u.k. environmental law association e-journal

e - law

www.ukela.org ***Issue 2 - march 2001***

Contents

Welcome

….to a new UKELA year. By way of reminder Council have established a number of new groups amongst Council members. Other members are welcome to join those groups and input to the deliberations. An update on group membership will be found on the website.

Chairman's Message

By Pamela Castle

I am delighted to have been elected Chairman of UKELA for the next two years and feel very fortunate to be taking over this position at a time when UKELA is well on its way to becoming the primary organisation addressing environmental law and policy. In this regard and on behalf of UKELA I would like to thank my predecessor David Cuckson for his steady hand on the tiller during his Chairmanship.

It is timely that UKELA is experiencing enthusiastic support in view of the plethora of legislation coming from the European Union - not only in the form of legislation dealing directly with the environment but also from legislation covering other areas but with an environmental dimension. Environmental Law also has a major part to play in the sustainable development debate and I anticipate that UKELA will feature prominently.

UKELA membership is a broad church encompassing not only environmental lawyers from private practice but also those from industry

academia and local government and non-lawyers from consultancies and environmental groups, so that it is well placed to give an informed view on every aspect of environmental law and policy.

I look forward to meeting members at the June Conference in Cardiff and on their home ground when I visit the Regional groups.

Outgoing Chairman's Report to UKELA AGM

by David Cuckson

I should like to look back over the past two years and review some of the progress which we have achieved over that period. Since I want to keep my comments brief, I will necessarily be selective, and I cannot mention everything of note or everyone who has worked to make things happen.

"financially we can now move forward with much greater confidence"

Two years ago expenditure was outstripping income to a worrying extent. I am pleased to be able to say that, due to a lot of careful stewardship, not least by Andrew Wiseman as Treasurer, as well as positive planning, this position has been reversed. Financially we can now move forward with much greater confidence.

Thanks in large measure to Pamela Castle, regular meetings are again being held in London. The good level of attendance demonstrates how much they are appreciated. It is also encouraging that a new regional group has been formed, and is active with its own local meetings, in the West Midlands.

"…new standards of excellence…"

The annual conferences in Belfast and Imperial College, London, set new standards of excellence, not least for the quality of their papers. We are grateful to Neil Faris and Sharon Turner in Belfast and Valerie Fogleman, William Upton and Helen Loose in London for their efforts in making it all happen so well, and also for arranging the publication of the papers afterwards.

The Garner Lecture went outside London for the first time last year, and it was appropriate that this should be to Jack Garner's own university at Nottingham. Another major event last year was the Environmental Court Seminar, organised largely by Daniel Lawrence. There was some initial nervousness about the financial commitment, but the Seminar provided the opportunity for a worthwhile debate on an important topic, and was rewarded by a large attendance.

"information super highway…"

Communication with the wider membership has been a continuing concern for the Council. The solution seems to be, to make more use of the "information super-highway". The Website, initially set up by Paul Hatchwell and now maintained by Hannah Mackinlay, is regularly accessed by many members. We are also using e-mail to contact those members whose internet addresses we have, and Catherine Davey as editor, and Hannah have begun producing 'E-Law', which has taken the place of the Journal.

An overall sense of vision and purpose is important for any organisation like UKELA. We have tried to address this in the Council and to that end arranged a special "Strategic Review" meeting last September. Bob Lee was a tremendous help on the day as guest chairman and facilitator. We now have a programme before us, which I believe can make UKELA more effective as an organisation. We need to boost not only our services for members, but also our wider role in promoting the study of environmental law and applying that study to the issues of the day. We have redrawn our objectives and made some changes to our management structures. I leave it to others to lead that process forward.

"UKELA today is in good heart…"

All in all, I believe that UKELA today is in good heart. We are making a useful contribution to the development of environmental law and its practice in this country. We are providing a forum where all those interested in environmental law can exchange views and generally help one another increase their understanding and expertise. We are able to take advantage of opportunities, and create new opportunities, for example, to participate in educational initiatives, for the benefit not just of our members but also of those who need knowledge of specific areas of environmental regulation. We can develop wider contacts with environmental lawyers in Europe and elsewhere.

It has been encouraging this year to see so many good candidates coming forward to stand for membership of Council, and I hope that those who were not successful this time will not be too disappointed. But we rely, of course, on lots of people being prepared to make their contribution in different ways. The more who volunteer, the more UKELA can achieve.

I should like to give my appreciation of the support given to UKELA by our President, Lord Slynn,
Thanks also to our General Secretary, Christina Hill, who is always there to hold things together just as they threaten to fall apart and whose ongoing efforts, many of them unseen, enable UKELA to continue to function.

I have found it a rewarding two years. And I hope, and believe, that UKELA can move forward from strength to yet greater strength and achievement.

UKELA Council Meeting 21st February 2001

The following council members have been elected to the following posts:

Pamela Castle - Chairman
Andrew Wiseman - Vice Chairman
Helen Loose – Treasurer

Peter Kellett – Deputy Treasurer
The following people have been re-elected to Council:
Helen Loose, Peter Kellett, Catherine Davey, Stephen Sykes, Stephen Homewood, Daniel Lawrence.
Julian Boswall(2001 Conference Organiser)was co opted to Council

Contaminated Land - What's Happening Out There?

Council, and we are sure other members, remain interested to find out what members' experiences are of the operation of the new Contaminated Land Regime. The editor will welcome letters and information on how local authorities and the Agency are approaching the legislation.

Developing International Links

Stephen Homewood of the University of Middlesex has the responsibility of the development of international links with academics and other lawyers working in the environmental law field.

If you have any contacts wither with individuals in foreign law firms or academics working in the environmental law field, Stephen would like to hear from you.
You can contact him by email:
shomewood@mdx.ac.uk

Or by fax on: 0208 362 5765

Job Vacancies

Environmental / Planning Solicitor
Morgan Cole, Cardiff Office

We have a vacancy for a 1 to 3 years PQE solicitor in our Planning & Environment Group, based in our Cardiff office. Candidates will be considered with experience in either environmental or planning matters, ideally both.

The Group is involved in a wide range of good quality contentious and non-contentious matters, working with clients across the firm's six offices.

Morgan Cole is a dynamic and ambitious firm, with over 90 partners, 600 staff and offices in Cardiff, Croydon, London, Oxford, Reading and Swansea.
Please apply in writing enclosing a CV and salary details to: Sue Vaughan, Human Resources Department, Morgan Cole, Bradley Court, Park Place, Cardiff CF10 3DP (Ref: PRP80). Visit our web-site at: www.morgan-cole.com

Certa (UK) Limited
Environmental Lawyer - City EC3

Certa (UK) Limited is a young, dynamic, fast growing company involved in designing insurance solutions for environmentally suspect or contaminated land. Managing Brownfield Risk and Liability is our area of expertise. We design long term insurance solutions using a multi-disciplinary team of lawyers, technical staff, insurance experts and commercial staff. We work for a large number of UK and International blue chip clients on property transactions in the UK and abroad. Our staff are exposed to a very broad range of business challenges at a senior level as we deal with complex property transaction issues for industry, the property sector, funders, lawyers, consultants and all the major UK regeneration agencies. We work closely with the UK Insurance Broking community.

We are seeking an Environmental Lawyer. The individual will be 0-5 year qualified or equivalent with experience of advising clients (developers, landowners, lenders etc.) about land contamination liability. You will be involved with environmental, commercial and insurance law, drafting, corporate and property transactions and particularly working with the legal community in the City. The candidate should be keen to expand within a fast growing environmental business as a key member of the Certa Legal team.

Self starting, teamwork and networking skills are essential for the job. There is an attractive salary and benefit package.

Dates of future UKELA Council Meetings :

Thursday 25 April 2001
Thursday 18 July 2001
Thursday 17 October 2001

(venues to be agreed)

Please write to Stephen Sykes, Legal Director, Certa (UK) Limited outlining your background, interests and including a CV and details of your current salary package:

Certa (UK) Limited, America House, 2 America Square, London EC3N 2LU
Email: info@certa.com
Website: www.certa.com

Training Contracts

Firms

If any firms are looking for trainees with experience in environmental law please contact the editor with your firm's name, address and the name of the person to whom applications should be sent, together with a note of any deadline for receipt of applications.

Prospective Trainee Solicitors

Ben Stansfield
ben.stansfield@tinyonline.co.uk
University of Kent at Canterbury - LLB Law with French - 2:1 (1999)
LPC at Nottingham Law School - Commendation (67%) (2000)
Preferred training contract date: September 2001.

Experience - 7 months as an Environmental Paralegal at Slaughter and May.
(References available).

Prospective trainee solicitors. *Please supply the following information for publication in a future edition of the journal: email address, university/degree class, CPE/LPC results, preferred commencement date for training contract.*

We cannot guarantee results and will appreciate feedback from both firms/trainees whose details are published in order that we can gauge the level of response and whether such a facility is of any actual benefit for members.

Their Rights, Your Responsibilities

*by Dr Norman Ellis**,** Chief Executive of Certa (UK) Ltd.*

He discusses the implications of the Human Rights Act on Brownfield development and environmental liability.

As of October 2000 the Human Rights Act of 1998 incorporated the European Convention of Human Rights into UK national law. For the first time British courts must consider and decide human rights issues. It may be some time before the full implications of the Act become apparent. The Government is gearing up the judiciary in anticipation of what some observers say may be a flood of cases on the back of the Human Rights Act. It is this very uncertainty that makes it all the more important to take a close look at the risk management aspects posed by this affirmation in law of Human Rights.

For the risk manager involved in Brownfield development it is imperative they cast a critical eye over the implications of human rights. The whole subject is too new and unexplored at present to reliably predict what may constitute a serious risk. There is little doubt the HRA will have far reaching consequences and it will be the wise risk manager who explores every nook and cranny of their operation looking for possible exposure.

To understand more fully the affect the HRA may have it is worth looking at a brief history of the European Convention of Human Rights. The original Convention for the Protection of Human Rights was first drawn up within the Council of Europe and came into force in 1953. It's objective was to take the initial moves towards the collective enforcement of a number of rights stated in the United Nations Universal Declaration of Human Rights of 1948.

Any complaint first went before the Commission for Human Rights for preliminary examination to determine their admissibility. If a case was deemed admissible it was then passed to the Committee of Ministers. This committee could then pass the case onto the Court for Human Rights for final adjudication. This whole process was very time consuming and with an average cost to the plaintiff of £30,000.

By the 1980's the steady growth of cases had made it increasingly difficult to keep the length of proceedings within acceptable limits. The number of cases increased from 404 in 1981 to 4750 in 1997. The cost and time taken to bring a case was a major hurdle that prevented many cases being brought before the Court of Human Rights in Strasbourg. In

order to simplify the system and reduce the cost each member state has now introduced the Human Rights Act into national law. This simplification of the system will inevitably lead to a substantial increase in the number of cases being brought especially those cases of a less serious nature that in the past would not have been pursued.

Under the Act any body within the UK will be able to seek a remedy in the UK courts for a breach of its Convention rights rather than take their case to Strasbourg. Although the Convention is not designed to protect the environment, Article 6 will entitle individuals, as well as commercial enterprises to a fair and public hearing before an independent and impartial tribunal. This will allow those involved to challenge decisions made by Government bodies including environmental enforcement agencies and local authorities, and by article 13 (Right to an effective remedy) the means to enforce those remedies.

For a civil contamination claim, a person or body would need to demonstrate a proprietary interest (i.e. owners or lessee) in the land affected before being able to sue.

This would now contravene the Convention as an unjustified restriction of the right under Article 6 (Right to a fair trial) to a proper hearing.

With the HRA now law rights of action would accrue in UK courts to any person who can demonstrate that their Convention rights have been infringed. In the event of pollution this would be brought under Articles 2 (right to life), Article 8 (Right to a home, private and family life) and Article 1 Protocol 1 (Peaceful enjoyment of possessions). It is no longer necessary to have a proprietary interest.

Enforcement Agencies will be very aware that if they fail to take adequate steps to apply and enforce their statutory powers to prevent pollution they could face judicial review for failure to uphold Convention rights.

There are also the wider implications of the Act to the whole area of Brownfield development. A recent case in the High Court could throw the whole planning process into disarray. At present Ministers have the power to decide on individual cases while still having control over the planning system. Judges have ruled that this amounts to Ministers being both policy makers and decision takers. The High Court felt this was a breach of the right to a fair trial under the HRA.

This case represents the first time an English court has used the new Act to declare an existing law to be in contravention of human rights. It sends out a clear message that UK courts are prepared to go head to head with the Government over the rights issue.

The outcome of this ruling by the High Court will be subject to an appeal by the Government and it could be sometime before a definitive decision is taken.

In the meantime hundreds of planning appeals could be in limbo while the planning authorities await the outcome of any appeal. Planners will not wish to take any decision now that could later be judged to have breached the HRA. The most fundamental change to the planning system will be the reversal of political need outweighing the landowners rights. This could have a major effect on Brownfield development as a number of proposed developments have already been stalled or delayed due to planning problems. Developers will now be able to argue that their rights are being infringed by delays or refusal of planning permission.

For the risk manager it will be no easy task to determine the true extent of any risks posed by the HRA. The wording of the Act is so open to interpretation that it is hard to see what situation could not be described as an infringement of the Act. The extent to which the HRA will have an impact will only become apparent once cases begin to come to court. The courts will play a major part in deciding the effectiveness of the new Act by their willingness or otherwise to uphold cases of infringement.

Environmental insurance is one area that may have a positive role to play with regards to the new Act. The goalposts for environmental liability have moved even wider due to the potentially unquantifiable consequences of greater numbers of people now being able to bring cases of contamination to court. The nature and extent of the risks involved in dealing with brownfield or contaminated land can be multitude, varied and complex. Legal risks can take the form of a civil liability or a regulatory action. The costs of fighting any claim can be large, especially if the claim centres on one incident affecting a large number of people.

For over three years Certa (UK) Limited have been providing specialist contaminated land insurance solutions, backed by Allianz Cornhill, part of the AAA rated Allianz Group. As each case presents different factors, cover is provided on a bespoke basis, allowing all risks to be effectively managed. Certa's own unique Contamination Assessment and Land Certificate (CALC) system has been developed with advice from acknowledged experts in the field of land contamination. CALC audits the surveys and reports of a client's environmental consultants to assess the risk of contamination and provide a guaranteed Certificate of Insurability. Conforming to industry standards and protocols, this up to the minute system checks the reports for consistency and completeness of information.

Insurance is often the first line of defence in any risk

assessment strategy. With the introduction of the Human Rights Act it is even more important to look at an insurance solution that will provide total cover for what could be unknown territory.

Defending Environmental Prosecutions and the Case for a Specialist Court

Report by Richard Kimblin

The West Midlands Group of UKELA held a meeting on 15 January 2001 on the topics of *Defending in Environmental Prosecutions* (Richard Kimblin PhD, Barrister, 3 Fountain Court, Birmingham) and *An Environmental Court - The Case For Inclusion Of A Criminal Law Jurisdiction* (Paula de Prez LLB PhD, Lecturer in Law, University of Wolverhampton). The presentations are summarised here. An article by Paula de Prez on the subject of a criminal law jurisdiction in an environmental court is currently in press in the journal of *Environmental Law and Management*.

Richard Kimblin took a whistle-stop tour though some general and current issues in defending environmental prosecutions. He took a broad definition to include the wide range of regulatory offences which concern the environment and human health, prosecuted by:

- The Environment Agency & SEPA
- Local Authorities
- Waste Planning Authorities
- Health and Safety Executive
- English Nature
- Food Standards Agency
- Non-governmental organisations (by private prosecution)

General observations

Water pollution and unlawful deposit of waste are the more common and challenging environmental cases to defend. This can be seen by contrast with other regulatory offences to which a statutory defence of due diligence is available, e.g. Food Safety Act offences; not that due diligence is easy to establish. On the other hand, there is significant scope to defend on the merits on a number of the elements in water pollution and waste offences because they are "event" related.

Contrast that again with prosecutions under the Health and Safety at Work Act 1974, in which prosecutions are brought for breach of one of the employers' or employees' duties under the Act, charged either under the statute or regulations made under it. Hence in health and safety matters, the incident which prompted the prosecution is usually only part of the evidence which proves the breach of duty rather than an offence arising directly from the injury or other complaint or "event".

An exception with its own anomalies is asbestos for which there are 'control limits' or 'action levels' for exposure of employees, set out in the regulations e.g. Control of Asbestos at Work Regulations 1987. The Regulations expressly permit exposure to asbestos where the exposure is assessed, monitored and controlled, but on the other hand create an offence under Regulation 8(1) that every employer shall prevent the exposure of his employees to asbestos. Hence a situation may arise where one employee is exposed daily to asbestos in the course of his duties but within the controls provided by the regulations while another employee, even of the same employer, who is accidentally exposed to asbestos at concentrations within the control limits and for a relatively short time would bring the employer in breach of the regulation and hence commit an offence.

Controls over the treatment of waste asbestos can overlap or be a closely related to health and safety of employees, but the issue may be quite different and is often; *is it waste*? *Mayer Parry Recycling Ltd v Environment Agency* [1999] Env LR 489 CA, in the detailed analysis given in the judgment of Carnwath J. makes the potential issues clear, i.e. 1) was the material discarded; 2) will it be re-used, and if so, 3) to what extent is a recovery operation required:

> *The general concept is now reasonably clear. The term "discard" is used in a broad sense equivalent to "get rid of"; but it is coloured by the examples of waste given in Annex I and the Waste Catalogue, which indicate that it is concerned generally with materials which have ceased to be required for their original purpose, normally because they are unsuitable, unwanted or surplus to requirements. That broad category is however limited by the context, which shows that the purpose is to control disposal and recovery of such materials. Accordingly, materials which are to be re-used (rather than finally disposed of), but which do not require any recovery operation before being put to their new use, are not treated as waste. Similarly, materials*

> *which are made ready for re-use by a recovery operation, cease to be waste when the recovery operation is complete.*

So, in general terms of opportunities and level of difficulty in defending, water and waste offences lie somewhere between, say, a Food Safety Act offence with a due diligence defence, and, say, a prosecution under the Control of Asbestos at Work Regulations.

The merits

Leaving aside the generally applicable (legal) technical defences to summary only and either-way offences, there remain a number of matters on which to put the prosecution to proof. Dealing briefly with water pollution offences by way of example, the element of the offence which can most commonly give rise to a live issue at trial is whether the matter complained of is poisonous, noxious or polluting and whether the particular material can be attributed to the defendant. Where the pollution incident is said to arise from construction works or other works which generate suspended silt or clay in a controlled water, the scope for argument about the origin of the material are probably at their greatest, particularly where there may have been bankside material introduced into the water course. So while it has long been established that silt, clay or other material which has its natural origin in or proximate to the water course may cause pollution, the rate of success in defending those cases is perhaps higher than in other common cases such as sewage and fuel oil spills.

Sampling, sample storage, preparation and analysis and evidence of continuity of custody of samples are potentially difficult areas for the prosecution of environmental offences, and other offences involving sampling and analysis. To date, the general level of environmental fines has limited, on a commercial view, the opportunities for defendants to investigate these aspects of a case and to instruct experts. Whether that will change as and when the level of fines changes remains to be seen.

Penalties and costs

To date, there is no guideline case on fines for environmental offences despite the Sentencing Advisory Panel urging that one is required. Such guidance as there is tends to come from *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 CA, a case under the Health and Safety at Work Act 1974 which appears generally to have increased the level of fines.

Costs awarded to the prosecution are not be grossly disproportionate to sentence; *R v Northallerton Magistrates Court, ex p. Dove* [2000] 1 Cr App R (S) 136, DC. Owing to both fine and costs, in total, being determined in part by reference to the defendant's means, this can limit the amount of costs which can be recovered, particularly in offences at the lower end of the scale. In the case of corporate defendants, the time which a court will accept for payment may be as long as two years, cf. the normal period of 12 months for a defendant charged personally; *R v Rollco Screw and Rivet Co Ltd and others* [1999] 2 Cr App. R (S) 436, CA;

An Environmental Court - the Case for Inclusion of A Criminal Law Jurisdiction

Aren't the arguments 'for' an environmental court at least equally compelling in the administration of environmental offences?[1]

The Grant Report[2] offers the following criticisms, frequently levelled at our current arrangements for administering environmental justice, as arguments 'for' an environmental court:

1. the ineffectiveness of governmental agencies;

2. an unsympathetic judiciary; and

3. the lack of public empowerment which is due (at least in part) to limited access to the courts.

While the main focus of the Grant report is on improving access to the courts in environmental disputes in light of the Aarhus convention,[3] this paper focuses instead on the lack of public empowerment in environmental litigation, and the environmental improvidence of the judiciary. The main thrust of the argument here is that these shortcomings are felt just as potently in the criminal law aspects of environmental litigation as in its civil law counterparts.

CIVIL LAW JURISDICTION

Lack of Public Empowerment

It is tempting to refute arguments in support of establishing an environmental court on the grounds that arguments could similarly be raised for a specialist forum in almost any field of litigation.[4] Special considerations affect the resolution of banking law matters, housing law disputes and medical malpractice cases, and yet it is clearly not practicable to create a highly fragmented court structure with a separate forum for every reasonably distinct field of litigation. The force of these

[1] Department of the Environment, Transport & the Regions. *Environmental Court Project: Final Report.* (Department of the Environment, Transport & the Regions, 2000).
[2] Ibid., at para 1.1.
[3] Denmark, 1998.
[4] Thanks to Professor David Hughes for this thought.

objections is weakened, however, in the case of environmental law because it is so demonstrably unlike any other area of law. Its marks of distinction include the fact that environmental law affects the entire range of industrial activities, from resource extraction to production and from consumption to disposal, and the fact that it regulates the conduct of individuals separated by thousands of miles.[5]

More importantly, the environment is more deserving of a special forum for the simple fact that although its public health origins were anthropocentric, or 'people-centred'; environmental law is no longer a 'people-centred' discipline. This fact is clearly demonstrated by the Environmental Protection Act's definition of environmental harm as including potential interference with any living organism).[6] The non-anthropocentric focus of many environmental disputes has important implications for the (lack of) empowerment of litigants in environmental law.

The law fails many environmental causes as a tool of empowerment because of its high level of complexity, and consequent inaccessibility. Additionally the issues raised in environmental litigation do not sit comfortably with the traditional tools of legal discourse and litigation. If we take Maureen Cain's simple but accurate portrayal of a lawyer's function as one of translator of her clients' needs into the conventions of legal discourse,[7] the environmental lawyer must distort and manipulate people-centred legal concepts such as '*property* damage' beyond recognition to fit the client's case.

Herein lies the fundamental challenge in seeking remedies (or retribution) for environmental damage, and also an explanation for the courts' judgments often seemingly overlooking environmental causes. The law of tort's insistence on proof of loss to the claimant in terms of what they 'own', or some physical harm to the person, leaves many claimants with environmental grievances without redress.

An Unsympathetic Judiciary

The Grant report identifies arguments 'for' an environmental court as often expressing dissatisfaction with the environmental sensitivities of the judiciary. In a string of recent insolvency law cases, the courts were presented with opportunities to prioritise environmental policies over commercial interests.

These cases provide a useful, although admittedly crude, litmus test for the environmental sympathies of the civil courts. In *Re Mineral Resources*[8] and *Re Celtic Extraction,*[9] the courts were asked to resolve the conflict between provisions of the Insolvency Act 1986 ('IA') which allowed liquidators to disclaim 'onerous property'[10] such as a waste management licence (meaning the liquidator can abandon the licence and the obligations thereunder, which would otherwise represent a drain on the resources of the company in liquidation) and s.35(11) of the Environmental Protection Act 1990 ('EPA') which preserves the existence of a waste management licence until it is either revoked by the Environment Agency ('EA') or its surrender is accepted by the EA. In *Re Mineral Resources* Neuberger J, concerned that allowing disclaimer could undermine the 'polluter pays principle', concluded that waste management licences, and the obligations arising out of them, could not be disclaimed.

He expressed no surprise that in today's political climate, the public interest in protecting the environment should have priority over the interest in a fair and orderly winding up of companies.[11] In *Re Celtic Extraction,* the same issue resurfaced, but this time the Court of Appeal decided that in fact the EPA and IA provisions were not in a position of conflict. This was because s.35(11) of EPA only prohibited termination of a waste management licence by the operator and not by force of statutes such as the insolvency legislation. In another place, a colleague and myself have argued that *Re Celtic* does not make good law, not least because the Court of Appeal's conclusion in *Re Celtic Extraction* glosses over the fact that it is the liquidator who initiates the process of disclaimer and not the 'force of statute.' Moreover, the *Celtic* judgment treats the insolvency principle of equality or *pari passu* (i.e. the general rule that an insolvent's property must be distributed equally between its creditors) as having an 'absolute' quality which should not be disturbed by continuing environmental obligations. Yet, both common law[12] and statute create a number of qualifications to *pari passu*, for example, provisions in the Insolvency Act itself accord priority to the claims of particular types of creditor, such as the Crown and the insolvent's employees.[13] These qualifications cast doubt on the proposition that environmental obligations should not disturb the *pari passu* principle.

Environmental principles have fared badly as against insolvency principles in this last case, and it is argued that a preferable way forward would be to draw from the principle of sustainable development which contemplates the coexistence and mutual

[5] T.M. Hoban and R.O. Brooks, *Green Justice: the Environment and the Courts*. (Westview Press, Colorado, 1987), 219.
[6] Section 1(3)and 1(4) Environmental Protection Act 1990.
[7] M. Cain, 'The General Practice Lawyer and the Client,' in R. Dingwall, and P. Lewis, (eds) *The Sociology of the Professions.* (1983) Oxford Socio-Legal Studies, Macmillan.

[8] [1999] 1 All ER 746;[1999] 2 BCLC 516.
[9] [1999] 4 All ER 684; [1999] 2 BCLC 555.
[10] S.178 Insolvency Act 1986.
[11] [1999] 4 All ER 684 at 757 E-H.
[12] A. Keay & P. de Prez, 'Insolvency & Environmental Principles: A Case Study of Public Interests.' To appear in next year's *Environmental Law Review.*
[13] See Insolvency Act 1986, Schedule 6.

protection of environmental and economic interests. Such an approach would guide the courts toward developing new means of compromise in situations where environmental policies fundamentally conflict with other statutory policies.[14]

The separation of environmental issues from the general jurisdiction of the courts may help to provide more coherent resolutions in cases such as these. However it is arguable that the courts are not best placed to consider the full implications of fundamental conflicts of statutory policies, given that they are prisoners of the arguments presented to them by the parties. It may also be argued that in such conflict cases it would be inequitable for the case to be heard by an 'environmental court' which might perceive its role as ensuring the environment overrides all other interests.

The answer to such an objection, however, lies in debate as to the ultimate composition and statutory remit of such a court and does not undermine the argument for a specialist court/panel having jurisdiction in such cases. In any event, at present the inequity arguably works the other way about with the insolvency provisions versus environmental protection conflict being played out in the Chancery Division which also deals with insolvency matters and may, therefore, favour insolvency principles.

CRIMINAL LAW JURISDICTION

The criminal law component of environmental law which is the subject of this discussion encompasses the prosecution of offences normally undertaken by the Environment Agency (the 'EA'); primarily, the unlawful discharge of polluting substances into controlled waters,[15] unlawful deposits or dealings with waste[16] and breaches of authorisation conditions.[17] In fact, the whole area of criminal litigation in environmental law is ripe for an overhaul, which is hardly surprising given that, in many cases, we are still using nineteenth century tools to deal with 21st century problems.[18] Recent suggestions for reform include:

i) sentencing guidelines (earlier this year, the Sentencing Advisory Panel advised the Court of Appeal to issue sentencing guidelines for environmental offences, [19] although the Court of Appeal has declined to do so[20]);

ii) fines to be used for repairing/improving the environment (the fines which result from an EA prosecution are not used to remediate environmental damage at the site or elsewhere, but merely accrue to the Treasury's funds. It is difficult therefore to conceive of a prosecution as being in any way a benefit to the environment,[21] which might explain, in part, any reluctance by regulatory agencies to prosecute offenders);

iii) heavier sentences; and

iv) companies to publicise the fines imposed on them in their annual reports.[22]

The creation of an environmental court may provide the perfect opportunity to synthesise and adopt many of these proposals.

Public Empowerment

Private citizens are not generally hindered by standing requirements in the criminal courts, yet they still suffer a degree of lack of empowerment in terms of their ability to enforce criminal law provisions. For example, the task of lawyers in 'empowering' their clients by translating environmental complaints into legal discourse is an unenviable one. Their task is to '…adapt our traditional legal concepts - relics of agrarian England - to a world of nuclear waste and bio-engineering.'[23] For those who pursue a private prosecution as a means of litigating environmental damage, there are a number of legal obstacles due to the lack of parity between the language of environmental offences and that of traditional crimes.

Environmental offences are hallmarked by the absence of a number of fundamental criminal law concepts.[24] Criminal liability is generally dependent on some *'mens rea'*, a mental condition of either reckless or deliberate causing of harm,[25] yet most environmental offences still require no *mens rea*, as such, and can be committed without what most lawyers understand as 'fault.'[26] In addition, the

[14] The case of In re Rhondda Waste Disposal, *The Times*, 2nd March 2000 appears to represent a compromise.
[15] Sections 85-87 Water Resources Act 1991.
[16] Sections 33-35 Environmental Protection Act 1990.
[17] Sections 6 & 23 Environmental Protection Act 1990.
[18] For example, the central provisions of the Water Resources Act 1991 date back to the Rivers (Pollution Prevention) Act 1876.
[19] Sentencing Advisory Panel. *Advice to the Court of Appeal on the Sentencing of Environmental Offences.*(2000)
[20] R v Milford Port Haven Authority [2000] JPL 943; [2000] Env L. R. (D2) CA (Crim Div).
[21] It would be different if the English courts adopted the practice of imposing probation orders. Such orders might prohibit or direct future action by the company, direct publication of the facts of conviction, require payments for research or community service or require any reasonable conditions to be fulfilled.
[22] House of Commons Select Committee on the Environment, Transport and Regional Affairs, 6th Report 1999-2000, *Inquiry into the Workings of the Environment Agency*. HC 34-II.
[23] T.M. Hoban and R.O. Brooks, *Green Justice: the Environment and the Courts*. (Westview Press, Colorado, 1987), 220.
[24] Although see G. Slapper, & S. Tombs, *Corporate Crime.* (Longman, London, 1999) at 174 where it is argued that the claim that regulatory crimes are not real crimes is 'powerful, pervasive, but highly misleading.'
[25] A. Ogus, *Regulation: Legal Form and Economic Theory.* (Oxford University Press, Oxford, 1994), p.79.
[26] See *CPC(UK) v NRA* [1995] (CA) Env LR 131 and *NRA v Empress Car* [1998] 1 All ER 481 (HL).

identifiable 'victim' in traditional crimes, whose suffering excites moral outrage toward the criminal, is also absent. The 'victim' of environmental offences tends to be society collectively, with individuals not even realising that their interests have been compromised.[27] Just as the 'victim' is absent, so is the recognisable 'damage.'

The majority of environmental offences are inchoate and require no proof that there was as much as an 'interference' with the environment.[28] Although environmental prosecutions do not require that *mens rea*, damage or victims must be proved for a conviction, failure to convince the court of these things surely results in a tendency towards leniency in sentencing. It is no coincidence that most prosecutions by the EA, perhaps excepting those under the waste management provisions, are of incidents that have resulted in identifiable 'damage' in terms of polluted waters or harm to aquatic life. These cases are understandably preferred by the EA for prosecution because the courts will be more likely to impose significant penalties.

An Unsympathetic Judiciary

It may be argued that current trends towards specialisation in the judiciary are adequate to meet the need for expertise in the resolution of environmental disputes. Such a trend is evidenced in the higher courts by the existence of the Construction and Technology Court and Admiralty Court at High Court level. Moreover, the allocation of judges to cases in the High Court and Court of Appeal is not without regard to the experience of the judge. This latter development is not enough, however, to satisfy the need for specialisation in environmental litigation, not least because such specialisation does not filter down to the lay bench, and yet it is the local justices who dispose of the majority of environmental prosecutions.

The evidence as to the environmental sensitivities of the courts in criminal cases can be conveniently divided between the lay bench and the higher courts:

1. The Lay Bench

Patricia Wald, an American Circuit judge, has argued that judges only become familiarised with the complexities of environmental crimes when they have experienced ten to twelve cases.[29] As the vast majority of environmental prosecutions are heard first and finally by the magistrates' courts, this suggests that the judiciary of the lower courts will be more familiar with environmental cases than the High Court or Court of Appeal. Nevertheless, there remain striking criticisms of the lower courts' involvement in this field. In the early 1980s, Hawkins, a leading academic on enforcement, observed from his work with the Regional Water Authorities:

> *'...[M]agistrates are regarded as ignorant laymen.…Their inability to distinguish between pollution of greater or lesser seriousness leads them, it is thought, to punish many polluters with derisory fines.'*[30]

Twenty years on, it is possible to identify similar views being expressed by a compliance manager in a water company:

> *'The magistrates are out of their depth, they just don't deal with these cases. If you go through a red light or through a 30 zone at 40 miles an hour, you know what you are going to get. They deal with this sort of thing every day and they have a tariff that they use and guidelines. With pollution incidents its a lottery - they do what they feel like. Sometimes we've had a bigger fine for a minor incident than for a major one.'*[31]

This paper is not in any way an attempt to cast aspersions on the adequacy or competence of the lay bench. It is to be remembered that the magistracy rarely sits on environmental cases, thereby limiting the effectiveness of any 'environmental awareness training.' They are also likely to be unfamiliar with corporate defendants and to compare environmental cases unfavourably with cases more common in their case load, such as those 'person centred' crimes involving damage to person or property.

The problems caused by lack of familiarity are only exacerbated by the mitigation arguments defence counsel routinely employ to extract sympathy from the courts where a guilty plea is entered. Defence counsel in environmental cases will often seek the court's sympathy by describing the offence as *'accidental,'* implying its unavoidability, or similarly as a *'fact of life'* or an offence which *'goes on all the time.'* In water pollution prosecutions, the defence will often portray being caught as 'bad luck,' pointing to the misfortune of their clients' pollution coinciding with the EA's inspection of the river!

Another favourite ploy is to emphasise the lack of

[27] C. Wells, *Corporations and Criminal Responsibility*. (Clarendon Press, Oxford, 1993), p.26.

[28] For example, in water pollution offences, all that is necessary is that the substance which is the pollutant be held to be capable of causing 'harm,' see *NRA v Egger* (unreported) Newcastle Upon Tyne Crown Court, June 1992, reported in [1992] 3(6) *Water Law* 169 and W. Howarth, 'Poisonous, Noxious or Polluting: Contrasting Approaches to Environmental Regulation.' (1993) 56 *Modern Law Review*. 171.

[29] P. Wald, 'The Role of the Judiciary in Environmental Protection.' (1992) 19 *Boston College Environmental Affairs Law Review*. 519 at 530.

[30] K. Hawkins, *Environment & Enforcement* (Clarendon Press, Oxford, 1984) at p.188.

[31] Interviewee from water company, August 1998.

harm to humans presented by a given contaminant in an attempt to distract the court from the true scope of environmental regulation which embraces the release of substances which could potentially interfere with *any* living organism or ecosystem.[32] These are just a few examples of the general practices of defence counsel in exploiting the difficulties inevitably experienced by the lay bench with scientific evidence and their task of gauging the seriousness of a given incident. The minimal acquaintance of the lay bench with environmental cases means that they are more likely to be swayed toward leniency by such strategies.[33]

It is argued that these rituals of aggressive and strategic mitigation by the defence undermine the efficiency of adjudication of environmental offences by the lay bench, and bolster arguments that serious consideration should be given to changing the forum for these cases. It is not possible to prove a causal nexus between aggressive mitigation and the general feeling that levels of penalty are too low. It is submitted, however, that the continuing frailty of penalties imposed on environmental defendants is convincing circumstantial evidence of aggressive mitigation having its intended effect.

2. The Appeal Courts

Again, a sampling of prominent judgments from the appeal courts should provide at least an impressionistic view of the environmental sensitivities of the higher courts. Despite the bad press the courts have received of late in their dealings with environmental disputes, the tenor of judgments in cases such as ***Empress Car v National Rivers Authority***[34] are encouraging. As most readers will be aware, the House of Lords had to decide whether the duty imposed by section 85 of the Water Resources Act 1991 included responsibility for third party acts.

Despite the strong tradition of resolving causation issues with the tool of 'foreseeability', their Lordships rejected the argument that operators could only be accused of 'causing' pollution triggered by *foreseeable* acts of vandalism/interference.[35]

Their preferred solution was to say that liability extended to all third party acts which prompted release of their pollutants, excepting 'extraordinary' acts of vandalism such as a terrorist bomb attack.[36]

Their Lordships' allegiance to environmental concerns is, however, by no means constant. Not so long ago, in a differently constituted House of Lords, the pull of foreseeability arguments proved too strong. The case in question was the ***Cambridge Water***[37] ***litigation where strict civil liability for water pollution under the rule in Rylands v Fletcher***[38] was diluted by considerations of whether the type of damage was 'foreseeable.'

At Court of Appeal level, the signs are perhaps less promising. The Court of Appeal was recently invited by the Sentencing Advisory Panel to draft sentencing guidelines for environmental offences. However, Bingham LJ in ***R v Milford Haven Port Authority***[39], did not feel that the Court of Appeal could '…usefully do more than draw attention to the factors relevant to sentence…' which were enumerated in the case of ***R v F Howe & Son (Engineers) Ltd***[40] for the purposes of health and safety offences. Is this failure to attempt to draft sentencing guidelines an admission of defeat - an inability to formulate meaningful guidelines for environmental cases?

If this is the case, it seems appropriate to seriously consider removing the 'environmental offences' jurisdiction from our existing court system. It is simply not good enough that environmental law should be expected to remain parasitic on the 'people centred' domain of health and safety law.

THE DISADVANTAGES OF AN ENVIRONMENTAL COURT

There are some words of caution that should be sounded before taking any further steps towards establishing a specialist jurisdiction for environmental litigation. We might take heed, for example, from the United States who have so far resisted the concept of environmental courts on the grounds that environmental decisions are considered to be so 'value-laden' that they should not be dealt with by non-judicial experts.[41] A specialist forum could also perversely contribute to a further 'trivialisation' of environmental offences. Why should these cases need a separate forum, unless they are indeed less serious than traditional crimes and deserving of special, less formalised treatment?

The decision to change the venue of these cases, is therefore one in which the implications will have to be very carefully weighed and assessed.

A change in venue may appear to be a sensible

[32] Ss.1(3) and 1(4) EPA 1990.
[33] P. de Prez, Excuses, Excuses: Ritual Trivialisation of Environmental Offences. [2000] *Journal of Environmental Law*. 65-77.
[34] [1998] 1 All ER 481 (HL).
[35] In another area of environmental liability, and in a differently constituted House of Lords, the pull of foreseeability arguments proved too strong. I am thinking particularly of the Cambridge Water case where strict liability for water pollution was diluted by considerations of remoteness.
[36] [1998] 1 All ER 481 at 490, per Lord Hoffmann.
[37] Cambridge Water Company v Eastern Counties Leather Plc [1994] 1 All ER 53,HL.
[38] (1866) LR 1 Exch 265.
[39] R v Milford Port Haven Authority [2000] JPL 943; [2000] Env L. R. (D2) CA (Crim Div).
[40] [1999] 2 All ER 249.
[41] Wald, P. 'The Role of the Judiciary in Environmental Protection.' (1992) 19 *Boston College Environmental Affairs Law Review*. 519 at 529.

solution to the increasing complexity in both environmental law and science. However there is the possibility that it may compound existing problems of trivialisation by confirming environmental offences as different in nature from those 'crimes' dealt with by a bench of magistrates. The segregation of environmental offences from the traditional offences dealt with by magistrates may give more weight to arguments that these offences are not deserving of sanction.

Conclusion

The role of the courts is crucial in the enforcement equation and in the progressive stigmatisation of environmental offences. If a new forum for environmental disputes is to make a difference to the enforcement of environmental offences, proposals should be conditional on at least two things
(1) any new environmental courts or specialised jurisdiction be designed to be proactive in the development of environmental law principles
(2) their introduction would be couched in terms which re-enforce the seriousness of and our commitment to environmental issues

Response to the EU Green Paper on Emissions Trading

By Anthony Hobley, CMS Cameron McKenna

Introduction

Towards the end of last summer a number of UKELA members decided to set up a Climate Change Working Group or to give it its full (perhaps unwieldy) name the UKELA Climate Change (Flexible Mechanisms) Working Group. There was clearly a need for such a group to bring a legal perspective to various developments which were taking place at an almost unseemly speed including:

at international level the then pending CoP-6 negotiations at the Hague

at domestic level the Government's proposed Climate Change Levy (together with the Climate Change Levy negotiated agreements) and the joint business and Government initiative to design a UK Emissions Trading Scheme

The Working Group's terms of reference can be found on the UKELA website.

The Working Group's first project was to prepare a response to the EU Commissions Green Paper on Greenhouse Gas Emissions Trading within the European Union. The underlying theme of this response was that Member States should be encouraged to start to develop their own emissions trading schemes early and so "learn by doing" rather than to delay in order to create the perfect harmonised EU Emissions Trading Scheme. Therefore, the response urged the EU Commission to set up a framework scheme with general rules designed to ensure a level playing field but to leave it to Member States themselves to develop the detailed mechanisms at their own levels to suit their own domestic circumstances.

The Working Group next considered the Government's consultation document "A Greenhouse Gas Emissions Trading Scheme for the United Kingdom", which was published by the Department of the Environment Transport and the Regions ("DETR") in November 2000 ("the Consultation Document"). The consultation period closed on Friday 12th January 2001.

Before turning to a few of the specific issues raised in that consultation document it is perhaps worth providing some background on this whole process and the briefest overview of the proposed UK Emissions Trading Scheme ("ETS") itself. Those who would like to familiarise themselves with all the points raised by the Working Group will need to read the full response which can be downloaded from the UKELA website.

International Perspective

The international community has slowly, and at times almost grudgingly, begun the long process towards building effective international and domestic measures to tackle greenhouse gas ("GHG") emissions in response to the increasing certainty that global warming is happening and the uncertainty over its likely consequences.

That process began in Rio in 1992 when 160 countries agreed the UN Framework Convention on Climate Change ("UNFCCC"). The UNFCCC is, as its title suggests, simply a framework; the necessary detail was left to be settled by the Conference of the Parties ("CoP) to the UNFCCC.

In 1997 the CoP-6 agreed what has been described as a watershed in international environmental treaty making, the Kyoto Protocol where 38 developed countries (Annex 1 countries) committed themselves

to targets and timetables for the reductions of GHGs. These targets for developed countries are often referred to as Assigned Amounts. The UK's Kyoto target is to reduce its emissions of all GHGs by 12.5% against 1990 levels by the Kyoto commitment period, 2008 - 2012.

One important economic reality recognised by many countries that signed the Kyoto Protocol is that, if countries have to rely solely on their own domestic measures, the result in flexible limitations on GHG growth could entail extremely onerous costs. As a result a number of international mechanisms, which would allow countries flexibility to meet, their targets were included in the Kyoto Protocol. There are four such international Flexible Mechanisms or Kyoto Mechanisms one of which is emissions trading.

The detailed rules, which would govern how emissions trading and the other Flexible Mechanisms will work in practice, were, as we know, to be settled at the CoP-6 negotiations. This of course did not happen. However, contrary too much of the rather negative press coverage, significant progress was made on many of the detailed rules for the Flexible Mechanisms. It is also the case that CoP-6 did not end, but is in suspension, now probably until July 2001 when it is planned to resume in Bonn.

UK's Emissions Trading Proposals

Why is the Government so determined to develop an ETS, particularly in the light of the suspension of CoP-6? Government clearly believes that there are potential economic advantages to the UK from being one of the first countries to develop a fully functioning ETS. It justifies its belief by stating that the early development of a domestic ETS will mean that the UK Government, UK business and the City of London will be well placed to play a leading and influential role in both the development and use of these schemes in other countries and internationally. Indeed, industry would generally seem to share this view, based on the fact that the ETS has to a large extent been designed by a business-led initiative in the form of the UK Emissions Trading Group ("ETG") which was set up jointly by the CBI and the Advisory Committee on Business and the Environment (ACBE).

It is intended that the ETS will cover not only carbon dioxide ("CO_2") emissions but also the other five greenhouse gases (methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride). To begin with there will be two major but mutually exclusive ways to obtain access to the ETS: (i) voluntary participation; and (ii) as a party to a Climate Change Levy Agreement ("CCLA").

The consultation document proposes that private companies and other commercial entities ("Participants") will initially enter the ETS on a voluntary basis. Perspective participants will have to bid for a part of a Government incentive of £30 million a year available over five years. In return Participants will accept an obligation to achieve absolute and binding GHG emissions reductions.

The detailed rules the financial incentive and the bidding process are due to be published in March, and the current timetable envisages (optimistically) that bids for the incentive should be received by early Autumn, even though Government does not expect the rules for the ETS itself to be finalised before late Autumn!

It is proposed that the ETS should start on 1st January 2002 when Participants will be issued with allowances permitting the holder to emit a given quantity of CO_2. It is not clear yet whether the scheme will also cover the other 5 GHGs immediately or only from some later date. This depends on whether or not suitable protocols for measuring baseline emissions and ongoing emissions can be developed in time. Suitable protocols for CO_2 have largely already been developed.

Participants will, subject to the rules of the ETS, be allowed to trade these allowances: so-called "Cap and Trade". On 31st December 2002 it will be determined, whether or not Participants have achieved their targets and incentive payments will be made in April 2003 to those who have done so. This process will be repeatedly annually.

Climate Change Levy Negotiated Agreements

As from 1st April 2001 a Climate Change Levy ("CCL") will be charged on all business use of electricity and gas and coal, paid as part of energy bills. Only the transport sector and domestic sectors will be exempt. This "downstream energy tax" is to apply to all energy used, whether or not such energy is derived from fossil fuel (i.e. it is not a carbon tax). However, those considered to be heavy users of energy (defined by reference to the Integrated Pollution Prevention & Control Directive) will be eligible for an 80% discount from the CCL if they enter into CCLAs with the Government, thereby taking on emissions or energy targets linked to tonnes of CO_2 emitted. Unlike the Participants in the ETS, parties to a CCLA will be able to choose between either an absolute target (linked to absolute emissions of CO_2) or a relative target linked to emissions of CO_2 relative to output).

The important point for this discussion is that the parties to the CCLAs are to be permitted to trade allowances to meet their targets, both between themselves, and (with some restrictions on those with relative targets) into the ETS itself. However,

they will only be able to obtain allowances to sell when they perform above their targets; this is referred to in the Consultation Paper as "baseline and credit". In effect, Companies in a CCLA will only be able to sell allowances obtained after each of the two-year compliance dates e.g. 1st April 2003, 1st April 2005 etc.

It is proposed that those in the relative (rather than the absolute) sector should have certain restrictions placed on their freedom to trade allowances so as to reduce potential for allowance "inflation". The major restriction proposed is a "gateway" which would work on a "one in, one out" basis between the ETS and the relative sector. Gateway would only permit allowances for the relative sector into the ETS to the extent that the same numbers of allowances have previously moved in the opposite direction.

Legal nature of allowances

The tradable units within the ETS will be emissions reduction "allowances". Allowances will be created by Government unless imported from recognised international sources. These allowances, as provided for under the Kyoto Protocol, will be denominated in tonnes of CO_2 and each will have a unique serial number.

However, it is surprising that the Consultation Document says little about the legal status of these allowances and in particular the rights of ownership which are to be associated with them. What it does say is that the registry in the form of the Emissions Trading Authority ("ETA") will hold an allowance account for each target-holder and others such as brokers. This registry will make a transfer of allowances between accounts when it receives approval from representatives of both the transferor and the transferee.

This may in fact be sufficient for simple bilateral trades between the Participants to the ETS and parties to CCLAs. However, this may not support more complicated financial mechanisms such as the "forwards" "streams" and "options" which the Consultation Document envisages when it draws a distinction between transfers, as a simple change of legal ownership, and trades being in effect the transfer equitable title or other rights in such an allowance. As the Consultation Document points out, such financial mechanisms will develop as a means of managing risk. As the Working Group has suggested to Government to allow these mechanisms to develop fully it is important that the legal nature of these allowances should be established, either by Government or if needs be by the market.

Governance

Initially there is to be no new legislation to set up the ETS; the scheme is to be brought into being using the Government's existing administrative powers. The Participants will each be required to enter into agreements with the Government; these agreements will presumably be similar to the CCLAs. Like the CCLAs these ETS agreements will probably not be contractually binding. Again, the Working Group has suggested to Government that draft agreements should be prepared and circulated for comment at the earliest opportunity.

As Government will have a key role in setting up the ETS, it is proposing that initially it will have the key role in administering the ETS. This it is proposing to do through a pseudo Emissions Trading Authority ("ETA") which will in reality be simply a function within Central Government, probably based at the DETR or possibly at the DTI. The consultation paper expressly states that in the longer term the ETA will be established as a statutory independent body, although no date is given for when this is likely to happen.

Enforcement

The consultation document makes it clear that in the early stages of the ETS, there will be no express statutory sanctions for breaches of the rules other than withholding the incentive or expelling Participants. Is this a problem? In some cases it is possible that the costs for a Participant of compliance with its target may easily exceed the value of the incentive. This raises the possibility that there may not, to begin with, be an effective deterrent against non-compliance with the ETS.

It is suggested in the Consultation Document that reliance could be placed on general criminal law. However, the Working Group's response raises a number of doubts over how effective this is likely to be in practice.

The other suggestion made is that the Participants might themselves agree to a self-imposed regime of penalties for breaches of the ETS rules. Such a regime would most likely have to rely on some form of contractual arrangement between the Participants. If the ETS agreements with Government are, like the CCLAs, administrative only and so not contractually binding, additional binding agreements would be needed between all Participants. Participants would probably need to appoint a body or set up a company to be a party to these agreements and enforce them. Case law suggests that there may be some problems with relying on contractual penalties on the basis that these may not actually be enforced by the Courts and consequently such a scheme could rely very much on the goodwill of the Participants in accepting any penalties imposed. However, it is possible that in this day and age the

courts may take a more enlightened view about the use of contractual penalties to underwrite schemes such as this.

Other sources of fixed allowances or credits

In time there are likely to be other domestic schemes which could generate "credits" tradable and thus capable of conversion into the ETS: e.g. Green Certificates relating to the Renewable Energy Obligation, credits for Energy Efficiency projects in business other than those in the main trading schemes and emissions reduction projects both domestically and internationally. Allowances from some overseas trading schemes are also likely to be recognised by the ETS before their recognition under the Kyoto Protocol and therefore international law in 2008.

However, with all these other potential sources of allowances one of the Government's biggest headaches is likely to be ensuring that the ETS does not double count emissions reductions achieved as a result of other policy measures.

International Trading

The Kyoto Protocol, an international treaty, provides for trading between sovereign states. Businesses or companies, however, will only have access to trading within a nation state if that state's domestic law provides for it. Further, if two companies each resident in a different Annex 1 state wish to trade with each other, domestic law in each state will need to recognise the allowances of the other state. If it does not this is not necessarily an absolute prohibition on such trading but the price of any such allowances traded is likely to be heavily discounted to take into account the risk that such allowances may not subsequently be recognised and, therefore, useable in the emissions trading scheme under which the buyer is obligated. There are already examples of such speculative trading having taken place albeit the price per tonne of CO_2 has been low at about $1. Contrast this with a value of between $5 and $10 for a tonne of CO_2 within the BP Amoco internal ETS where there is the necessary certainty as to recognition of the relevant allowances.

Moreover, the international trading of parts of an Annex 1 Country's Assigned Amounts does not have any legal basis under the Kyoto Protocol and therefore public international law until 1st January 2008 when the Kyoto Protocol commitment period begins. Thus, it remains unclear if international trading can actually take place before then. Although Parts of Assigned Amounts ("PAAs") will not exist under international law before that date, it is entirely possible, and in fact likely, that some sort of pseudo or pre-cursor PAAs will be traded before then. This could well happen where countries (such as Denmark and the UK) recognise each others' allowances before 2008.

Will it be effective?

If one views the ETS essentially as a pilot programme developed jointly by business and Government so that both may "learn by doing" it is then a reasonable assumption that the ETS will achieve this objective in the short term. In many respects the main objective for the UK in making such an early start is to "learn by doing" so making the UK a centre of expertise in this new market. It is therefore not expected that it will be perfect. In many respects there is time before 2008 to make mistakes and to correct these. Many of the companies taking part are likely to be enthusiastic: therefore, they will also probably believe that making early emissions reductions and thereby learning how to trade emissions will give them a commercial advantage over their competitors if, as many believe the global economy is moving from a carbon-free one to a carbon-restricted one. On this basis the ETS will probably work in the short term, but there are two caveats. First, the laws protecting early entrants against being penalised for early emissions reductions need to be set out now, and secondly the legal nature of allowances, including rights of ownership, needs to be clarified.

However, the ETS will not be a "pilot scheme" indefinitely: in the medium to longer term it will probably only survive if it is put on a full statutory footing with clear statutory penalties for non-compliance. There are many reasons why in future such a statutory scheme could well be a mandatory one.

It will be a difficult decision for those companies that are not already parties to CCLAs or that have emissions outside their CCLAs to decide whether or not to bid into the ETS in the early Autumn. However, companies should now be weighing up the pros and cons of so doing. If the timetable envisaged is maintained there is in fact very little time to make this decision and prepare a bid for the incentive. If these companies look at the bigger picture and see a carbon restricted future then this may be an easier decision than it at first appears to be.

Freedom of Access to Environmental Information

by Elizabeth Hattan, Freshfields Bruckhaus Deringer

The UKELA Practice & Procedure Working Group together with the Contaminated Land Working Group[42] have submitted comments on the DETR's consultation paper entitled "**Proposals for a Revised Public Access to Environmental Information Regime"**[43]. The consultation process addresses both the UK initiatives for a revised domestic regime and the proposals by the European Commission to replace the existing Directive on Freedom of Access to Information on the Environment (90/313/EEC).[44]

EUROPEAN DIRECTIVE

The current directive on access to environmental information has, according to the Commission, greatly improved openness and transparency within Member States and in so doing increased public awareness of environmental matters. However, amendments to the regime are now considered necessary in order to:

- improve the operational shortcomings that have been highlighted during the course of the last 8 years (such as the uncertainty regarding some of the definitions, the use of the exceptions from the general duty to provide access and the time limits for fulfilling the duty);
- put in place a regime compatible with the Aarhus Convention[45]. The Community and the Member States signed the Convention in 1998 and in order to ratify it the directive needs to align its provisions. This has been highlighted as a political priority by the Commission;
- update the regime to reflect the increased use of information technology, for example by making information available electronically.

Given the number of amendments proposed, the Commission considers that the whole directive should be replaced rather than amended.

Some of the specific comments made by UKELA in their submission include:

- **Definition of Public Authority (Article 2(2)) -** the Commission have suggested an extended definition of bodies to which the revised Directive would apply so as to include:

  any legal person entrusted by law…with the operation of services of general economic interest which affect or are likely to affect the state of elements of the environment.

  UKELA explained their concern that the proposed definition lacks clarity and is potentially extremely wide, conceivably including a broad range of bodies (public and private) whose activities affect the environment in some way.

- **Requests made for a specific reason (Article 3(3)) –** under the Commission's Proposal, the public authority supplying the information must have regard to the reason for the request, if stated by the applicant. UKELA explained in their submission that it is not entirely clear from the Proposal whether regard must be had for time reasons only e.g. to meet a deadline to a planning application review, or whether the duty extends to more general matters e.g. the form in which the information must be supplied. If the latter is the case then this could have important implications with regard to the quality and usefulness of information provided to applicants. The Government have assumed in the Consultation Paper that the provision relates to timing requirements only, but UKELA explained that this may not have gone far enough.

- **Form or Format (Article 3(4)) –** under the current directive, there is no provision concerning the form or format in which the information requested should be made available. The Commission addresses this by requiring that information should be supplied in the form or format requested by the applicant (unless the information is already publicly available in another form or format which is easily accessible by the applicant or unless it is reasonable for the authority to make it available in another form or format).

  In their submission, UKELA welcomed this proposal, believing that it should not pose too unreasonable a burden on the bodies concerned, provided they maintain the information electronically. On the other hand, UKELA were concerned that there is a concomitant risk that authorities may refuse to provide access to the underlying, hard-copy records from which the electronic data base was created, arguing that it is reasonable not to do so because the information in electronic form

[42] The UKELA submissions were prepared by Daniel Lawrence, Convenor of the Practice and Procedure Working Party and by Matthew Townsend, Convenor of the Contaminated Land Working Party.

[43] Published on 10 October 2000.

[44] Commission Proposal COM (2000) 402 Final, issued on 29 June 2000.

[45] Full title is the UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters

(though not as detailed or comprehensive in scope) is more easily accessible by the applicant.

- **Commercial Confidentiality Exemption (Article 4(2)(d)) –** The Commission's Proposal provides an exemption in respect of *the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest*….. This exemption is not to apply however where the public interest served by disclosing the information outweighs the interest served by the refusal.

  UKELA raised the concern in their submission that this provision might override a determination of commercial confidentiality made under domestic law e.g. under section 22 of the EPA 1990, where there is no public interest exception.

- **Dissemination of environmental information (Article 7(1)) –** under the Commission's Proposal, Member States will have to ensure that authorities make available and disseminate to the public environmental information held by or for them by means of computer telecommunication and/or electronic technology. In their submission, UKELA requested clarification as to the extent of this obligation as it has potentially wide implications if information is to be publicised or circulated to a wider audience than those simply making formal requests for the information.

- **Information where there is an imminent threat (Article 7(3)) –** The Commission's Proposal would require Member States to ensure that, in the event of an imminent threat to human health or the environment, *all* useful information held by the public authorities will be disseminated without delay. UKELA explained in their submission that this could place an obligation on public authorities to prepare relevant information in advance to meet a range of possible (reasonably foreseeable) threats within their areas, by way of ensuring that information is available for immediate dissemination to the public in the event of an emergency.

UK REGIME

The UKELA comments on the Government's consultation paper were limited to the potential impact of the revisions on the contaminated land regime.

In particular UKELA welcomed in their submission the fact that the DETR makes no suggestion that any changes will be necessary to the public registers established under Part IIA Environmental Protection Act 1990 (and associated regulations). UKELA's submission explained that in their opinion these registers are, in essence, registers of enforcement action relating to particular sites and not general registers of contaminated or potentially contaminated land (and any initiative to widen the registers in this way would not be welcomed).

(Copies of the UKELA submission are available on the UKELA web page)

LONDON CONFERENCE PAPERS

We hope that all members have now received a copy of the conference papers from the London conference held in London. The book is entitled "The Changing Role of Environmental Law" (ISBN 0-951 3937-3-1). If you are a member and have not yet received a copy, please do contact us, with your name and address, and we will ensure that one is sent out. Additional copies are also available, for £35 (including P&P in the UK).

Copies are also available for non-members, at this price. If you become a member of UKELA, then they are available as part of the membership package at no extra charge (limited availability).

The book includes papers from the sessions on
Getting Access to Environmental Justice;
Environmental Crimes and Misdemeanours;
Who's Afraid of Environmental Risk?;
Planning and Pollution Control; and
Future Forms of Regulation (including on the European Commission's White Paper on Environmental Liability and on Economic Instruments).

William Upton (wupton@compuserve.com) or
Valerie Fogleman (vfogleman@blg.co.uk)

ANNUAL CONFERENCE CARDIFF

22 TO 24 JUNE 2001

Baroness Young, new Chief Executive of the Environment Agency is the keynote speaker at this year's UKELA annual conference. The conference runs from 4pm Friday 22 June to 2pm Sunday 24 June at Cardiff University, in the centre of the city.

The (loose) overall theme is "Economics, Ethics and the Environment". **A booking form is attached to this e-law** and posted on the web-site. There are discounted rates for bookings before 1 May 2001. The full programme will be updated going forward on the web-site.

The full programme and booking details will be posted on www.ukela.org shortly. Please make a note of the dates in your diary now.

Conference organisers: Professor Robert Lee, Cardiff University Law School; Julian Boswall, Head of Planning & Environment Group, Morgan Cole (julian.boswall@morgan-cole.com)

ANNUAL CONFERENCE – STUDENT SCHOLARSHIPS

INTRODUCTION

The United Kingdom Environmental Law Association (UKELA) will be holding its Annual Conference in Cardiff from 22 June to 24 June 2001. Details of the conference are on the UKELA web-site – www.ukela.org

SCHOLARSHIPS

There are 10 free tickets for the full conference (including all accommodation and meals) available to full time students interested in environmental law.

To apply for one of these tickets you need to:

1. Send a short letter to Professor Robert Lee at the address below explaining why you are interested in attending the conference.

2. Enclose a letter from a lecturer on your course, which confirms (a) that you are a full time student and (b) would be an appropriate recipient of one of these scholarships.

3. Enclose a completed booking form for the conference (obtainable from www.ukela.org).

Please apply by **1 May 2001**, after which the 10 successful applicants will be selected and notified.

NB Successful applicants may be asked to provide some organisational assistance at the conference. Travel expenses to and from the conference are *not* included in the scholarship. Attendance at the gala dinner on Saturday night is not guaranteed if we reach the upper attendance limit.

Write to: Professor Robert Lee, School of Law, Cardiff University, Law Building, Museum Avenue, Cardiff CF14 3XZ.

CASENOTE 1

Update on the progress of *R. (on the application of Holding & Barnes PLC v. Secretary of State for the Environment, Transport and the Regions*; and 3 other cases (inc. Alconbury Developments Ltd*)*

By William Upton, Barrister

It has been confirmed that these four cases will be heard in the House of Lords on February 27, 2001. They have successfully leap-frogged the Court of Appeal, with the agreement of all the parties. The House of Lords hearing will no doubt witness a further display of legal gymnastics from the massed ranks of counsel now involved.

For those still looking for a case report, the Divisional Court's decision is reported in full in the Estates Gazette, 3rd February 2001at page 170 (please note that the case name reference should no longer be 'ex parte' anyone!). As I hope everyone now knows, the Divisional Court held that the Secretary of State should not call-in applications for his own decision, nor decide on government-sponsored developments. This is, it is said, in breach of the right to a fair trial under Article 6 of the European Convention on Human Rights. The first ever Declaration of Incompatibility was made.

The latest entrant into the arena is the Scottish Lord Advocate, who has been roped into the *Holding & Barnes* hearing in order to bolster the government's shaky defences. It is said that he will argue that there are no relevant 'victims' and that there are no third party civil rights (or, to use the French text of the Convention –'contestations') to be determined in the planning system – points which the Secretary of State must now regret having conceded without a fight in the Divisional Court. Indeed, it is one of the nice things about the absence of a rule of precedent in the Strasbourg jurisprudence that we can indeed revisit recent cases (such as *Ortenberg*, *Zander, Balmer-Schaforth* etc) and argue for a more favourable interpretation of the Convention.

It could be said that reports of the death of the call-in system are therefore exaggerated, particularly if the House of Lords does decide to expand the powers of the High Court to review executive decisions. The planning world holds its breath. Many cases and inquiries stand adjourned. Nervous environmental and local authority regulators must be wondering if they will be the next to be put through their paces on human rights. But no one can say that they haven't been warned.

wupton@compuserve.com

CASENOTE 2

R –V- ROCHDALE MBC EX-PARTE TEW ROUND 2

by Peter Atkinson, Pinsent Curtis Biddle

R –v- Rochdale MBC ex-parte Tew [1999] 3 PLR 74 was a case which caused the development industry major concerns as to the future of outline planning permission where environmental impact statements were required. There was a genuine fear that the result of the Tew decision was that environmental impact assessments ("EIA") could not be adequately undertaken unless full details of the development were set out in the application. It therefore came as a relief to developers when Mr Justice Sullivan QC had the opportunity to consider a second challenge to the Rochdale scheme and this time found in favour of the developer.

In summary two applications for planning permission were made by Wilson Bowden Properties Limited and English Partnerships in February 1998. These were a bare outline application for a business park and a full application for a spine road to serve the park. Not surprisingly given the scale of the development (nearly 500 acres) the Local Planning Authority considered that the proposal required an environmental assessment under the Town & Country Planning (Environmental Impact) (England and Wales) Regulations 1988. While this application was a bare outline application it was accompanied by an illustrative master plan and an indicative schedule of land uses. The environmental assessment and the resulting environmental statement were based on the illustrative master plan and indicative schedule. The Council imposed a condition that the permission was required to be carried out in accordance with mitigation measures set out in the environmental statement but the Council did not approve the illustrative master plan and the schedule of abuses was not incorporated into the planning permission.

Mr Tew challenged the planning permission inter alia on the basis that it did not contain "a description of the development proposed, comprising information about the site and design and size or scale of the development" as required by paragraph 2(a) of Schedule 3 to the Assessment Regulations. His application was successful.

Many commentators overlooked Mr Justice Sullivan's acknowledgement that the outline application procedure is particularly valuable for projects such as a business park which are demand led and which may be expected to evolve over many years. He specifically recognised "the utility of the outline application procedure for projects such as this, [and] I would not wish to rule out the adoption of a master plan approach, provided the master plan was tied, for example, by the imposition of conditions to the description of the development permitted. If illustrative floor space or hectarage figures are given, it may be appropriate for an environmental assessment to assess the impact of a range of possible figures before describing the likely significant effect. Conditions may then be imposed to ensure that any permitted development keeps within those ranges".

Subsequent to Mr Tew's successful challenge an amended application was submitted for outline planning permission and those responsible for preparing it paid close attention to the comments of Mr Justice Sullivan. The application comprised the application form which cross-referred to and incorporated:-

1. an attachment which described the development;

2. a schedule of development;

3. the development framework; and

4. a master plan

Details of landscaping, design and external appearance of all buildings were reserved. The environmental impact assessment was updated and was based on the development described in these documents.

In round 2 of this Rochdale saga in July 2000 Mr Milne challenged inter alia on the ground that the requirements of the assessment regulations had not been fully complied with. It should be noted that by this time the 1988 Regulations had been superseded by the 1999 Regulations but nothing turned on this.

John Howell QC for Mr Milne sought to argue that whereas a full application for planning permission must include the information "necessary to describe the development" an outline application did not have to describe the development in respect of any matter reserved for subsequent approval in that it could not be said that reserved matters could have no significant effect on the environment. In support of his argument Mr Howell derived two propositions from World Wildlife Fund –v- Bozen [2000] 1 CMLR 149 where:-

1. any development consent for the purposes of the directive [Council Directive 85/337 as amended by Directive 97/11] must be defined in detail, so as not to omit any element which could be capable of having a significant effect on the environment; and

2. any later modification to a project must be subject to a further environmental assessment unless it is not likely to have a significant effect on the environment.

It followed in his reasoning that to comply with the requirements of paragraph 2(a) of Schedule 3 of the Regulations the development proposed must be described in such detail that nothing is omitted which may be capable of having a significant effect on the environment if comprehensively assessed. Since it is impossible to say that the ultimate treatment of any of the reserved matters in an outline application is incapable of having a significant effect on the environment, the outline application procedure is inconsistent with the requirements of the environmental assessment.

In reaching his conclusions Mr Justice Sullivan QC accepted that the assessment regulations should be construed so far as possible to accord with the objectives of the directive. The intention was that the likely significant environmental effects of industrial development projects etc in annexe (ii) should be comprehensively assessed before development consent was granted. The Judge clearly took a pragmatic and one might even say commercial view and recognised that preparing detailed drawings etc at the application stage for such a large scheme would be an immensely detailed work of fiction. He recognised the need for flexibility, which the domestic procedure provided and saw nothing inconsistent between that procedure and the directive. Whether the amount of information provided was sufficient was then a matter for the Local Planning Authority to decide. The environmental statement does not have to describe every environmental effect however minor but only the "main effects" or "likely significant effects" and what was significant had to be considered in the context of the kinds of development that are included in Schedules 1 and 2 of the Regulations.

On this point it was entirely appropriate for the Local Planning Authority to say that it had sufficient information. Major developments will be subject to a number of detailed controls. Not all of them will be included within the planning permission, some will be subject to controls under legislation dealing with environmental protection. In assessing the likely significant environmental effects of the projects the LPA are entitled to rely on the operation of those controls. Developers can therefore breathe a sigh of relief.

SCOTTISH BRIEFING

by Douglas a J Taylor, Maclay Murray & Spens

- Climate Change

  The Scottish Executive has published their climate change programme; www.scotland.gov.uk/climatechange The programme emphasises that a partnership approach with the UK Government is being pursued.

- Contaminated Land

  A new planning advice note, PAN 33 was published in October 2000. This document has been revised in line with the new contaminated land regime and is available on the planning section of the Scottish Executive web site - www.scotland.gov.uk/planning. It provides advice on the implications of the new contaminated land regime for the planning system, the development of contaminated land, the approach to contaminated land in development plans and the determination of planning applications when the site is or may be contaminated. It also emphasises the important role, which the planning regime must play in the redevelopment of contaminated land.

- IPPC

  The new Pollution Prevention and Control regime came into force in Scotland on 28 September 2000. SEPA have produced a practical guide on the new regime and the guidance for the paper and pulp sector - both documents are available on SEPA's website, www.sepa.org.uk

- Isle of Harris Super Quarry

  Scotland's new Environment Minister, Sam Galbraith, has rejected plans for a super quarry on the island of Harris on the grounds that adverse environmental effects outweighed the need to meet English stone demands.

- The Landfill Directive

The Scottish Executive issued a consultation paper on the Landfill Directive in February 2001. The deadline for comments in 3 May 2001. It is due to be transposed into Scots law by 16 July 2001. The paper is available on the Scottish Executive website at www.scotland.gov.uk/consultations/environment/landfill. It describes the regulatory requirements set out in the Landfill Directive 1999/31/EC (which is available at europa.eu.int/eur-lex/en/oj/1999), assesses the likely impact on both landfill operators and waste producers and describes how the Scottish Executive intends to implement the Landfill Directive.

The Scottish Executive intends to make use of an exemption in the Landfill Directive such that landfill sites for non-hazardous or inert waste in isolated settlements will be exempt from certain requirements (for example some financial provisions and ground and surface water protection provisions) of the directive if the landfill site is destined for the disposal of waste generated only by that isolated settlement. Views are sought on this proposal and a number of other issues - these questions are summarised in chapter 14 of the consultation paper.

- LIFE III

A budget has been announced for LIFE III. LIFE III is the only Community instrument specifically devoted to supporting and implementing EU environmental policy. £640m will be available for environment related projects over the next 5 years. The Scottish Executive is hosting a seminar on the EC LIFE Funding Programme at Victoria Quay in Edinburgh on 30 March 2001.

- Prosecutions

The Procurators Fiscal in Scotland failed to act in over 33% of cases referred to them over the past four years. SEPA do not have a chief prosecutor who would appear to be making it hard for SEPA to enforce the growing number of statutes and regulations.

- SEPA

Trish Henton is the new Chief Executive of SEPA. A review of SEPA's whole senior management structure is currently underway which will be operational by the end of March 2001. As part of that review, Campbell Gemmell has been appointed Director of Strategic Planning.

The Scottish Auditor General, Robert Black, has reported that better information is needed to assess more accurately what SEPA achieves in the course of spending it's £33m annual budget. SEPA will, however, receive an additional £16.5m in funding over the next three years.

- Waste

ERM was commissioned in October 1998 by SEPA and the Scottish Executive to collect waste data. The data, for 1997 and 1998, will be used to support the Scottish National Waste Strategy and the Scottish Executive EC data reporting requirements. Landfill is the main form of disposal of controlled waste - 14m and 11.9m tonnes were deposited in 1997 and 1998 respectively. The reduction was a result of a reduction in the quantity of construction and demolition waste sent to landfill.

Environ UK carried out a survey of the effects of the landfill tax for the Scottish Executive over the same period. Key findings were that less inert waste was sent to landfill, the number of waste management exemptions registered has increased and there has been a growth in land spreading of waste since the introduction of the tax (the Scottish Executive and SEPA are currently reviewing the controls on spreading inorganic waste on land).

- Water Pollution

New powers were introduced (by inserting sections 49A-B into the Control of Pollution Act 1974) on 1 January 2001 that will give SEPA powers to serve enforcement notices to prevent water pollution (through the Environment Act 1995 (Commencement No.19)(Scotland) Order 2000 and the Control of Pollution (Registers) and Consents For Discharges)(Secretary of State Functions) Amendment Regulations 2000).

SEPA will be able to serve an enforcement notice on the holder of a discharge consent where it believes than any condition of the consent is being or is likely to be breached. The notice must specify the remedial measures to be taken and set a deadline for their completion. Failure to comply with the notice is punishable with a fine of up to £20,000 and/or three months imprisonment on summary conviction or an unlimited fine and/or a two-year prison sentence on indictment. Further provisions have also been introduced in relation to appeals.

- Wave Power

  The first commercial use of wave power has taken place on Islay, on the West Coast of Scotland - the wave-generated electricity has started to feed into the main grid.

ENVIRONMENTAL ASSESSMENT

By Martin White, Pinsent Curtis Biddle

Environmental Assessment has become one of the most contentious areas of planning law litigation over the past couple of years, mainly due to the involvement of a number of campaigning lawyers challenging decisions of local authorities and the Secretary of State on behalf of clients affected by major projects.

Two cases involving Rochdale Metropolitan Borough Council have related to the amount of detail, which has to be included in a planning application, which is subject to environmental assessment. From those cases it is now clear that a bare outline application is completely inadequate, but also at the opposite extreme that a fully detailed application (impossible for example in a PFI scheme where detail only emerges over a long procurement process) is not required. In the second Rochdale case the judge said that where environmental assessment is required, as much knowledge as can reasonably be obtained (given the nature of the project) about its likely significant effects on the environment must be made available to the decision taker. Precisely what that means is a major headache for developers and local authorities alike.

Another significant decision was that of the House of Lords in Berkeley v Secretary of State which, contrary to previous case law, held that, given the importance of the UK's European Treaty obligations, compliance not only with the spirit, but the letter of environmental assessment legislation (which derives from Europe) is essential. Where a developer fails to produce an environmental statement (where environmental assessment is required), but does produce environmental information in a different form (e.g. in dribs and drabs over the course of the planning process), that is no longer sufficient for compliance with the legislation: a Court is now very unlikely to exercise its discretion to uphold the planning consent unless, for example, the challenge to it has been made out of time (as it was in the case of R v Hammersmith and Fulham ex parte CPRE).

There have also been a number of cases specifically with regard to minerals planning where objectors have essentially been able to show that the UK legislation fails to reflect the requirements of the European Directives of Environmental Assessment, and hence they have been able to show that the European Directives should have "direct effect" and overrule the requirements of domestic legislation. In those cases, the central issue was whether various types of consent required under the mineral planning legislation (which were not themselves planning consents) constituted "principal consents" attracting environmental assessment under the Directives. It was held they did. However, to the relief of developers everywhere, R v Bromley London Borough Council ex parte Baker held with regard to the general planning regime that a reserved matters application pursuant to an outline is not a "principal consent". Hence, if the outline has been granted without an environmental statement and time for any challenge has passed, it is not open to objectors then to seek to challenge any reserved matters consent for want of environmental assessment.

Challenges under the environmental assessment legislation are likely to continue. When allied to challenges, which are now possible under the Human Rights Act, they much enhance the ability of third party objectors to oppose and even defeat major projects – certainly strengthening their position when compared with half a decade ago.

ENVIROQUESTIONAIRE

A LITTLE FUN WITH COUNCIL MEMBERS

Stephen Sykes - Certa

Don't take this too seriously (I didn't).

What year did you qualify?
1992

What is your best career moment?
Still waiting for it!

What is your worst career moment?
I have a very low boredom threshold. There were times (many) in private practice when this was breached recurrently.

What is your favourite book?
The magic realism book by of Gabriel Garcia Marquez: "100 Years of Solitude". Escapism does not get better than this.

What is your favourite film?
The Third Man - for the black and white shots of post war Vienna and the witticisms of Graham Greene and Orson Wells.

What if any NGOAs are you a member?
Not many, lately.

What are your hobbies?
The great outdoors - climbing, scrambling, fell walking - and taking my daughter to London Zoo.

What is the most scary / extreme / exciting thing you have done?
Scaling the peaks of Scotland, England and Wales in 18 hours (including drive time). The day started at 5.00 am at the foot of Ben Nevis and ended at 11.00 PM - in the gathering dark - on top of Snowdon.

What is your dream occupation?
Being Legal Director of Certa, of course.

What is your favourite holiday destination?
Visiting family in Milan.

What car do you drive?
Volvo V40.

What is your favourite quotation?
"Getting and spending we lay waste our powers" (Wordsworth). The problem is, if we stop "getting and spending" just what does that leave?

Hannah Mackinlay – Pinsent Curtis Biddle
E-Journal Layout and production.

1. *What year did you qualify?*
1981

2. *What is your best career moment?*
Possibly getting acquittals when I was newly qualified for undeserving people on criminal charges or getting injunctions for battered wives

3.*What is your worst career moment?*
The day I qualified when, with about 2 hours notice I was told to appear before a stipendiary magistrate in Marylebone Magistrates Court to defend two Irishmen on charges of assaulting a police officer, needless to say I did not get them off!

4. *What is your favourite book?*
War & Peace (honestly!)

5.*What is your favourite film?*
Either Blade Runner or True Lies

6. *What (if any) NGOs are you a member of?*
Birmingham Arts Trust

7. *What are your hobbies?*
Being with my two little girls Natasha aged 9 and Kirsty aged 6, and playing piano (badly at present!)

8. *What is the most scary / extreme / exciting thing you have done?*
Flying and doing aerobatics in a Jet Provost trainer

9. *What is your dream occupation?*
Not having to work but having lots of money and time! If I had to have one, it would be being a successful singer and dancer

10. What is your favourite holiday destination?
Japan

11. *What car do you drive?*
Toyota MR2 Turbo and an old 3 litre Vauxhall

12. *What is your favourite quotation?*
"Nothing takes away the past like the future" - Madonna

Catherine Davey – Stevens & Bolton
E-Journal Editor

1. *What year did you qualify?*
1981

2. *What is your best career moment?*
There must be more! However little compares to the thrill of reading the inspector's decision report and discovering that you've won your first ever public inquiry (and against a QC to boot!)

3.*What is your worst career moment?*
As an articled clerk in a local authority, I was authorised to appear to appear on its behalf before Magistrates and County Court. I was prosecuting a little old lady village shop keeper who had been deep freezing food and then putting it out on display from whence it walked (almost of its own volition) into the bags of unsuspecting shoppers. She burst into tears in the dock in the middle of my outline of the council's case…

4. *What is your favourite book?*
Salgado's Photography Masterpiece "The Workers", Cold Comfort Farm and Harry Potter!

5.*What is your favourite film?*
Blade Runner – Director's Cut and the original version of The Thirty-nine Steps.

6. *What (if any) NGOs are you a member of?*
Guildford Arts Council and various others.

7. *What are your hobbies?*
Travel, photography, film, theatre and sailing (I'm extremely incompetent crew).

8. *What is the most scary / extreme / exciting thing you have done?*

Sailing in rough weather / getting lost on Dartmoor in a thick fog / almost doing a bungee jump!

9. *What is your dream occupation?*
Anthropologist / explorer / photographer and documentary maker!

10. What is your favourite holiday destination?
Yemen / East Pakistan / Cuba
11. *What car do you drive?*
Lotus Elan SE Turbo and until its recent demise, an ageing Volvo 245.

12. *What is your favourite quotation?*
(I paraphrase with apologies to Lisa Alther author of "Kinflicks") "*My father the major always kept a penknife by the side of his plate at mealtimes lest one of us choked and required an emergency tracheotomy"* – well it made me laugh!

EVENTS ROUND-UP

(Any group or working party can insert details of future events or reports of events – email the Editor)

UKELA West Midlands
"Part IIA Birthday Party"

UKELA West Midlands is holding a seminar on issues arising during the last twelve months in implementing Part IIA Environmental Protection Act 1990
(the contaminated land regime). The meeting will be held at Eversheds Solicitors, Birmingham, commencing at 6pm on 2 April.

A panel of experts, including a consultant to local authorities, a local authority representative, a property lawyer and a remediation contractor will summarise the main issues from their perspective and take questions on the main issues, such as:

- What has been happening on the ground?
- What has been happening on paper?
- Knowingly permit - does anybody know what it means yet?
- Is Part IIA the most significant risk of significant harm to your contaminated land portfolio - what about the other liabilities?

There is a £10 fee to attend the meeting payable to UKELA West
Midlands and to be sent to:

Richard Kimblin, 3 Fountain Court,
Steelhouse Lane, Birmingham,
B4 6DR. DX 16079 Tel 0121 236 585
Fax0121 236 7008
email: richard.kimblin@3fc.co.uk

Congratulations !

To Mary Fraser (nee Thackeray) of the Environment Agency, and her husband Charles, on the birth of their first child, Elizabeth. She is now learning about the practical side of waste disposal!

WATER AID

Thames Water say they will donate £100K to third world countries if they get 250K hits on

www.givewater.org

in three months. The site seems genuine and worth a visit!

CONFERENCE BOOKING FORM

A copy of the booking form is attached.

FORM & PAYMENT SHOULD BE RETURNED TO:

Su Hayward-Lewis
UKELA Conference 2001
Cardiff University
Southgate House
PO Box 533
Cardiff CF14 3XZ

Tel: +44 (0)29 2087 5508
Fax: +44 (0)29 2087 4990
E-mail: haywardlewis@cardiff.ac.uk

CONFERENCE CONDITIONS

- No VAT is charged on the above fees
- Cancellation will not be accepted but you may send a substitute delegate (subject to payment of any additional fees arising from change of status)
- UKELA reserves the right to amend the programme or cancel the conference
- CPD hours may be claimed for the Law Society
- Please note accommodation is single en-suite except for student rooms, which are single semi-en-suite. Accommodation will be allocated on a first-come-first-served basis.
- [1] Proof of status will be required at registration

Please see www.ukela.org for further details

The editorial team would like feedback on this edition. We want letters, news and views from you.

All contributions, be they letters, articles, book reviews, case reports etc should be dispatched to the Editor, Catherine Davey

catherine.davey@stevens- bolton.co.uk

as soon as possible. The sooner we have the material from you, the sooner we will be in a position to produce the next edition!

Letters to the editor will be published, space permitting

Environmental Law aims to update readers on UKELA news and to provide information on new developments. It is not intended to be a comprehensive updating service. It should not be construed as advising on any specific factual situation

UK Environmental Law Association

Registered Charity number: 299498, Company limited by guarantee: 2133283

General Secretary: Dr Christina BT Hill, MA Registered Office: Honeycroft House, Pangbourne Road, Upper Basildon, Berkshire
RG8 8LP

Tel /Fax: (01491) 671631
Email: cbth_ukela@yahoo.com

See also the web site at

www.ukela.org

for more information about working parties and events, including copies of all recent submissions.

Booking Form Return by 1 June 2001

(block capitals please)

Title: .. ..First name: .....

Surname: ....

Organisation (if applicable): ....

Position (if applicable):..... .....

Address:

....

..... Postcode: .....

Tel No: ..... Fax: .....

Do you require a parking space?..... Approx. time of arrival in Cardiff:.....

E-mail: .....

Special Dietary or Access Requirements: .....

Emergency Contact Name & Tel. No:.....

CONFERENCE FEES

			For Bookings Received *Before* 1 May 2001	
UKELA members				
Full conference	£240	☐	£220	☐
Non-residential	£210	☐	£190	☐
Non members *				
Full conference	£260	☐	£240	☐
Non-residential	£230	☐	£210	☐
Full Time Students[1]				
Full conference	£135	☐		
Non-residential	£85	☐		
Scholarship [2]	Free	☐		

*This rate includes 6 months UKELA membership. If you wish to take advantage of this offer, please tick here ☐

SATURDAY AFTERNOON TRIPS - PLEASE INDICATE 1ST AND 2ND CHOICE

☐ Cardiff Bay & Barrage ☐ Museum of Welsh Life ☐ Motor Show - Millennium Stadium

☐ Sewage works visit (or alternative) ☐ Free time in Cardiff

HOW TO BOOK

Send completed booking form and cheque made payable to ***CARDIFF UNIVERSITY.***
Payment may also be made by ***VISA/MASTERCARD***
(Please indicate which).

Card Number…… ..... Date of expiry .....

Name on Card……