstructing economic revival or the resumption of former hedonistic lifestyles. The truth may be somewhere between the two, but the fact is that we are at a fundamental, and dangerous, crossroads.

Are there, then, any lessons to be learnt from the wisdom of Sir Richard Southwood and his distinguished colleagues[11] on the RCEP? In my view, yes.

First, the early 1980s were a time of economic peril. In January 1980 the U.S. economy entered a recession that, at the time, was the most significant since the Great Depression. There was a serious surplus of crude oil caused by falling demand following the 1970s energy crisis, resulting in a six-year decline in the price of oil. In the UK, Prime Minister Thatcher took office at a time of economic crisis. The RCEP noted the

considerable change in the economic climate, presenting the issue of 'not so much how to curb the effects of unbridled growth but to ensure a return to steady economic and technical development in parallel with continued protection of an improvement to the quality of the environment'.[12]

Secondly, the RCEP, in an extended discussion on public attitudes, began with a quotation from Adlai Stevenson, Democratic Presidential candidate and later US Ambassador to the UN, 'Government ... cannot be wiser than the people.' The public often gets the leaders and the policies it deserves, but as the Commission pointed out, in forming its opinions 'the public is heavily influenced by what it learns from the media and other sources [the internet and social media were of course for the future] and by the ways in which the issues are presented'.[13]

Thirdly, the RCEP recognised the growing importance of international cooperation. It worried that the UK had harmed its international standing by its reluctance to accept majority views within the European Community and urged the UK to give a greater lead internationally.[14] It recalled the terms of the original 1972 Declaration at the European Council of Ministers which inaugurated the first Community Environmental Action Programme: 'Economic expansion is not an end in itself ... It should result in an improvement in the quality of life as well as in standards of living'.[15]

These three issues, it seems to me, go to the heart of what needs to happen in the post-Coronavirus era. It cannot, and must not, simply be business as usual. Economic regeneration must be linked with a massive re-orientation of industry and the economy. The fact that governments have intervened in the market to levels previously unimaginable must present opportunities – and precedents – for the intervention necessary to bring about the shift required. It cannot simply be left to markets: there is no guarantee they will deliver, or deliver in the timescales needed.

However, this will need the support of the public. We must at all costs avoid governments being driven by short term and selfish populism. Media and social media are of critical importance. The current pandemic has shown that people are willing to make severe sacrifices in the common good. The case is going to have to be made for constraints on unsustainable personal behaviour (travel, food, fashion, etc) to secure a future for the planet and for our grandchildren. This will not be easy, but will be essential.

Climate change and other global environmental challenges are not going to be addressed by the UK, or any other nation, alone. Some nations however are obviously critical to success – the US, China, Brazil,

India. The UK can no longer exert influence through its membership of the EU – its influence and importance alone may be relatively insignificant. But it is vital that it assumes what leadership and influence it has. While the UK's direct emissions may be small, its indirect, supply chain emissions must not be overlooked. As *Time Magazine* noted in a perceptive article:

As the world's manufacturing hub, China is in a unique position to change the course of global emissions. In most industrial sectors, 75% of greenhouse-gas emissions are produced from the supply chains. In a globalized world, this means China's emissions are generated to meet more than just its own rising demand. Research conducted by the Carbon Trust found that China is the world's largest emitter in the apparel sector, but 72% of those emissions are essentially the responsibility of companies overseas where the products are exported and sold.[16]

It is trite to observe that we are living through history. Another common observation is that 'history is just one damned thing after another'. What we need to do seems clear, as it was in 1984: the case must be made for massive and sustained investment in carbon reduction technologies, energy efficiency, the reduction of demand for unsustainable consumption, the replacement and phasing out of environmentally harmful chemicals and materials. Only in that way can the quality of life, as well as standards of living, be secured. Somehow, the international challenge of raising large parts of the world's population out of dire poverty, without wrecking the planet, will need to be achieved. Lawyers alone cannot of course bring that about. But we are in a good position to play a significant role, particularly if we can work in smart ways with scientists, behavioural experts, educationalists, the media and politicians, as well as our legal colleagues in other jurisdictions. I very much hope that UKELA will debate this and take a lead in the coming months and years.

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Endnotes

- 1 Cmnd. 9149, February 1984.
- 2 Cmnd. 8852, April 1983.
- 3 Third Report, Cmnd. 5054, September 1972.
- 4 Fifth Report, Cmnd. 6371, January 1976.
- 5 Sixth Report, Cmnd. 6618, September 1976
- 6 Eighth Report, Cmnd. 8358, October 1981.
- 7 Para. 2.46.
- 8 Para. 4.59.
- 9 Paras. 5.63 – 5.66.
- 10 Para. 5.130.
- 11 Which included Lord Nathan, then senior partner of a London law firm and later to be UKELA President, after whom UKELA's Lord Nathan Memorial Fund for the Environment which raises money to help maintain and update the public information website, *Law and Your Environment*, is named.
- 12 Para. 1.19.
- 13 Para. 2.23.
- 14 Para. 1.24.
- 15 Para. 3.8.
- 16 *How China Can Truly Lead the Fight Against Climate Change*, September 12, 2019. Available at: <https://time.com/5669061/china-climate-change>.

Covid-19 and the business of the courts and tribunals in environmental cases



Ned Westaway and Esther Drabkin-Reiter

At a glance

- COVID-19 has forced a digital revolution in courts and tribunals and required the rapid development of new protocols and practices.
- Many hearings are now proceeding using remote technology. For others, arrangements are being discussed.
- Jury trials, cross-examination and site visits are particular outstanding difficulties.
- The position is evolving: hyperlinks to the latest guidance as of 20 May 2020 are provided below.

Introduction

On 19 March 2020, a week before 'lockdown', the Lord Chief Justice issued a [message](#) to all judges in the civil and family courts: the default position in all hearings must be that 'one, more than one or all participants' appear remotely. Otherwise 'access to justice will become a mirage'.

Keeping the business of the courts and tribunals going throughout the crisis is obviously important both to maintain justice and to avoid an excessive backlog of cases when restrictions are eased. Two key tensions are (i) ensuring parties can properly prepare and present their cases in a remote (or physically distanced) environment and (ii) maintaining open justice and (where applicable) public participation.

Other than HMCTS [guidance](#), there has been little central co-ordination of the judicial response. The approach adopted by different courts and tribunals varies.

This note covers courts and tribunals in England and Wales but the issues will be relevant to the devolved administrations. Guidance on proceedings in [Northern Ireland](#) and [Scotland](#) is available online. The courts and tribunals relevant to environmental claims fall into five main categories:

- Civil courts;
- Criminal courts;
- Magistrates' courts;
- Tribunals; and
- The Planning Inspectorate.

A [list](#) of open, staffed and suspended courts and tribunals in England, Wales and Scotland is being updated regularly.

1. Civil Courts

Practice Directions and Protocol

Three new [Practice Directions](#) have been introduced, the most relevant being:

- [PD 51Y](#): permits courts to direct that a video or audio hearing will be held in private.
- [PD 51ZA](#): permits parties to agree extensions of time for procedural steps for up to 56 days.

Private remote hearings are now the norm. On 26 March 2020, senior members of the judiciary issued a [Protocol](#) regarding remote hearings in civil cases. The Protocol states that remote hearings should as far as possible be public. The ways that are envisaged are by the relaying of audio in an open court room (although as far as the authors are aware, this has not been used), media attendance and/or the broadcasting of hearings. Any recording or transmission of a broadcast hearing is an offence.

High Court

Urgent business

The High Court has put in place a [Business Contingency Plan](#) for maintaining urgent hearings. Individual courts will deal with all other hearings according to their own procedures.

Queen's Bench Division

The Queen's Bench Division has issued a number of guidance documents.

- [Bulletin 1](#) explains that hearings are being conducted by telephone conference or Skype. If a party is unable to use these, an adjournment should be sought. To accommodate the backlog of adjourned hearings cases will be listed in July and the Long Vacation. Documents should be filed electronically and an electronic bundle must be provided in accordance with court guidance.
- [Bulletin 3](#) clarifies that documents requiring signatures must be signed and scanned or signed electronically.

Interim Applications Court

The Interim Applications Court (Court 37) is closed. Documents must be filed electronically in accordance with [guidance](#).

Administrative Court

The Administrative Court Office is closed and documents must be filed electronically in accordance

with [guidance](#). As of 19 May 2020, non-urgent cases documents must be uploaded online via a new Document Upload Centre. Cases will continue to be considered on the papers and listed for hearing, although there may be delays in relation to non-urgent business. Most, if not all, hearings will be conducted by Skype or phone.

Planning Court

By an email of 8 April 2020, Mr Justice Holgate, the Planning Liaison Judge, circulated by email a list of ‘top tips’ for advocates. The key points raised included the following.

- 1 Skeleton arguments should be succinct skeletons, cross-referenced to key passages in the bundle and accompanied by an agreed, focussed list of essential reading.
- 2 Bundles should be limited to material which really is essential for the legal argument on both sides (what Lord Carnwath once called a “micro-bundle”).
- 3 Bundles of authorities should be similarly confined.
- 4 Good indices are essential, with a single set of numerical, continuous pagination and hyperlinks.
- 5 Parties should review the merits of their cases and abandon points which do not have worthwhile merit as far in advance of the hearing as possible; similarly defendants should indicate if they intend to submit to judgment at the earliest opportunity.

Court of Appeal (Civil Division)

The Civil Appeals Office is only dealing with [urgent](#) applications as defined in [guidance](#). However, applications in non-urgent cases are being accepted and processed as capacity is increased. As with the High Court, all documents should be filed electronically.

Hearings are currently being heard remotely, but the live streaming of appeals (using the facilities in court) has been suspended.

Supreme Court

The Supreme Court building closed on 20 March 2020 and will remain closed until further notice.

[Guidance](#) indicates that hearings which are already listed are going ahead as planned using video conferencing facilities and are being live streamed on the website in the usual way. Judgment hand downs also continue to be streamed on the court website. New cases have recently started being listed for hearing.

Applications for adjournment and extensions of time

While PD 51ZA (above) allows for extensions of time, the courts will not adjourn hearings due to Covid-19 unless there is a very good reason to do so.

The High Court has delivered two recent judgments on this. [Re One Blackfriars Ltd \(In Liquidation\) \[2020\]](#)

[EWHC 845 \(Ch\)](#) is a private claim for over £250 million damages that was set down for a five week trial from 8 June 2020 involving four live witnesses of fact and 13 expert witnesses. Deputy judge John Kimbrell QC refused the claimants’ application for an adjournment. On practical difficulties, he said at para.39(c) that:

... if immovable obstacles do exist in relation to the participation of one or more experts, I would expect the parties to co-operate and to propose ways in which issues which can be tried without the involvement of those particular witnesses.

While he did not doubt ‘the technological challenges’ he said that the parties must co-operate and plan ‘in seeking remote trial platforms and document handling systems’ (para.50).

[Municipio de Mariana v BHP Group Plc \[2020\] EWHC 928 \(TCC\)](#) arose from the collapse of the Fundão Dam in Brazil in 2015 which released toxic material and contaminated water affecting over 200,000 individuals. Two of the defendants’ applications for strike out were due to be heard in June. They applied to extend time for service of replies to the claimants’ evidence by five or six weeks due to practical difficulties caused by the Covid-19 pandemic. The extension would have necessitated vacating the hearing.

HHJ Eyre QC accepted that even allowing for the use of technology, the defendants had made a compelling case as to the difficulties of remote working and the need for extra time.

The Judge articulated the relevant principles at paras. 24 and 32. He emphasised the importance of the continued administration of justice and the negative impact of delay. The possibility of a remote hearing should be rigorously examined on a case-by-case basis and litigants should not shy away from remote hearings. The court must also be prepared to be flexible in accepting evidence that might be less polished or focused than usual.

These cases illustrate the potential compromises that parties may have to make to ensure that hearings go ahead, including very possibly limiting the role of cross-examination.

Fewer difficulties arise for Administrative Court claims due to the general lack of contested evidence. The authors’ experience is that public law cases are not generally being adjourned, and some are even being expedited.

Conclusion

There is a strong presumption in favour of remote hearings, which necessitates greater co-operation between the parties. Electronic bundles must be relatively concise, searchable and hyperlinked. The

Planning Court's 'top tips' are a good general reference point. However, guidance makes clear that how hearings are managed and heard is a matter ultimately for the judge allocated to hear the claim. There is, as yet, no overarching model. It may be that a more unified approach emerges in due course, but at present, the key attributes are flexibility, co-operation and good communication with the judges' clerks.

2. Criminal Courts

New provisions and Criminal Procedure Rules

A number of procedural statutes and the [Criminal Procedure Rules](#) were amended by the Coronavirus Act 2020 and Criminal Procedure (Amendment No. 2) (Coronavirus) Rules 2020. These provisions enable the court to direct all parties and attendees (with the exception of members of the jury) to give evidence or attend via live audio or video link, if it is in the interests of justice to do so. Amendments also include enabling Magistrates' courts to sit at different locations where suitable facilities for receiving live link evidence are otherwise not available.

Crown Court

New jury trials were suspended on 23 March 2020 but have now [resumed](#) in a few courts under special arrangements.

Non-jury hearings continue, many of which are being done remotely, including sentencing hearings and all urgent applications. Pre-trial preparation hearings and further case management hearings are also taking place remotely.

Court of Appeal (Criminal Division)

The Criminal Division of the Court of Appeal is focussing on [urgent](#) applications, having regard to e.g. expected release date and vulnerability of appellant/applicant. All applications and documents should be lodged electronically, but if this is not possible, drop boxes in the RCJ may be used.

Where possible, cases are being heard by telephone or video (HMCTS's Cloud Video Platform, not Skype or Zoom). A small number of in-person hearings are proceeding.

3. Magistrates' Courts

[Guidance](#) issued on 14 April 2020 confirms that attendance of parties and witnesses at court should be avoided where possible and arrangements made for participation through live or audio link.

A list of priorities for Magistrates' courts will be applied when making decisions on whether and when to list cases. Civil applications in relation to public health legislation are in the highest priority category.

In the authors' experience, non-urgent regulatory cases are being adjourned by agreement, while more

pressing matters are being dealt with at hearings in person. Social distancing measures are in place at court buildings, including taping off waiting areas and restrictions on the number of people permitted in a court room. However, practical difficulties arise given the number of cases allocated to a court list (and the correspondingly large number of advocates and parties attending) and the potential for a long wait at court before a case comes on.

4. Tribunals

Upper Tribunal (Lands Chamber)

The latest version of [Presidential Guidance](#) on the conduct of proceedings during the Covid-19 pandemic was issued on 1 May 2020. This should be read alongside the [Pilot Practice Direction](#) on contingency arrangements and the [Pilot Practice Direction](#) on video/audio hearings.

The Presidential Guidance sets out principles for determining whether a case should be decided on paper, by a remote hearing or be postponed. For example, appeals from the First Tier Tribunal, where there is no need for oral evidence, will usually be capable of being dealt with remotely. Cases where the issue depends on the evidence of one expert on each side may also be heard remotely, but more complex cases are being postponed (but not indefinitely). The need for site visits may be a relevant factor in determining whether a remote hearing is fair and practicable.

On matters such as electronic bundles and arrangements for remote hearing, the guidance is similar to the High Court.

First Tier Tribunal (General Regulatory Chamber)

The Pilot Practice Directions also apply to the First Tier Tribunal.

A [Pilot Fast Track Protocol](#) was issued on 23 March 2020 to enable certain appeals to be dealt with more speedily than normal. Designated appeals for this process include challenges to Stop Notices under the Environmental Civil Sanctions (England) Order 2010 and 'any other appeal at the direction of the Chamber President, where the nature of the appeal is such that standard case management would frustrate the purpose of the appeal or would adversely disrupt the business continuity of a party in the case'.

As of 1 April 2020 all freedom of information proceedings, including those under regulation 18 of the Environmental Information Regulations 2004, have been [stayed](#). The initial stay has now been extended to 27 May 2020.

Further [guidance](#) was issued on 14 April 2020 to the effect that:

- All face-to-face hearings listed until the end of June 2020 have been postponed.
- Parties are being asked to consider whether they would like their appeals to be determined on paper, by Skype or by telephone.
- Cases are being prioritised according to the Pilot Fast Track Protocol.

5. Planning Inspectorate

On 24 March 2020 the Planning Inspectorate (PINS) postponed all casework, including site visits, hearings and inquiries. That [remains](#) the general position.

However, progress is being made. Cases where no physical events are necessary are progressing as normal and PINS has issued over 1,700 decisions since 'lockdown'. Case management hearings for future inquiries are continuing. New cases are being registered and progressed as far as possible.

A significant [news item](#) posted on 28 April 2020 confirmed the approach which will be taken regarding PINS' next steps:

- A first fully digital pilot hearing is to take place on 11 May 2020.
- Preparation is being made for additional cases to be heard by digital hearings/inquiries in May/early June with 'scaling up' over June/July.
- Postponed cases are being assessed, and consideration given to whether they can proceed by 'digital, traditional or a "hybrid" approach'.
- 'Virtual site visits' are being trialled.

Further [guidance](#) has also now been published.

It seems likely that a new model for remote hearings and inquiries will emerge later this year which may be of a wider scope than the current crisis. It is understood that a three-week local plan examination is soon to proceed by way of remote hearing. PINS is also rearranging development consent order (DCO) examinations to proceed remotely (and extending examination periods accordingly), although exactly how these will proceed has not been confirmed.

Final reflections

Digital hearings and remote working present an enormous challenge for professionals working in environmental law. However, at least where the number of parties is limited and the evidence relatively confined, hearings have been proceeding both efficiently and effectively.

As this note demonstrates, there is already a large amount of guidance available to assist practitioners. Public hearings and more complex cases present a much greater challenge, but systems and practices will have to develop to mitigate the limitations of digital technology and any potential unfairness.

For courts and tribunals, Covid-19 has forced a digital revolution and required the rapid development of new protocols and practices.

For advocates, remote hearings can feel like an entirely new experience, involving some fundamental rethinking of the art.

What seems clear is that the lessons and skills learned by lawyers during this current pandemic will have a practical applications that long outlast it.

Ned Westaway and Esther Drabkin-Reiter are barristers at Francis Taylor Building.

Health and biodiversity

Part I: Wild diseases

Nina Seale

[Originally published by Synchronicity Earth, May 5 2020](#)



As the COVID-19 pandemic has put both our health systems and our relationship with nature in the spotlight, Nina Seale investigates the relationship between health and biodiversity.

Let's begin with the elephant in the room: diseases that have transferred from animals to humans. Not just COVID-19, but Severe Acute Respiratory Syndrome (SARS), HIV, bird flu (H5N1), Ebola, swine flu, malaria, Lyme disease and rabies are some of the most well-known infections humans have picked up from wildlife (known as zoonotic diseases).

Trade in wildlife for uses such as consumption and medicine are thought by many scientists to be responsible for the emergence of COVID-19 in 2019 ([potentially from the Huanan Seafood Wholesale Market in Wuhan](#), which is thought to have been selling wildlife including snakes, porcupine and deer); SARS in 2002 (thought to have transferred to humans from masked palm civets and/or raccoon dogs which were being sold for consumption in Guangdong's animal markets); Ebola (consumption of raw bushmeat (infected fruit bats, monkeys, apes, forest antelope or porcupines) in West and Central Africa); and HIV (HIV-1 is thought to have infected chimpanzee hunters for the bushmeat trade and HIV-2 from Sooty mangabey monkeys, which are hunted and kept as pets). Livestock has also been traced as a source in the case of the Middle East Respiratory Syndrome (MERS) coronavirus outbreak in 2012, which transferred to humans handling domesticated camels or possibly from consumption of raw camel products like unheated milk.

Why bats?

With the exception of HIV, there is evidence that all of the above viruses originated in bats, and were then passed to intermediary animals (possibly pangolin for COVID-19, civets for SARS, camels for MERS etc.) before they infected humans. Bats are thought to be ripe for the rapid evolution of viruses into highly aggressive strains due to their [fierce immune response](#) (which possibly evolved as [a result of bat flight](#), but that's a fascinating conversation for another time). Viruses adapt to reproduce quickly, which bats can tolerate but these high viral loads then become extremely infectious when bats (or bat droppings) come into contact with other species. Therefore, in a species where the immune response is not nearly as high as a bat's (like humans), it is extremely aggressive, leading to outbreaks of severe and highly infectious viruses like COVID-19.

There are [conservation implications for bats](#) as a result of being reservoir species for viruses. A predictable response is that human populations affected by a disease which originates in bats will call for large-scale culling of wild bat colonies. This happened when Hendra virus emerged in Australian flying fox populations and in Latin America, where vampire bats are culled as an attempt to control rabies. However, instead of dealing with the problem, this approach has been shown to have the opposite effect. For example, [a study](#) of the relationship between vampire bat culls and rabies transmission in Peru found that the size of a bat population barely affected rabies transmission. Plus the culling techniques disproportionately killed adult bats, who are less likely to transmit viruses than young bats, and this also caused greater movement between colonies – spreading viruses more widely.

A better response could be mediated using conservation techniques such as community outreach about the importance of bats as pollinators, seed dispersers and pest controllers, therefore the value of protecting them and their habitat, as well as the dangers of bat capture and consumption – and the danger of any supposed bat control techniques that in fact makes these animals move around more, thus increasing the chances of them spreading disease. Habitat conservation is also extremely important; in Central and South America, the conversion of forested habitats into pastures shifted the dominant food source for vampire bats from native vertebrates to livestock. This increased rabies transmission from vampire bats to livestock and domestic animals, and consequently humans.

Conservation solutions

The current pandemic has brought conversations with conservationists about disease control [into mainstream media](#). If more than 70% of all emerging diseases affecting people have originated in wildlife and domesticated animals, could conservation provide solutions to preventing future outbreaks?

The short answer is yes. Conservation preserves biodiversity, and biodiversity itself shields us from the spread of diseases through a mechanism called the [dilution effect](#). In a richly diverse ecosystem, intermediary species which are not very infectious (so are less likely to pass on a zoonotic infection such as a coronavirus) are likely to outnumber intermediary species and individuals which are highly infectious, diluting the rate of infection. There are lots of other aspects to this, such as an intact food chain in a

healthy, diverse ecosystem where predators will control the numbers of more infectious animals (such as rodents, ticks, etc.).

In addition to the diluting effect of biodiversity, many of the factors which have led to the transmission of zoonotic diseases from wildlife to humans (including COVID-19) are being tackled by conservationists: habitat loss and degradation, industrial agriculture, unsustainable, illegal and/or unregulated wildlife trade, and the vulnerability of communities living alongside wildlife, to name just a few.

Habitat loss and degradation

Habitat loss and degradation (when a habitat is degraded so far as to lose most of its biodiversity due to human activities such as pollution, development, agriculture, livestock farming, war etc.) causes animals to live in smaller and smaller spaces. This makes it easier for diseases to spread through populations as well as causing them stress, which can compromise their immune systems.

A lack of habitat also means a lack of food, which can cause animals to leave their home ranges to look for alternatives, and when there is a lack of connecting habitat, this often forces them to enter human-inhabited areas. This increases the likelihood of wildlife-human disease transmission, but also wildlife-intermediary-human transmission through domesticated animals such as pets ([free-ranging dogs](#) are a well-known intermediary host for zoonotic diseases) and livestock. The conversion of natural habitats to land for human uses also rarely takes into account the 'edge' effect – where fragmenting natural habitats into unconnected 'pieces' spread across a landscape increases the amount of edges there are which form 'contact zones' between humans and wildlife where disease transmission may occur. Another angle to the correlation between habitat loss and increased disease transmission is that the species which are more likely to survive disruption (for example, [rats and some bats](#)) are also the ones which are most likely to promote transmission. By losing other species in the ecosystem, natural control systems like predation and competition are lost and these species thrive.

But by conserving habitats and restoring degraded areas, we can reduce this risk. Conservation NGOs, local communities and governments have already implemented [habitat protection models](#) such as protected areas, national parks, community conservancies and indigenous-managed conservation areas – they just need to be supported and scaled up. These also have the additional benefits of cleaner air and water, less human-wildlife conflict (especially when protected areas are part of greater connected networks) and recognising and compensating communities and indigenous peoples for their role.

The expansion of industrial agriculture

One of the driving causes of habitat loss is the expansion of industrial agriculture, which has severe consequences for disease transmission. This [study](#) found that a quarter of all diseases- and half of all zoonotic diseases- that emerged in humans could be traced back to agricultural causes.

The dam, reservoir and irrigation networks created to support industrial agriculture frequently increase local populations of water-borne disease hosts (like mosquitoes for malaria or snails for schistosomiasis). The widespread overuse of anti-parasitic and antibiotic drugs in industrialized livestock and aquaculture operations is causing increased resistance to these drugs, some of which are also used in human medicine. In addition, the vast amount of pesticides used inevitably enter the food or water supplies of wildlife and local people, which can compromise their immune systems and leave them more vulnerable to disease. The last touches on the vulnerability of communities living in areas between remnant forests and industrial agriculture, where healthcare is often insufficient, but risk of infectious diseases is high.

Good conservation practice is not just about creating an environment which best suits wildlife, but also making sure that these interventions support local communities and their needs. The evident overlap between biodiversity, land use and healthcare shows how interdisciplinary conservation needs to be. The speed of the transition many of Synchronicity Earth's partners have made [from traditional conservation work to supporting communities](#) in the current health crisis shows how many local conservation organisations already understand this.

This is also why we support organisations advocating [agroecology](#), a far more sustainable alternative to industrial agriculture which preserves the soil, water, plants and biodiversity surrounding food production rather than exploiting or eliminating them. Rotating two or more crops in a field, growing a variety of crops, managing soil and nutrients and [other sustainable methods](#) offer a far more secure future than chemical overuse and soil depletion, with added benefits to health and biodiversity as well as food security.

Wildlife trade

Alongside habitat loss and disease, one of the biggest threats to biodiversity tackled by conservationists is the global wildlife trade. As a response to the COVID-19 pandemic and its likely transmission to humans from pangolins (the most trafficked mammal in the world) in a wet market, China recently announced [a ban on consuming wild animals](#) (though there are issues with enforcement and wildlife use for traditional medicine was not mentioned). Many conservation organisations are calling for even

greater, global action, with conservation and animal welfare groups asking leaders of the World Health Organisation (WHO) to take action "[to permanently end the commercial trade and sale in markets of wild terrestrial animals, for consumption, worldwide.](#)"

However, other conservationists [have urged caution](#). Even though it is acknowledged that the wildlife trade needs a global review, they say it is far too complex for a ban to fix, and a global trade ban in response to COVID-19 could have devastating impacts on communities relying on wildlife markets for affordable food or dependent on wildlife trade for their livelihoods. Some of the [alternative responses](#) suggested are targeting strategies to reduce disease transmission in areas with the highest risk; building partnerships between international agencies for environment (the United National Environment Programme, UNEP, and the International Union for Conservation of Nature, IUCN), health (WHO, World Organisation for Animal Health, OIE) and food (Food and Agriculture Organisation of the United Nations, FAO and the World Trade Organisation, WTO); and raise intergovernmental awareness of the risks to human health associated with biodiversity loss.

In a [nuanced op-ed](#) for *The Independent*, the acting executive secretary of the UN Convention on Biological Diversity (CBD) Elizabeth Maruma Mrema said that a ban may also "inadvertently exacerbate risk, by driving an underground market for the illegal trade of species used as food and medicine." She advocates the "One Health" approach, where the intimate relationships between the health of wildlife, livestock, the environment and people is acknowledged and compensated for in decision making.

One Health

The interconnected nature of human health with that of all other life with which we share our planet is a consistent theme which has arisen during the research for this series on health and biodiversity, which has only scratched the surface. Creating barriers which separate sectors for environment, health and food makes these fundamental issues compete with each other for funding and action when, in reality, they should be developed together. A similar barrier is created just by saying the word 'nature'- implying that we exist outside the natural world, when actually we are greatly affected by it, as it is by us. Maybe one world-changing outcome we can hope for when we emerge from the current crisis binding our global community together is an understanding that human health, wildlife health and planetary health, are in fact one health.

Synchronicity Earth's next Health and Biodiversity piece moves away from wild diseases to wild medicines – focussing on some of the evolutionary innovations which have led to medicinal breakthroughs. [Have a read >>](#)

Nina joined Synchronicity Earth in May 2019 as Engagement Assistant after three years of working for wildlife conservation charity World Land Trust. She was introduced to field conservation in South Africa, where she was a safari guide, and this inspired her to study Zoology at the University of Edinburgh. Her passion for wildlife is only seconded by her love for writing, and her niche is sharing conservation stories to inspire further action for wildlife. Outside the office, she is working on a novel set in a climate change dystopia, and loves climbing, diving and hiking.

Matters in practice

Aarhus Compliance Committee turns up the heat on legal costs

Carol Day and Will Rundle



At a glance

- In 2009, the Aarhus Convention Compliance Committee found the UK in breach of Article 9(4) of the Aarhus Convention (the requirement that environmental claims be 'not prohibitively expensive').
- Following this, Decision VI/8k¹ was adopted and set out the steps required for UK compliance with Article 9(4).²
- This article provides summary findings resulting from the Aarhus Convention Committee's report on the UK's Second Progress Review.
- This article also highlights concerns following the report on the UK's Second Progress Review over future proposals for judicial review from an English and Welsh perspective, concluding on what this could mean for the future.

Introduction

Those familiar with the Aarhus Convention³ will know that the UK is a regular 'guest' before the Aarhus Convention Compliance Committee (the Committee). One of the longest running UK Communications (as complaints before the Committee are known) concerns the issue of costs. In 2009, the Committee found the UK in breach of Article 9(4) of the Aarhus Convention regarding the requirement that environmental claims be 'not prohibitively expensive'. In 2017, the last 'Meeting of the Parties' to the Aarhus Convention adopted Decision VI/8k setting out, in broad terms, the steps required for the UK to comply with Article 9(4).

In September 2019, the UK submitted its Second Progress Review on the implementation of Decision VI/8k to the Committee⁴. Those of us following the UK's progress submitted detailed comments to the Committee⁵ and on 6 March 2020, the Committee published its own review.

This article summarises the Committee's report on the UK's Second Progress Review, reflects on the UK's longstanding non-compliance, and highlights concerns over future proposals for Judicial Review in England and Wales.

The Committee's Second Progress Review on Decision VI/8k⁶

Having been previously criticised as light on detail, it was pleasing to see more heft to the UK's Second

Progress Review. However, while welcoming limited steps forward and a more constructive approach, the Committee was highly critical of the UK's general lack of progress.

To summarise the main findings for England and Wales:

- **Type of claims covered** – despite welcoming the extension of Aarhus costs protection to challenges brought under s.288 of the Town and Country Planning Act 1990⁷ (as of 1 October 2019), the Committee noted that other types of claims, such as private nuisance (or other private law) claims, are still exempt from Aarhus costs protection, and so the UK fails to comply.
- **Eligibility for costs protection** – while noting concerns about the ambiguity of the level of the cap applying to individuals acting on behalf of unincorporated associations, the Committee found no evidence of non-compliance in relation to the status of the association *per se*, but evaluated the issue with regards to the level of caps in general (see more on this below).
- **Level of the costs caps (including default levels; possibility to vary the caps)** – the Committee 'remains unconvinced that Civil Procedure Rule [sic] 45.44(2) creates sufficient certainty for claimants in practice'⁸ and reiterated that the levels of default costs caps given (£5,000 (individuals) and £10,000 (organisations)), can be prohibitively expensive for many claimants in any event. For a claimant cap variation to be acceptable it should only be downwards to account for this. The Committee then noted that the current trend is for those caps to be varied almost exclusively upwards. It maintained concerns about the possibility that cap variation may also be contrary to the requirement in Article 3(1) to establish a clear, transparent and consistent framework to implement the Convention. The Committee invited the UK to include information on this in its final report in Autumn 2020.
- **The procedural stage at which a variation may be sought** – the Committee expressed concern that applications were happening, or the matter was being resolved, late in proceedings. It noted an example of this happening even after hand-down of judgment. The Committee therefore held: 'the possibility for defendants to apply to vary cost caps during proceedings, and even after judgment,

fails to guarantee sufficient certainty for claimants⁹, and that as a result, the UK had failed to demonstrate progress in meeting Aarhus Convention requirements.

- **Costs for procedures with multiple claimants** – the Committee continues to see ‘no basis’¹⁰ for a rule requiring separate costs caps for multiple claimants. Moreover, the UK’s argument that the rule requiring a separate costs cap per claimant provides fairness to defendants is flawed, because the concept of ‘fairness’ in Article 9(4) refers to what is fair for the claimant, not the defendant. Again, the Committee concluded that the UK has made no progress towards meeting the requirements of Decision VI/8k regarding procedures with multiple claimants.
- **Costs protection on appeal** – despite noting CPR 52.19A allowed the court to consider afresh the matter of ‘prohibitive expense’ on appeal, the Committee remained unimpressed:
 - as it has previously made clear ... the lack of a maximum costs caps in CPR 52.19A fails to ensure sufficient clarity or costs protection for claimants ... In this regard, the Committee notes that there is nothing which would prevent or dissuade defendants from seeking costs caps for claimants on appeal which are higher than those established under CPR 45.43 to 45.45... costs to be ordered on appeal, including any possible costs caps that may be introduced into CPR 52.19A must recognize that the requirement not to be prohibitively expensive applies to the procedure as a whole, encompassing all stages of the procedure.¹¹
 - It remains the Committee’s clear view that there should be a maximum cap applied for all stages which is not duplicated or raised on appeal (reinforced by their other finding on variation only being downwards).
- **Privacy concerns regarding applications for costs protection** – in light of concerns that certain conditions must be met for hearings on cost caps to be held in private, and that this may have a chilling effect by adding an extra procedural hurdle in order to prove a private hearing is required. The Committee invited the UK to monitor the situation and provide an update in its final progress report.
- **Costs protection prior to grant of permission** – in light of the UK’s assertion that the Aarhus cap covers all costs recoverable by either party, including any pre-action costs, the Committee held that the UK has met the requirements of the Decision regarding costs protection prior to the grant of permission.
- **Costs for unsuccessful challenges to the status of an Aarhus Convention Claim** – the UK acknowledged that changes to the CPR introduced in February 2017 reducing the costs payable by defendants could lead to more defendants

challenging the status of a claim as an Aarhus claim, and so deter claimants from bringing claims at all. However, it argued that the amended rule still provides an appropriate disincentive against unmeritorious challenges, and that courts can still decide to impose costs on an indemnity basis. Nevertheless, the Committee maintained its view that the 2017 amendment ‘has moved the Party concerned further away from meeting the requirements’¹² of the Decision with respect to the costs related to the determination of an Aarhus claim.

- **Cross-undertakings for damages** – the Committee could not assess whether the UK has made progress on this issue due to a lack of data since the 2017 CPR amendment. The Committee invited the UK to report on this in its final report.
- **Costs orders against or in favour of interveners and funders of litigation** – the UK argued that a potential intervener can apply to become a party to judicial review proceedings and would thereafter have the benefit of the Aarhus Convention costs cap, but the Committee considered this would simply add costs for all parties to the proceedings. The Committee concluded the UK has ‘not yet made progress towards meeting the requirements’¹³ of the Decision with respect to costs orders against (or in favour of) interveners and invited the UK to report further in its final report.

Finally, in light of the UK’s indication that it would review its environmental costs protection regime in April 2020, the Committee invited the UK to address the above points and include any conclusions and recommendations in its final progress report to the Committee.

Reaction to the Committee’s Review

The Committee’s considered and balanced review provides yet further strong condemnation of the UK’s ongoing non-compliance with the Aarhus Convention. The 2013 regime designed to address the issue of prohibitive expense in environmental claims – whilst not perfect – has been consistently undermined by subsequent legislative changes, thus weakening the UK’s ability to comply with the Aarhus Convention. Of this there can no longer be any doubt given the Committee’s review, if there ever was.

The issues summarised above are not insignificant either. They collectively amount to broad systemic failings that make the litigation process harder for environmental claimants. The lack of compliant cost protection undermines public interest litigation on the environment.

Some of the most glaring and longstanding problems revolve around central aspects. For example: the levels of cost protection being too high in some cases, a

basic lack of certainty in the system as a whole, misguided rules to provide fairness for defendants where not permissible (such as with reducing costs liability for defendants in challenging claim status; also in the highly problematic reciprocal caps place on what a claimant can recover when it wins – making it ‘too expensive to win’ cases on occasion).

The reasons for this intransigence are unclear, but the objective reality is that successive governments have worsened the opportunity for challenge by the general public. This is the case despite the absence of any evidence that environmental claims are prolific, vexatious or hopeless (in fact environmental claims perform roughly twice as well as judicial reviews in general¹⁴). Whilst litigation may be seen as an inconvenience by some in government, the recent Heathrow judgment illustrates the importance of cases in which state power is checked, thereby maintaining public confidence in the justice system, the rule of law, and environmental governance in the UK.

The Committee’s Review confirms that, unfortunately, the public does not yet have the legal system it is entitled to.

What does this mean for the future?

With the government’s desire to ‘reform’ judicial review yet further, as seen in the Conservative Party’s manifesto¹⁵ and recent media articles, it can only be speculated whether that will be positive or even worse for environmental claimants. However, if the track record on review of environmental judicial review is to be concerned, and as noted in the Committee’s latest report, we should be concerned to scrutinise any proposals very carefully indeed.

It is now over a decade since the UK was found to be in non-compliance with the Aarhus Convention on costs. If the UK’s final progress report fails to make good, the Government will need to weather increased political embarrassment in the international arena and face the possibility that a UN-backed Committee may escalate the implementation of its findings. We hope the case for improved environmental governance at a time of a declared climate emergency is clearly understood, and that legitimate concerns over future ‘reform’ will not materialise – but only time will tell. Certainly, until the UK meets its legal commitments under the Aarhus Convention it cannot claim to provide world leading environmental governance as it leaves the EU.

Carol Day is a part-time legal consultant for the RSPB and Chair of Wildlife & Countryside Link’s Legal Strategy Group. Her work for the RSPB is focused on access to environmental justice.

Will Rundle is Head of Legal at Friends of the Earth (England, Wales and NI branch). He leads a cross-cutting team of environmental lawyers campaigning for environmental justice and a better future for us all.

Endnotes

- 1 Decision VI/8k available [here](#)
- 2 There were two previous Decisions before this – Decision V/9n (available [here](#)) and Decision IV/9i (available [here](#)) arising from MoPs in 2014 and 2011 respectively
- 3 Text of the UNECE Aarhus Convention available [here](#)
- 4 The UK’s Second Progress Report can be found [here](#).
- 5 The RSPB, Friends of the Earth and Friends of the Earth Scotland submitted a detailed response to the UK’s Second Progress Review. This included a Report based on data on JR obtained from the Ministry of Justice for JR in England and Wales between 2013-2019. The Report A Pillar of Justice can be found [here](#)
- 6 The Committee’s comments on the UK’s Second Progress Review can be found [here](#)
- 7 Section 288 Town and Country Planning Act 1990 available [here](#)
- 8 The Committee’s review report, paragraph 51.
- 9 The Committee’s review report, paragraph 56.
- 10 The Committee’s review report, paragraph 59.
- 11 The Committee’s review report, paragraphs 64 and 65.
- 12 The Committee’s review report, paragraph 78.
- 13 The Committee’s review report, paragraph 86.
- 14 “A Pillar of Justice” (2019), report by Friends of the Earth and RSPB on MOJ statistics, page 33 and 34; available [here](#)
- 15 see [here: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf](https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf)

Adverts, jobs and tender opportunities

The UK Earth Law Judgments Project: Call for judgment writers, commentators, artists and other participants and invitation to on-line workshop

The UK Earth Law Judgments Project seeks to reimagine and rewrite significant cases in UK law (including English, Scots and Northern Irish law) from an ecocentric perspective. It builds on the work of feminist judgment projects in a number of jurisdictions, and the recent Wild Law Judgment Project led by Australian scholars. The project aims to engage academics from a range of backgrounds, as well as legal professionals and the broader public.

Introductory workshop on 'Judgment writing from an Earth law perspective', 1 July 2020

This half-day workshop will introduce those interested in writing judgments and commentaries to the idea of alternative judgment writing, to explore the vision for the UK Earth Law Judgments Project and to provide an opportunity for networking. It will include talks from the leaders of the Australian Wild Law Judgment Project and the UK project leads. If you wish to participate in the project as a judgment writer, commentary writer, artist or to be involved in some other way, and would like to join the workshop on July 1st, please provide a brief (maximum 300 word) outline of your field of expertise or interest and how you would like to contribute to the project and include a brief biography (max 100 words). The deadline for expressions of interest is Monday 22nd June. Participants will be notified by Wednesday 24th June.

Call for judgment writers

Judgment and commentary writers are sought from all legal (or non-legal) backgrounds. No specialist knowledge of environmental law is necessary and interdisciplinary contributions and collaborations are encouraged. If you would like to rewrite a judgment, please send a proposal including a title and brief (max 300 words) description of the judgment you would like to rewrite and an explanation of why you think that this judgment would be interesting to reimagine. Alternatively, you may wish to propose a judgment for a case that has yet to be brought in the UK courts, based on a set of facts that raise questions about people-nature relationships that are of significance in the UK. Please also provide a brief biography (max 100 words). Due to the challenging circumstances that many of us faced around the time of our initial

deadline, please note that we will be extending the deadline for submission of abstracts for judgments until September 4th.

Please see the [website](#) and the call attached for full details and send submissions to [Dr Helen Dancer](#) and [Dr Bonnie Holligan](#).

Book reviews

The e-law editors are regularly sent book lists by various publishing houses which may appeal to UKELA members keen to write a review. If you are interested in contributing a book review to a future edition of e-law, but would first like some guidance or suggestions, please drop [us](#) a line.

The UK Earth Law Judgments Project
Call for judgment writers, commentators, artists and other participants
Invitation to online workshop

Background

The UK Earth Law Judgments Project will involve the reimagining and rewriting of significant cases in UK law (including English, Scots and Northern Irish law) from an ecocentric perspective. It builds on the work of feminist judgment projects in a number of jurisdictions, and the recent Wild Law Judgment Project led by Australian scholars.

The project aims to change legal culture by:

- inspiring ecoconscious ways of thinking about and practicing law among judges, legal practitioners, academics and students; and
- furthering critical debates around the idea of Earth law, wild law and ecocentric paradigms. What might or should an ecocentric jurisprudence look like in the UK?

What is Earth Law?

This project uses the term 'Earth law' to recognise the diversity of ecocentric ways of thinking about relationships between people and planet. These include Earth jurisprudence and Wild Law, rights of nature approaches, proposed new legal concepts (e.g. Ecocide), ancient and indigenous holistic belief systems (e.g. Buddhism, Druidism), and local earth-centred customary practices that connect people and place. The project will create a space for reflection on, and critique of, different ecocentric visions. It does not favour any one normative paradigm, but aims to explore a range of potential avenues for the development of ecocentric jurisprudence in the UK.

Call for judgment and commentary writers, artists and other project participants

The project aims to engage academics from a range of backgrounds, as well as legal professionals and the broader public. The main academic output from the project will be an edited collection of the reimagined judgments, along with commentaries. We are inviting proposals for judgments and commentaries. We are also keen to hear from others (for example, artists) who would like to become involved in alternative ways.

Introductory workshop on 'Judgment writing from an Earth law perspective'

Our planned initial event at the Middle Temple has been postponed, and we will now hold an initial half-day workshop online on the morning of **Wednesday 1st July 2020**. The workshop will introduce those interested in writing judgments and commentaries to the idea of alternative judgment writing, to explore the vision for the UK Earth Law Judgments

Project and to provide an opportunity for networking. It will include talks from the leaders of the Australian Wild Law Judgment Project and the UK project leads.

How to participate in the online workshop on July 1st

If you wish to participate in the project as a judgment writer, commentary writer, artist or to be involved in some other way, and would like to join the workshop on July 1st, please provide a brief (maximum 300 word) outline of your field of expertise or interest and how you would like to contribute to the project and include a brief biography (max 100 words).

The deadline for expressions of interest is Monday 22nd June. Participants will be notified by Wednesday 24th June.

Please note that no additional preparation will be required in advance of the workshop. The workshop will be free of charge.

Call for judgment writers extended

Judgment and commentary writers are sought from all legal (or non-legal) backgrounds. No specialist knowledge of 'environmental law' is necessary and interdisciplinary contributions and collaborations are encouraged. If you are not from a legal background, but would like to be involved, please do contact the project leads to discuss further.

We are looking for proposals that reimagine key cases across a broad range of legal areas, including (but not limited to): Criminal Law and Evidence, Commercial Law, Contract Law, Employment Law, Environmental Law, Family Law, Human Rights Law, Planning law, Property and Trusts Law (including both Land and Personal Property Law), Public law and Tort Law.

If you would like to rewrite a judgment, please send a proposal including a title and brief (max 300 words) description of the judgment you would like to rewrite and an explanation of why you think that this judgment would be interesting to reimagine. Alternatively, you may wish to propose a judgment for a case that has yet to be brought in the UK courts, based on a set of facts that raise questions about people-nature relationships that are of significance in the UK. Please also provide a brief biography (max 100 words).

Due to the challenging circumstances that many of us faced around the time of our initial deadline, please note that **we will be extending the deadline for submission of abstracts for judgments until September 4th.**

For more information about the UK Earth Law Judgments Project, please contact the project leads Dr Helen Dancer, University of Sussex (H.E.Dancer@sussex.ac.uk) and Dr Bonnie Holligan, University of Sussex (B.Holligan@sussex.ac.uk). Details about the project can be found at the project webpage, http://www.sussex.ac.uk/law/research/projects/earth_law.

UK Environmental Law Association

eLaw

The editorial team is looking for quality articles, news and views for the next edition due out in August 2020. If you would like to make a contribution, please email elaw@ukela.org by 15 July 2020.

Letters to the editor will be published, space permitting.

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