e-law

UKELA Making the law work for a better environment

Issue 49 - January 2009

www.ukela.org

EDITORIAL

2009 looks likely to be a challenging time for those interested in environmental law. The radical new frameworks created by the Climate Change and Planning Acts will become more widely recognised as such. Reconciling these frameworks and the requirements of other environmental laws will challenge many lawyers well beyond the recent Heathrow decision and pending Kingsnorth decision. The impact of the worldwide recession on EU and national environmental laws is still far from clear. Much new legislation has been published in draft (such as the Marine and Coastal Access Bill) or is promised (from the Carbon Reduction Commitment, to the Floods and Water Bill to further extensions of Environmental Permitting).

UKELA's Council remains fixed on delivering on the priorities in its current strategic plan:

- planning for our Annual Conference in Durham on 3rd-5th July with leading speakers examining the topical issues of Coal and Energy and Floods and Water - bookings are open via a link on the UKELA website www.ukela.org;

- engaging a legal contractor to help UKELA influence Government more effectively and professionally than we can at present;

- completing a new website, in partnership with Professor Robert Lee of Cardiff University, which aims to explain rights and responsibilities on environmental law in plain English, more on this later; and

- the annual essay competition and moots have continued to attract high calibre entries, in parallel we have launched a bursary to help those without funds gain vocational experience, together with the new Young UKELA Group, these initiatives aim to bring more talented individuals into this field at a time when it may be challenging to get a foot on the ladder.

Finally, UKELA's Council is now considering where it should put its limited resources for the next 3 years so a new plan is put in place, spending money on things that our membership think matters most, well before the current plan expires. Thank you to those who have already kindly fed into this process.

Peter Kellett

Chair

In this issue

WE NEED YOUR VIEWS

How would you like UKELA to change over the next three years? What would you like out of your membership? Are there things we should be doing or things we should stop doing? Do you feel your membership is good value for money?

Please help UKELA's Council draw up the next strategic plan for 2009-2012. Some great things emerged from the last plan – the new Law and Your Environment website (soon going on line); work on Wild law; making UKELA better able to influence environmental law.

With this edition of e-law you will find a short questionnaire which you can fill out electronically and return to Alison Boyd alisonboyd.ukela@ntlbusiness.com. Alison will analyse the results and present them to Council's Strategic Plan session at the end of February.

Please take a few minutes to fill out the form and return by February 13th. All replies go into our prize draw to win a bottle of bubbly (locally sourced so not technically champagne).

STOP PRESS

MOOT FINAL

There has been a record number of entries for this year's UKELA moot competitions: the Lord Slynn Moot and the Student Moot.

The final is to be held on Tuesday, February 10th, at the Practical Law Company, 19 Hatfields, London, SE1 9DJ (thanks to PLC for hosting), with UKELA's President, Lord Justice Carnwath, as the judge. Formalities start at 4.30pm. Drinks afterwards.

The subject of this year's moot is Protective Costs Orders, and Richard Kimblin, of No5 Chambers and UKELA's Council, will open the event by giving a presentation on the issues and latest cases. This is an ideal opportunity to get briefed on this important and topical issue.

All are invited to support the mooters and hear the presentation.

Prizes are kindly provided by No5 Chambers and Lawtext, which is providing subscriptions of Environmental Law and Management to the winners, also Oxford University Press which is giving copies of the sixth edition of Environmental Law by Stuart Bell and Donald McGillivray.

If you would like to attend you'd be very welcome. Please email Alison Boyd to let her know as places are limited: alisonboyd.ukela@ntlbusiness.com.

MEMBERSHIP RENEWAL 2009

Have you renewed your membership subscription for 2009? If not, then now is the time to do so to ensure uninterrupted benefits of UKELA membership. It couldn't be easier to renew. All you need to do is return your renewal form (sent to you at the beginning of December) with any amendments and payment to our Membership Secretary. Membership remains excellent value with subscription rates starting from just £15 per year and offering a host of benefits including regular updates via e-law, discounts for UKELA events including our Annual Conference in the Summer and other specially negotiated events. If you need any advice about renewing your membership, please contact our Member Support Officer at alisonboyd.ukela@ntlbusiness.com who will be happy to help. Thank you to all who have renewed already.

CONFERENCE 2009

SPONSORSHIP

UKELA is very grateful to WSP and 39 Essex Street for being the main sponsors of this year's conference at Durham University. Sponsorship makes all the difference to UKELA, as a small charity with limited resources, which aims to offer an excellent conference to its members.

Sponsorship opportunities for the 2009 Conference in Durham are still available. For information please contact Andrew Wiseman on +44 (0)20 7809 2528 or by email to Andrew.Wiseman@shlegal.com

CONFERENCE BOOKING

Don't forget that you can now book your place at our Annual Conference online – simply go to the homepage on our website www.ukela.org and follow the links. Booking in this way is very straightforward and quick. We are pleased to offer a number of discounted places once again for delegates on low incomes who demonstrate a genuine need eg the academic sector, NGO staff and pupil barristers. We are also able to offer 2 different types of accommodation, standard (with shared bathroom facilities) and ensuite so there really is an option to suit all pockets and requirements.

The Conference Venue

FINAL CALL TO ALL BARRISTERS

CONFERENCE 2009 NEEDS YOU

Volunteers are sought to provide the end of year review of the hottest environmental cases in 2008/9 at this year's conference. Three papers of approximately 25 minutes duration will be required on Sunday 5 July (between 11.30 and 13.00).

Over the past few years David Hart, Justine Thornton and Stephen Tromans have kindly filled this slot with wit and erudition but this year we are looking for other speakers.

Please contact Catherine Davey at catherine.davey@stevens-bolton.co.uk (01483 734234) if you are interested in participating this year and have not already been in touch with her.

FLOODING AND PRIVATE RIGHTS

Introduction

1. This paper looks at the rights of landowners to prevent their land from being flooded and their duties towards their neighbours. In essence most of these rights and duties are based on the common law; although statutory regimes have been enacted to ensure that landowners' duties to prevent obstruction of watercourses or to maintain defences against the sea are carried out.

2. This is particularly relevant in the context of a policy of 'managed realignment' of flood defences. While, as will be shown, there is no general duty on the state to protect all land from the sea, in many cases the former common law duty of a landowner will have been commuted (exchanged) with Commissioners or local boards in return for an annual or fixed payment by virtue of a local Act or Order. Where these commuted duties still exist then the successors to the Commissioners or boards – usually the Environment Agency – will have a duty under the local Act or Order to maintain the seawalls.

3. Over all this is the human rights regime. Article 1 of Protocol 1 to the European Convention of Human Rights is concerned with the protection of private property. It states "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." The question here is "Is a policy of allowing the sea to flood land a deprivation of the landowner's property for the purposes of Article 1?"

Natural drainage

4. There are no rights or duties in respect of water naturally flowing over the surface of land. This is in distinction from water flowing in a watercourse to which riparian rights and duties may attach. The leading case here is *Chasemore v. Richards* (1859) 7 H.L.C. 349 where a mill owner brought an action against the landowner above him for preventing percolating water from flowing onto the mill land. The House of Lord held that no rights could be created in such a flow.

5. As far as flooding from such water is concerned the Court of Appeal in *Palmer v Bowman* [2000] 1 WLR 842 said "The idea that every time natural drainage from the higher land to the lower occurs the lower land owner can bring an action to compel the higher to take impossible steps to prevent such natural process occurring only has to be stated to be seen to be nonsensical." The Court followed the decision of *Home Brewery Co. Ltd. v. William Davis & Co (Leicester) Ltd.* [1987] Q.B. 339 where the judge held

"that the common law rule is that the lower occupier has no ground of complaint and no cause of action against the higher occupier for permitting the natural, unconcentrated flow of water, whether on or under the surface, to pass from the higher to the lower land, but that at the same time the lower occupier is under no obligation to receive it. He may put up barriers, or otherwise pen it back, even though this may cause damage to a higher occupier. However, the lower occupier's right to pen back the water is not absolute.."

"...He may put up barriers and pen it back, notwithstanding that doing so damages the upper proprietor's land, at all events if he uses reasonable care and skill and does no more than is reasonably necessary to protect his enjoyment of his own land. But he must not act for the purpose of injuring his neighbour. It is not possible to define what is reasonable or unreasonable in the abstract. Each case depends upon its own circumstances."

6. However if the higher owner alters the contours of his land so as to concentrate the natural flow or otherwise artificially increases the flow of water onto the lower land then he may be liable for any damage caused – e.g *Hurdman v. North Eastern Railway Co.* (1878) 3 C.P.D. 168.

The 'Common enemy' rule

7. Since the 18th century the courts have developed the 'common enemy rule' in respect of flooding from surface water. The

rule can be stated as "an owner or occupier of land is entitled to use or develop his land so as to prevent flood waters coming on to his land. If in times of flood, waters which would have entered his land in consequence damage another's land – that does not provide a cause of action in nuisance."

8. The rule was most recently examined by the Court of Appeal in *Arscott v The Coal Authority* [2004] EWCA Civ 892. There the court stated at para. 33

"The common enemy rule has consistently been accepted in the English cases. I will not cite all the learning. The first case in the books is R v The Commissioners of Sewers for the Levels of Pagham (1828) 8 B & C 355. There, the common enemy was not a river's overflow, but the inroads of the sea. The Commissioners erected groynes and other works to defend the stretch of coast for which they were responsible against the sea's encroachment. But the consequence was that the sea flowed with greater force upon adjoining land, whose owner brought proceedings. Lord Tenterden CJ said at 361:

"I am… of opinion that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy."

9. However the Court also pointed out the limitations to the rule at paras 39, "You are entitled to protect yourself against the common enemy's incursions; but if the incursion upon your land has already happened or is about to happen, you may not export it to your neighbour. This is a pragmatic drawing of the line."

10. The Court considered whether the rule was consistent with the European Convention on Human Rights and decided that it was – paras 42 – 46.

Water in watercourses

11. A watercourse is a course for water. In *Lyons v Winter* (1899) 25 VLR 464 (AUS) it was said "To constitute a watercourse such as creates riparian rights there must be a stream of water flowing in a defined channel or between something in the nature of banks. The stream may be very small and need not always run, nor need the banks be clearly or sharply defined; but there must be a course, marked on the earth by visible signs, along which water flows."

1. Riparian rights

12. Riparian rights are based on ownership of land abutting onto a natural watercourse or lake. They are part of the owner's property, being transferred to him on the conveyance of the relevant land. Riparian rights exist on tidal and non-tidal waters and may also attach to artificial waters. A lessee or a licencee of the riparian land will also have the riparian rights that go with it.

13. A riparian owner has the right to have a natural stream come to him in its natural state in flow, quantity and quality and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state - *Chasemore v. Richards* (1859) 7 H.L.C. 349 at 382. These rights are subject to the rights of upstream and downstream owners and to any additional rights that may have been acquired by another riparian owner by grant or prescription.

2. Right to protect against extraordinary floods

14. A riparian owner can protect himself against 'the common enemy' in the same way as any other landowner. A distinction, however, is drawn between 'ordinary' flooding and 'extraordinary' flooding. The 'common enemy rule' here applies only to 'extraordinary' flooding.

15. In *Nield v London and North Western Railway Co* (1874) LR 10 Ex 4 the Defendants put in temporary flood protection works to stop water coming on to their premises. As a result of these works the Plaintiff's land was flooded. It was held that the Defendants had the right to protect themselves against the anticipated flooding. While this case concerned a canal, rather than a natural river, it was said :

"Where, indeed, there is a natural outlet for natural water, no one has a right for his own purposes to diminish it, and if

he does so he is, with some qualification perhaps, liable to any one who is injured by his act, no matter where the water which does the mischief came into the watercourse. I say with some qualification, because it may be that, even in the case of a natural watercourse, the riparian owner is entitled to protect himself against extraordinary floods by keeping off extraordinary water. But it is not necessary to go further into that question, for here there was no right to an outlet for water."

3. Right to protect from increases in flow

16. A riparian owner has the right to raise the banks of his river or stream as the waters rise. But here, unlike the common enemy rule, he may not do so to the detriment of his neighbour – e.g *Provender Millers (Winchester) Ltd v Southampton County Council* [1940] 1 Ch 131.

17. The position was set out by Lord Lyndhurst in *Menzies v Breadalbane* (1828) 3 Bligh (NS) 414:

"A proprietor on the banks of a river has no right to build a mound which .. would if completed, in times of ordinary flood water throw the water of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them. It is clear beyond the possibility of a doubt that by the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a new sort of water way to the prejudice of the proprietors on the other side. The ordinary course of the river is that which it takes at ordinary times. I am not talking about that which it takes in extraordinary or accidental flood; but the ordinary course of the river at different seasons of the year must, I apprehend, be subject to the same principles."

18. This principle is likely to be followed today, particularly in the light of the prevailing doctrine of reasonable user of land between neighbours as set out in *Leakey v National Trust for Places of Historic Interest or Natural Beauty*[1980] QB 485 and other cases.

19. Thus if, as a result of global warming, water levels in a river rise the riparian owner will have the right to raise the banks so as to ensure he is not flooded. But if he does so to the detriment of upstream or downstream owners he is likely to have to pay for any damage so caused.

4. Liability for flood damage from watercourses

20. The leading authority on liability for flooding from watercourses is now *Green v Somerleyton* [2002] EWCA Civ 198 where the court applied the *Leakey* principles to a flooding case. It said "In *Leakey*, this court held that an occupier of land owes a general duty of care to a neighbouring occupier in relation to a hazard occurring on his land, whether such hazard is natural or man-made (the "hazard" in *Leakey* being an unstable mound of earth which was present on the land not as a result of any human action or activity on the land). As to the nature and extent of such duty of care, Megaw LJ said (at *ibid.* p.524D-E): ".... the nature and extent of the duty is explained in the judgment in *Goldman v. Hargrave* [[1967] 1 AC 645] at pp.663, 664. The duty is a duty to do that which is reasonable in all the circumstances."

21. At paragraph 84 the court said "If reasonableness between neighbours is the key to the solution of problems concerning encroaching tree roots, I can see no reason in principle why it should not also be the key to the resolution of a dispute such as has arisen in the instant case. The more so because I cannot draw any sensible distinction in this respect between unreasonably allowing fire to escape onto a neighbour's land (the situation in *Goldman v. Hargrave*, where the defendant was held liable for the resulting damage) and unreasonably allowing floodwater to do so."

22. Indeed in *Leakey* itself (at 526G) Megaw J used flooding as an example of the nature of the duty :

"Take, by way of example, the hypothetical instance which I gave earlier: the landowner through whose land a stream flows. In rainy weather, it is known, the stream may flood and the flood may spread to the land of neighbours. If the risk is one which can readily be overcome or lessened – for example by reasonable steps on the part of the landowner to keep the stream free from blockage by flotsam or silt carried down, he will be in breach of duty if he does nothing or does too little. But if the only remedy is substantial and expensive works, then it might well be that the landowner would have discharged his duty by saying to his neighbours, who also know of the risk and who have asked him to do something about it, "You have my permission to come on to my land and do agreed works at your expense"; or, it may be, "on the basis of a fair sharing of expense". In deciding whether the landowner has discharged his duty of care – if the question were thereafter to come before the courts – I do not think that, except perhaps in a most unusual case, there would be any question of discovery as to means of the plaintiff or the defendant, or evidence as to their respective resources. It may be

that in some cases the introduction of this factor may give rise to difficulties to litigants and to their advisers and to the courts. But I believe that the difficulties are likely to turn out to be more theoretical than practical."

23. The court adopted this example and concluded (para. 102) that :" It follows that, absent any relevant easement, and given the parties' awareness of "the propensity of the marshes to flood and the necessity to drain [Scale Marshes] into [Priory Marshes] and thus to pump water into the river (judgment p.25G-H), the Trustees will be liable to Mr Green in nuisance if and to the extent that the flooding of Priory Marshes in December 1993 and thereafter was attributable to their failure to do that which was reasonable in all the circumstances."

24. The phrase 'absent any relevant easement' is recognition that there might be an easement of drainage that would affect the position. In *Green* such an easement was claimed by the Defendants and that claim was upheld. In particular the court found (at para. 122) that a right of drainage can have sufficient certainty and uniformity to constitute a legal easement. Thus in any flooding case the position as to drainage rights should be assessed.

25. Where the court says in para. 102 of the judgment "given the parties' awareness of the propensity of the marshes to flood" it is concerned with foreseeability of harm. In any nuisance case the Claimant must show that it was reasonably foreseeable by the Defendant that the condition of his land or the use to which it is put would cause harm to the Claimant.

26. In the old cases there is a defence of 'Act of God' – see e.g *Corporation of Greenock v Caledonian Railway Company* [1917] AC 556 - which will exonerate a Defendant if the act of nature concerned was overwhelming – such as a torrential downpour. However with modern forecasting of weather events this defence is more an aspect of reasonable foreseeability. Should the Defendant have foreseen an event that the meteorological evidence shows was one likely to happen once in a hundred years? In general a court is likely to answer this question with a 'yes.'

Liability of statutory agencies for flooding

27. A statutory agency's liability for nuisance or negligence will depend on the statutory authority under which it operates. If it has a duty to maintain certain works then it may be liable for a breach of that duty – depending on the nature of the duty. If it has only a power to maintain then it is unlikely to be held liable for damage caused by a failure to maintain; though it may be liable if it has conducted maintenance operations negligently.

1. Liability under a power to maintain

28. Public land drainage statutes will give a statutory body a general power to maintain land drainage works. For example section 14(2)(a) of the Land Drainage Act 1991 gives powers to local authorities and drainage boards "to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work." In *Symes and Jaywick Associated Properties Ltd v Essex Rivers Catchment Board* [1937] 1 KB 548 Scott LJ said (headnote but see 572):

"In passing the Land Drainage Act, 1930, Parliament must be presumed to have intended to deal with any residual prerogative rights and duties, to entrust them to the various authorities mentioned in the Act, and to maintain the general constitutional position originally built up at common law and then taken over and developed by various statutes. It is an express or implied principle of the Act of 1930 that it is the duty of the relevant Board constituted under the Act to look to the attainment of its two main objects: (a) to control the flow of inland waters, and (b) to keep out sea water from farm lands. Where these lands lie below the level of high water, the sea defences can ensure no effective legal protection unless the Act contains this implication."

'Maintain' in section 14(2)(a) needs to be interpreted in the light of this.

29. In *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 the House of Lords held that where a statutory authority is entrusted with a mere power it cannot be liable for any damage sustained by a member of the public by reason of a failure to exercise the power. If in the exercise of its discretion the authority embarks upon an execution of the power, the only duty owed to any member of the public is not thereby to add to the damages which that person would have suffered had the authority done nothing. So long as the authority exercises its discretion honestly, it can determine the method by which, and the time during which, the power shall be exercised.

30. In the *Kent* case owing to a very high tide a breach was made in a sea wall as a result of which Mr Kent's land was flooded.

The Board, in the exercise of their statutory powers undertook the repair of the wall, but carried out the work so inefficiently that the flooding continued for one hundred and seventy eight days, thereby causing serious damage to the land. Had the work been done with reasonable care and skill the breach could have been repaired in fourteen days. The House held that as the Board was under no duty to repair the wall or to complete the work after having begun it, they were under no liability to Mr Kent, the damage suffered by him being due to natural causes.

31. This absolute declaration of 'no liability' has been considered subsequently by the courts. Although it was more or less embraced by Lord Hoffman in *Stovin v Wise* [1996] 3 WLR 388 the more recent decision of *Barrett v Enfield* [1999] 3 All ER 193 has refined the concept. Thus for example, Lord Slynn at 211, "Where a statutory power is given to a local authority and damage is caused by what it does pursuant to that power, the ultimate question is whether the particular issue is justiciable or whether the court should accept that it has no role to play."

32. The law in this area is still developing. The question of what is a 'justiciable' decision is unclear. Although reliance is frequently based on whether a particular action resulted from a policy or operational decision, the use of this criteria was disapproved of by Lord Hoffman in *Stovin.* Nevertheless it survives as shown in *Barrett.*

33. In *Phelps v London Borough of Hillingdon* [2001] 2 AC 619 Lord Slynn said at 653 :

"This House decided in Barrett v Enfield London Borough Council that the fact that acts which are claimed to be negligent are carried out within the ambit of a statutory discretion is not in itself a reason why it should be held that no claim for negligence can be brought in respect of them. It is only where what is done has involved the weighing of competing public interests or has been dictated by considerations on which Parliament could not have intended that the courts would substitute their views for the views of ministers or officials that the courts will hold that the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory discretion."

34. This paper is not the place to go into these complexities. The Law Commission in its papers '*Monetary Remedies in Public Law'* (2004) and Law Com. CP 187 (June 2008) has addressed this issue and is due to issue a final report this year. It will be interesting to see what it recommends. However, all that can be said at this stage that it is likely to be difficult for a person whose land is flooded by a failure to maintain drainage works to succeed in an action against the relevant statutory agency.

35. In my view, even if the agency own the relevant works, an action on the basis of the *Leakey* principle set out above, is unlikely to succeed. In *Marcic v Thames Water* [2004] 2 AC 42 Lord Hoffman at paras. 62 – 64 drew a distinction between an action between two private neighbouring landowners and an action against a public body. He held that the *Leakey* principle did not apply in such cases – see also *Gorringe v Calderdale MBC* [2004] 2 All ER 326 at para. 17. Thus it is likely that a court will follow that reasoning in a case between a landowner whose land is flooded and the agency responsible for maintaining relevant drainage works under a statutory power.

2. Liability under a duty to maintain

36. Where there is a duty to maintain works the statutory agency may be liable if it fails to carry out works without due care and expedition. The question in such cases is whether the statute which imposes the duty enables the particular Claimant to bring a private law action for its breach.

37. In *X (Minors) v Bedfordshire County Council* [1995] AC 633 Lord Browne-Wilkinson said (at 731C)

"The principles applicable in determining whether [a] statutory cause of action exists are now well established, although the application of those principles remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of a statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of that duty."

38. He went on to say

"If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action. ... If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and

not by private right of action… However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statute of criminal penalties for any breach."

39. If the action against the statutory agency is brought in negligence the basis for imposing a duty of care is similar; although it would be wrong to treat it as the same as the concept of a statutory duty is different to that of a duty of care. As was said in *Rice* v *the National Dock Labour Board* [2007] EWCA Civ 289 at para. 27 "The question depends on the statutory framework, the relationship between the claimant and the statutory body, the kind of injury or loss for which the claimant claims damages, and whether the injury or loss was caused by a negligent act or omission by or on behalf of the statutory body." The court, having considered various cases, summarized the position, at para. 42 as:

"Drawing together and synthesising the threads of these authorities, a statute containing broad target duties owed to the public at large, and which does not itself confer on individuals a right of action for breach of statutory duty, is unlikely to give rise to a common law duty of care, breach of which will support a claim by an individual for damages. Such a public law duty is enforceable, if it is justiciable at all, only by judicial review. There may, however, be relationships, arising out of the existence and exercise of statutory powers or duties, between a public authority and one or more individuals from which the public authority is to be taken to have assumed responsibility to guard against foreseeable injury or loss to the individuals caused by breach of the duty. There is then a sufficient relationship of proximity and it is fair, just and reasonable that a duty of care should be imposed. In order to determine whether the law should impose such a duty, an intense focus on the particular facts and the particular statutory background is necessary."

40. Thus if a flooded landowner seeks to bring an action on the basis of a breach of a statutory agency's duty to maintain drainage works it will be necessary to analyse any alleged duty carefully. It is to the question of what, if any, duty arises on statutory agencies to maintain drainage works that I now turn; in particular as to whether there is a duty to maintain sea defences.

A statutory duty to maintain sea defences

1. A general duty to maintain

41. In early statements of the law it was said "…the King ought of right to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted. .. and therefore if the sea walls are broken .. the King ought to grant a commission to enquire and to hear and determine these faults." – Lord Coke *Case of the Isle of Ely* (1609) 10 Co Rep 141a. This led some authors to consider that there was a general duty on the Crown to establish and maintain sea defences – e.g Coulson & Forbes on the *Law of Waters* (6th Edn 1952) at p.44.

42. However in *Hudson v Tabor* (1877) 2 QBD 290 Lord Coldridge CJ stated (at 293), "It is said that it was the duty of the king to guard and protect the shores and lands adjoining the sea from being overflowed by the sea; but although such expressions are used … from which it might seem that this was supposed to be a liability to be enforced against the king, such cannot be the meaning of them and no mode of enforcing it has been, or can be, suggested." While in *Attorney-General v Tomline* (1880) 14 Ch D 58 it was held that there was a duty to protect the realm from the inroads of the sea, this was explained in *West Norfolk Farmers' Manure Co. v Archdale* (1886) 16 QBD 754 as applying to natural protecting banks against the sea and the waters of tidal rivers – see Lord Esher MR at 758.

43. In the New Zealand case of *Falkner v Gisborne District Council* [1995] 3 NZLR 622 it was held, relying on *Tomline*, that there was a common law duty on the Crown to protect land from encroachment by the sea. However the *West Norfolk Farmers* case was not cited to the court and this decision must therefore be regarded as doubtful. Certainly in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 the argument that the Crown was under such a duty was rejected at first instance and the case proceeded in the Court of Appeal and the House of Lords on the basis that the Board had a power to maintain seawalls but not a duty.

2. A duty to maintain specific works

44. In *Morland v Cook* [1868] LR 6 Eq 252 it was said "The case of *Rex v. Commissioners of Sewers for Essex 1 B&C 477* lays down as a proposition of undoubted and unquestionable law that all persons enjoying the benefit of a sea-wall are

bound, and are liable at common law, to repair and maintain it in the absence of any special custom, or in the absence of any contract for that purpose." In those days 'benefit' was strictly interpreted to mean 'immediate benefit' and it was not until the 1927 Royal Commission on Land Drainage that it gained a wider meaning. The *Essex* case was one of a liability to repair that could be enforced by the Commissioners. It did not impose liability as between neighbouring landowners – see *Hudson v Tabor*.

45. However the problem was that quite often landowners ignored their duty and floods occurred. The first step to resolving this was to create Commissioners of Sewers with powers to require landowners to carry out their duties. Unfortunately this policy did not succeed either and the solution was then to 'commute' the landowners' liability. In return for an annual payment as set out in a local Act the landowner's liability would be taken over by the Commissioners. Thus the duty to maintain was passed to the Commissioners and their successors. The annual payment was a rentcharge on the relevant property and such 'rents' are being paid to this day.

46. Under the Land Drainage Act 1930 the payment was altered to a fixed sum and local Acts were replaced by orders made under the 1930 Act. The modern position is found in section 33 of the Land Drainage Act 1991 where the Environment Agency or an Internal Drainage Board may commute a drainage obligation in return for a fixed sum calculated under section 34 of the 1991 Act to be "be payable by way either of a capital sum or of a terminable annuity for a period not exceeding thirty years, at the option of the owner" which should represent "the probable average annual cost, taking one year with another, of carrying out and maintaining in a due state of efficiency the works which are required to be carried out and maintained by virtue of the obligation to be commuted."

47. In my view where a liability was commuted by a local Act and payments are still being made by a relevant landowner under the commutation arrangement the relevant statutory agency remains under a duty to keep those works in proper repair. It would be the same if the commutation was for a fixed sum. I doubt a court would hold that the payment of a sum representing the costs of maintenance works over thirty years means that the agency is only obliged to maintain the works for that period. What was transferred to the agency was a duty to maintain those works and that obligation remains. 'Maintain' here means 'keep the sea out' – see para. 28 above.

3. Conclusion on duty

48. In the DEFRA paper *Managed Realignment: Land Purchase, Compensation and Payment for Alternative Beneficial Land Use* (2003) it is said, "There is no general legal right to provision of flood defences except in certain specific cases (e.g. the statutory duty on riparian owners to provide flood protection in parts of London and the legal requirements of the Habitats Regulations)." This is right as far as it goes but would be more transparent and open if it made reference to liabilities statutory agencies may have inherited through commutation of obligations.

Managed Realignment

49. The only reported case on the policy of managed realignment is *Falkner v Gisborne District Council* [1995] 3 NZLR 622. I have already criticised part of that decision. However its central conclusion was that, having found a duty to maintain sea defences existed:

"It would be wrong to frame the duty in terms of an absolute, positive duty on the Crown to construct and maintain sea walls, if such construction and maintenance be not in the wider public interest (for example if it would cause greater damage to other areas of the coastline or if it were geographically impracticable.) What Brett and Cotton LJJ had in mind in formulating the duty in the Tomline case was a situation where the Crown entirely neglects or acts in defiance of its duty, rather than that where it genuinely decides as a matter of public policy not to erect or maintain a particular sea wall."

50. In my view an English court may well follow this line of argument. It fits in with the line the courts are taking on breach of statutory duty/ use of statutory powers. The question is whether a court could interpret a duty in this way. On the face of it the duty is an absolute one. A parallel can be drawn with the duty to maintain a highway under section 41 of the Highways Act 1980. This has been held to be an absolute duty to keep the highway in good repair – see e.g *Goodes v. East Sussex County Council* [2000] 1 WLR 1356. It is arguable that only Parliament could downgrade the duty in the way suggested in *Falkner*. Alternatively it should provide a power to discontinue or realign drainage works as is done for highways in Part VIII of the Highways Act 1980.

51. However, unlike the duty in section 41 of the 1980 Act, which has the statutory defence in section 58, the liability to maintain drainage works is ill-defined and may vary from place to place depending on the terms of the liability that was commuted. In particular the liability tended to be to maintain sea walls against the effects of ordinary seas. If there was an extraordinary storm which damaged the wall a frontager might not be liable to repair it – *Fobbing Sewer Commissioners v R* (1886) 11 App Cas. 449. In that case the liability was described by Lord Blackburn (at 460) as "a liability to keep in repair, not extending to what is commonly called the act of God." Thus the liability here never was absolute in the sense that the sea wall had to be maintained in all circumstances. In addition in the recital of facts in the Court of Appeal ((1885) 14 QBD 561) it is noted (at 565) "it was agreed between the prosecutor and the commissioners (without prejudice) that it would be less difficult and less costly and more secure to vary the position of the wall, and that the cost of so doing should be treated as part of the cost of repairing the wall pursuant to the order. This was done at a cost of 3300*l.* 6*s.* 10*d."*

52. Thus there is no absolute duty here. Even where a statutory agency is liable by virtue of the commutation of a frontager's obligation to maintain a sea wall the agency may follow a policy of 'managed realignment.' However, if *Symes* (see para. 28 above) is right that 'maintain' means 'keep the sea out' then the agency's room for allowing defences to lapse will be limited.

53. If there is an absolute duty then there would have to be an application under section 32 of the Land Drainage Act 1991 to vary an award made under a public or local Act. It is not entirely clear that section 32 enables the Environment Agency to modify its own obligations but the section does say "including any provision affecting the powers or duties of any drainage body or other person with respect to the drainage of land."

54. If the commutation was done under an order or other power the right of a statutory agency to vary it is less certain. That may require primary legislation.

Compensation

55. Currently it is not proposed to compensate landowners whose land is flooded as a result of withdrawal of maintenance.

"Except in limited circumstances, outlined below, no compensation is payable to those affected by flooding or erosion, including cases where it is decided not to defend a particular area, or to undertake managed realignment. This approach, adopted by successive Governments, is justified by current legislation, which provides operating authorities with permissive powers to undertake flood and coastal defence works. Save for the specific requirements of the Habitats Directive, there is no general obligation to build or maintain defenses either at all, or to a particular standard. Consonant with this approach, the legislation also makes no provision for compensation from public funds to persons whose property or land is affected by erosion or flooding. Government response to 1998 Agriculture Select Committee report.

56. Where a decision has been taken to stop maintaining a wall that is only maintained under a statutory power I doubt compensation could be obtained under the common law. In the *East Suffolk* case Lord Thankerton said (at 95) :

"If the appellants [the Board] chose to abandon the operations when only partially complete, they would be, in my opinion, entitled to do so, and would be under no liability to the respondents for such cessation, except in so far as the partially completed works might constitute a danger leading to damage. This is clearly stated by Scrutton L.J. in the Glossop case[(1)] . This discretion as to abandonment of the operations is in marked distinction to the case of a positive statutory duty to undertake the repair, and the cases of a contractual undertaking to do the work."

57. However if the relevant statutory agency is under a specific duty to maintain - as opposed to a broad general duty -I consider there is a right to compensation.

58. In *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] 1 AC 749 Lord Atkinson said (at 752) "...an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms. I used the words "legal right to compensation" advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to the subject to a sum given ex gratia, it cannot be so confined."

59. Thus, despite the absence of a statutory provision for compensation, a government agency can be liable to compensate an individual where it takes away his property - and see Lord Radcliffe *Belfast Corporation v O.D. Cars* [1960] 1 AC 490 at

523. The 'property' taken here is the right to have land protected by a sea wall under the relevant duty.

60. The government position set out above may be valid where defences are maintained under permissive powers. Where they are maintained under a commuted liability a court is likely to require compensation.

61. Although there may be an action for breach of statutory duty here, such an action could not be based on a decision to abandon works. The decision only gives rise to a prospective loss. Actual damage would only occur when, as a result of the abandonment, land was flooded; which might not occur until ten to twenty years after the decision had been taken.

62. Compensation to the current owner is a fairer way of dealing with the situation as his land is likely to substantially diminish in value consequent on a decision to abandon protective works.

Human Rights

1. Article 1 of Protocol 1

63. If an individual's home is not threatened by the encroachment of the sea then Article 1 of Protocol 1 to the European Convention of Human Rights applies. This provides that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

64. The person's land is a possession and the abandonment of the sea wall would mean that he is being deprived of it. The main question here seems to me to be whether the deliberate decision to stop maintaining the wall is actionable under Article 1. This, in my view, is a case of 'expropriation' rather than 'control of use' so that the cases on 'control of use' like *R (on the application of Trailer & Marina (Leven) Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2005] 1 WLR 1267 will not apply.

65. In *Bistrovic v Croatia* ECHR 31 May 2007 the court said:

33. The essential object of Article 1 of Protocol No. 1 is to protect individuals against unjustified interference by the State with the peaceful enjoyment of their possessions. However, by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII and *Broniowski v. Poland* [GC], no 31443/96, § 143, ECHR 2004-V), particularly where there is a direct link between the measures which an applicant may legitimately expect from the authorities and the effective enjoyment of his possessions (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 134, ECHR 2004-XII). This means, in particular, that the States are under an obligation to provide judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any cases concerning property matters (see, *mutatis mutandis*, *Sovtransavto Holding v. Ukraine*, cited above, § 96).

34. In each case involving an alleged violation of this provision, the Court must determine whether, due to the State's interference or passivity, a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 of Protocol No. 1 (see *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 26, § 69 and *Novoseletskiy v. Ukraine*, no. 47148/99, § 101, 22 February 2005). Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicant. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Article 1. That Article does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may

call for less than reimbursement of the full market value (see *Holy Monasteries (The) v. Greece*, judgment of 9 December 1994, Series A no. 301-A, pp. 34-35, §§ 70-71 and *Papachelas v. Greece*, cited above, § 48).

66. The first sentence of para. 34 where the court looked at the balance in the light of the state's "interference or passivity" is important here. In *Broniowski v. Poland* [GC], no 31443/96, § 143, ECHR 2004-V), the court said at para. 135

"The parties did not take clear positions on the question under which rule of Article 1 of Protocol No. 1 the case should be examined. While neither of them argued that the situation complained of had resulted from measures designed to "control the use of property" within the meaning of the second paragraph, the applicant alleged that there had been a general failure by the State to satisfy his right, and the Government maintained that neither any failure to respect that right nor any interference with it could be attributed to the authorities." The court found that "the alleged violation of the right of property cannot be classified in a precise category." (para 135) and considered that the case fell under the general principle of peaceful enjoyment of possessions.

67. The Court went on to say at para. 144

"..the boundaries between the State's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of an interference by a public authority which requires to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. It also holds true that the aims mentioned in that provision may be of some relevance in assessing whether a balance between the demands of the public interest involved and the applicant's fundamental right of property has been struck. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention"

68. Thus in my view there need not be a positive 'taking' of possessions for Article 1 of Protocol 1 to apply. There can be a general failure by the state to satisfy the Article 1 right. In determining a policy of managed realignment a state must have regard to "to the fair balance to be struck between the competing interests of the individual and of the community as a whole."

69. It is worth pointing out here that sea walls were not emplaced for the protection of the particular landowner but for the benefit of the community as a whole – see Cockburn CJ in *Board of Works for the Greenwich District v Maudslay* (1870) LR QB 397 at 401 "The power to erect a sea wall or embankment as a protection against the sea, or from the influx of the tide in rivers, is one of those things which emanate from the prerogative of the Crown for the general safety of the public.." Indeed the reforms to land drainage in the 1920s and 30s were largely done to improve farm land to provide greater self-sufficiency for a nation that had been besieged in World War I and to provide employment for the large numbers of unemployed. That is why the financial basis of the system was changed from loans to grants. Thus if the public benefited from the sea wall and the landowner was encouraged to maintain it for the public benefit – as well as his own – it is fair that the community compensate him for any loss suffered as a result of the abandonment of the wall; even if the state has taken over maintenance in return for an annual 'rent.'

2. Article 8

70. It may be that a person's home is also lost as a result of the abandonment. In such a case Article 8 of the ECHR would apply. In my view the position will be similar under Article 8 to that under Article 1 of Protocol 1 and I don't deal with Article 8 in as much detail – see *Hatton v UK* (2003) EHRR 611, para. 98.

71. At para. 97 of *Hatton* it was said

"At the same time, the Court re-iterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, for example, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, § 48). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight (see James and Others v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one").

72. Thus again I suspect the ECHR would uphold the policy of managed realignment in a case brought under Article 8; although it may hold that reasonable compensation should be paid to the home owner for his loss.

3. Conclusion

73. There is a case - *Budeyeva v Russia* (2007) Admissibility decision, Lawtel -concerning damage to property by natural forces. A final ruling has not yet been made. This case will be worth watching although the facts are far more extreme than most peoples' situation. Nevertheless it may set out the principles under Articles 8 and 1 of Protocol 1 where damage to property is caused by natural forces.

74. Here I suspect a court would say that the Agency is entitled to operate a policy of managed realignment but that landowners whose land is flooded as a result are entitled to some compensation from the state. That compensation may be less than full market value; particularly if there is some payment under agri-environment schemes.

How We Live Now - UKELA Partners in Major Environmental Law Forum Event

By Stephen Sykes, of Sykes Environmental, and chair of UKELA's membership development working group

In conjunction with IEMA (Institute of Environmental Management and Assessment) and a local law firm, UKELA organised a highly successful sustainability conference with the theme of *"How We Live Now"* which took place at the National Science Learning Centre in York on January 20th.

The event attracted more than 120 people – one of the largest numbers of delegates ever to attend a UKELA event (other than our Annual Conference and the Garner Lecture). Eminent legal, planning and scientific speakers addressed a series of important issues relating to sustainability – from locally generated energy, to carbon neutral development, waste management and waste minimisation to sustainable spatial planning.

Two factors were behind UKELA's decision to run this event. As a nationwide organisation, UKELA was very keen to hold a major environmental law event for our members outside London. Moreover, to encourage further diversification of our membership, we wished to attract as many non-lawyers to this event as possible. We partnered with IEMA which has a membership of 14,000 environmental consultants, as well as the York-based law firm, Denison Till, who helped a great deal by finding a fabulous venue for the event and attracting interest from local attendees.

The event was chaired by Professor Stuart Bell of the University of York and co-author of one of the leading texts on environmental law - Bell and McGillivray (7th edition). Stuart invited delegates to consider whether environmental law is starting to lose its capacity to address satisfactorily the complex environmental problems of the day, for instance as it has to compete with lighter touch economic instruments which can work well to discourage polluting activities. He suggested that the law of diminishing returns may also be at work – with so much environmental law already on the statute book, it is difficult for new law to make much of an impact in terms of bringing about improvements, especially when such laws tend to be exceptionally complicated, hard to understand and hence difficult to enforce. Perhaps legislators need to spend more time evaluating whether our current library of environmental is working, before adding to it. Stuart said that some environmental lawyers might not like it, but they had to recognise that they cannot solve environmental problems on their own – this requires a collaborative, multi-disciplinary approach. He welcomed the multi-disciplinary quality of the conference with lawyers and non-lawyers presenting.

The first speaker was barrister Richard Harwood of 39 Essex Street. Richard spoke on the topic of *"Is Environmental Law a Barrier to Developing Sustainable Communities?"* Richard stressed, first of all, that it would be a mistake to expect environmental law to provide clear-cut answers to questions – rather it provides a framework for decision-making. He considered the extent to which this framework can deal effectively with new environmental challenges (such as climate change) and environmental technologies (such as carbon capture and storage). Richard went on to argue that there are numerous examples where the underlying principles of law have been applied to address circumstances which legislators could not possibly have anticipated when the relevant stature was passed (e.g. the original consent for Sizewell B was issued under an Act of Parliament dating from 1909). Richard agreed with Stuart Bell in noting that, at times, there is a danger that environmental law has become so over-complex that it can stop anything from being done (e.g. where a waste management client wishes to apply for an environmental permit for a landfill site), but generally speaking the law is not a barrier to creating sustainable communities.

A paper was then presented by Professor Peter Roberts, Board Member of the new Housing and Communities Agency, Chair of the Academy for Sustainable Communities, and Professor of Sustainable Spatial Development at the University of Leeds. Peter spoke on the topic of *"Developing Skills and Knowledge for effective Sustainable Communities"*. He advocated the need to break down endemic "silo thinking" amongst some of those involved in planning and development (e.g. *only* to look at maximising the rate of return, or *only* to consider job creation). It was essential to ensure that considerations such as social inclusion, responsible economic progress, inheritance, sustainable development, and local and regional requirements are given their due weight. It is, he said, vital for planner and developers to take a longer view as to how land and buildings will be used into the future (meaning tens of decades, if not longer). Peter noted that there is a training and skills shortage to achieve the longer / wider / deeper approach which he would like to see more of in practice. However, the Academy for Sustainable Communities has been running for several years and is making a difference.

Nabarro Energy Partner, Tom Bainbridge, spoke on the subject of *"Distributed Energy"* (meaning energy which is generated at or near to the point of use, such as solar, combined heat and power (CHP), waste from energy, wind, etc). Tom spelt out the clear benefits of distributed energy - it is the most efficient form of energy generation (e.g. up to 60% of the coal burned by a coal fired power station is lost in transmission – wasting resources and carbon emissions – whereas CHP can be up to 90% efficient). Tom thought that Government had been slow to develop a cohesive strategy for distributed energy. Some policy measures

had been disjointed as they fell between Government's energy policy and environmental policy. However, the establishment of the Department of Energy and Climate Change (DECC), together with the Renewable Energy Directive (RED) and HM Government's current consultation exercise (as to how we can meet our RED-derived target of generating 15% of our energy from renewable sources by 2020) were steps in the right direction. More is needed though, such as lower cost connection to the grid.

WSP's Ripin Kalra addressed the question of what we can do to achieve zero carbon communities with a paper entitled: *"Carbon reduction – some issues for Project Development"*. Ripin's practice is international in scope. Many of his projects are highly inspiring for anyone aiming to reduce carbon usage. Ripin emphasised that the main way to achieve carbon reduction is to maximise the ability of the site / building to generate its own energy. He is currently involved with the development of a wholly new zero carbon city being built in the Middle East. Ripin explained how careful consideration of the bioclimatic design and location of each new building in this city has an impact on carbon and energy usage and generation (from distributed energy). Closer to home, Ripin also described a project in West Sussex where 1,000 new homes are to be powered by solar energy. He advised that simply orientating the new homes in the right direction (taking account of the sun and shadows arising from the wooded area in which the development is to take place) will lead to a 19% saving in carbon.

Gary Bower, a Principal Environmental Consultant Royal Haskoning, presented his paper on the *"Challenges and Opportunities for the UK Waste Industry"*. This was a practical, up-to-the-minute presentation which suggested that there are perhaps more challenges than opportunities. Gary looked at how the waste management sector is coping with a multitude of waste minimisation and recycling targets. Under the current Batteries Directive, for instance, the UK must recycle 25% of its batteries by 2012. We currently recycle around 2% of our batteries. It has taken France 5 years to go from a similar low level to 23% - we have a little over 3 years to do this before the target ramps up thereafter to 45% by 2016! By 2020 50% of our household waste will need to be reused or recycled. By 2010, a 35% reduction by weight in the amount of biodegradable municipal waste is targeted. The setting of ever more stringent targets (e.g. in the Waste Framework Directive) is ongoing and relentless. This creates headaches and serious challenges for some and opportunities for others such as new technology suppliers.

The day ended with a panel session involving the Chair and the speakers and a series of questions from the audience (many of which relating to planning and sustainability) and a most enjoyable, light-hearted closing speech by Andrew Lindsay, Partner and Head of Environmental Law at Denison Till.

This was a great collaborative event with a superb and diverse range of speakers and a large and very keen audience. There is every chance that more large scale collaborative events of this nature will be held outside London in the future. Thanks go to Alison and Vicki for helping from the start of this event to the very day itself.

Stephen Sykes - Sykes Environmental LLP stephen@sykesenvironmental.com

NATURE CONSERVATION WORKING GROUP (NCWG)

TRIBUTE TO TOM HUGGON AND NCWG'S WORK PLAN FOR 2009

After many years of service as the Chair of UKELA's Nature Conservation Working Group, Tom Huggon decided to step down from his position at the Group's meeting on 10 September 2008.

The Group is indebted to him for his strong and visionary leadership throughout the period since the Group's inception in the late 1990s. However his commitment to the development and evolution of nature conservation law goes much further back than that. Tom was one of the founding members of the "Lawyers' Ecology Group" set up in the 1970s, this Group being the forerunner to the NCWG. As a partner with Browne Jacobsen for 20 years (where he now remains a consultant) working on nature conservation issues, he has been involved in most of the significant changes and developments in nature conservation law and it is difficult to imagine that his breadth and level of experience in this area is surpassed by anyone else. For example, Tom brought the first ever prosecution under the Wildlife and Countryside Act 1981 on behalf of the (then) Nature Conservancy Council. His experience has been a very significant asset to the Group.

Tom intends to remain an active member of the Group and his continued involvement will be greatly appreciated by the other members.

Working Group News

Penny Simpson has taken over as Chair of the Group and we have a busy 2009 expected ahead.

The issues which we expect to be focussing upon this year are:

1. the Marine Bill
2. the Floods and Water Bill (expected later in 2009)
3. review of implementation of the Environmental Liability Directive (the implementing Regulations may well have been published by the time this piece goes to press); and the Planning Act
4. liaising with Natural England in relation to its arrangements for European Protected Species licensing, and in particular Natural England's consultation on alteration of those arrangements
5. Natural England's consultation on protected species general licences
6. consultation on amendments to the Marine Works (Environmental Impact Assessment) Regulations 2007 including specific proposals to apply Articles 6.3 and 6.3 of the Habitats Directive to such works.
7. continued monitoring of nature conservation related case law
8. UKELA Annual Conference, July 2009
9. monitoring the development of "wild law".

We meet quarterly, last in January. The date of the spring meeting will be announced soon.

Offers

CCLR CARBON & CLIMATE LAW REVIEW

As climate policies evolve around the globe, attention is shifting from their conceptual design to the challenges of implementation. Where theoretical concerns once dominated, legal professionals are now called upon to ensure smooth operation of the regulatory framework. No area reflects this better than the carbon market, where each transaction is subject to sophisticated contractual arrangements, liability rules, accounting practices, and other mandatory constraints.

Responding to the growing demand for a discussion forum on these issues, the journal Carbon & Climate Law Review strikes a balance between the interests of practitioners, notably those engaged in the rapidly evolving carbon market, and a more doctrinal focus, alternating legal policy recommendations with timely articles on legal aspects of carbon trading and other dimensions of greenhouse gas regulation.

A section on current developments updates readers on recent market trends, political decisions, new literature and relevant events. Most importantly, however, the Carbon & Climate Law Review brings together representatives from the legal discipline and other stakeholders in one specialised journal, allowing them to engage in a dynamic debate on the law of climate change.

Lexxion are offering a 9% discount on the regular subscription price of “CCLR Carbon & Climate Law Review” for members of the UK Environmental Law Association (UKELA)

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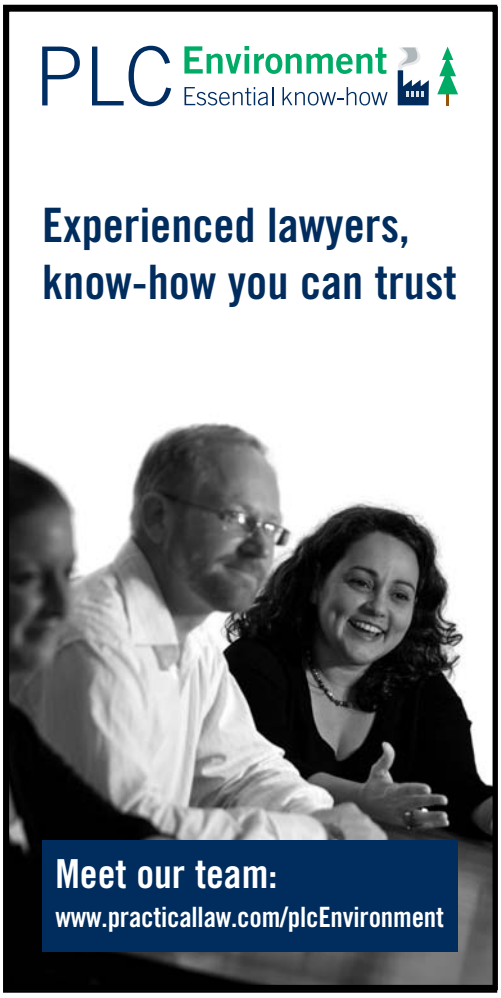

PLC Environment is an online service that provides know-how on environmental law for lawyers and other commercial practitioners in the private and public sectors - including lawyers in private practice and in-house, EHS managers, environmental consultants, bankers and insurers.

The service includes:

- Clear and concise summaries of the law on a wide range of environmental topics.
- Standard documents and drafting notes, such as environmental warranties and indemnities.
- E-mail alerts on key UK and EU environmental developments.
- A guide to environmental law in other jurisdictions, including details of leading environmental lawyers and law firms in those jurisdictions.

PLC Environment is run by a team of specialist environmental lawyers with a wide range of experience in both the private and public sectors - including Herbert Smith LLP, Freshfields Bruckhaus Deringer LLP, Norton Rose LLP, Veale Wasbrough and the Department for Environment, Food and Rural Affairs.

For a full list of topics covered by PLC Environment and to meet the team, see www.environment.practicallaw.com.

Why not see for yourself?

- To view an example of a practice note, see 'New Waste Framework Directive' www.practicallaw.com/6-384-1760.
- To view an example of an e-mail alert, see 'Carbon Reduction Commitment: an update' www.practicallaw.com/4-384-4062.

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Legal Research volunteer for Earth Jurisprudence Resource Centre

The Gaia Foundation, a UK registered charity supporting sustainable livelihoods and ecologically based community governance, seeks resourceful and enthusiastic Legal Research volunteers to join us in developing an innovative online Earth Jurisprudence Resource Centre (EJRC). Ideally, interested applicants will have a degree in environmental law and/or policy as well as proficiency in IT and internet research. Knowledge and experience of and interest in Community Ecological Governance (CEG)[1] and Earth Jurisprudence (EJ)[2] would be highly beneficial. Volunteer opportunities are flexible and ongoing.

The online EJ Resource Centre has germinated primarily in response to a need for a hub to connect a growing international and interdisciplinary EJ Network to develop the philosophy of EJ and to share EJ precedents and inspiring best practices of Earth centred governance. Housing an interdisciplinary range of EJ related materials the online EJRC will provide and promote a range of learning and training opportunities in EJ principles and practice, and also advocacy and consultancy support to the EJ Network.

Over the past year the EJRC with contributions from the EJ Network has been developing EJ materials such as EJ indicators and a glossary to help identify and assess the EJ relevance/potential of legal precedents. Researchers have started compiling a global database/library of EJ legal precedents and publications that already, or have the potential to, embed and promote EJ. We are developing a website which when completed mid 2009 will provide free access to an up to date, global database/library of EJ materials, a discussion forum, EJ news and events and volunteering opportunities.

To continue evolving the EJRC we are now looking for a network of volunteers to:

- Research legal precedents (e.g. international law, statutory law, regulations and judicial decisions) that address key EJ/CEG issues (particularly rights of nature, rights of indigenous communities to govern their territories including sites of critical ecological, cultural and spiritual significance, according to their cultures, traditional knowledge and customary law/lores);
- Catalogue these legal precedents into a database;
- Analyse key legal precedents, explaining its relevance to EJ, highlighting exemplary provisions and allocating appropriate EJ keywords using EJ methodology and materials;
- Expand the research and tracking of emerging EJ precedents

Work will be supported, overseen and guided by the Gaia Foundation (Gaia).

If you are interested in this position, please send your CV and covering letter to: Carine Nadal, The Gaia Foundation, 6 Heathgate Place, Agincourt Road, London NW3 2NU. Email: carine@gaianet.org

1 Community Ecological Governance (CEG) uses a holistic approach centred on community elders to revive and strengthen indigenous knowledge systems and carry them through to the next generation.

2 Earth Jurisprudence refers to the development a coherent system of values and principles, for the development of more appropriate laws and governance practices to regulate human behaviour, based on lessons from traditional and indigenous cultures and from nature itself, to prevent the excessive levels of ecological and social degradation and injustice, and evoke a more creative use of human potential. See for more information www.earthjurisprudence.org

Water working party - Marine Bill Event

Speaker meeting and discussion on the Marine and Coastal Access Bill

17th March, 5.30 pm – 8.00 pm

The meeting is being hosted by Bircham Dyson Bell LLP at their offices, 50 Broadway, London SW1H 0BL

Refreshments provided

The long-awaited Marine and Coastal Access Bill aims to ensure clean, healthy, safe, productive and biologically diverse oceans and seas. It proposes various measures for doing this, including setting up a Marine Management Organisation and introducing a strategic marine planning system. With the Bill currently passing through Parliament and timetabled to be debated in the House of Commons (having passed through the Lords) by the time of the meeting, this is a very topical subject. Although widely welcomed, will it be able to achieve all it promises?

Speakers:

Sharon Thompson (Senior Marine Policy Officer, RSPB)

Defra person (name and title as yet unconfirmed)

Lisa Chilton (Marine Development Manager, The Wildlife Trusts)

Peter Winterbottom (Association of Sea Fisheries Committees)

Cost:

£10 UKELA members; £20 non-members; free to students (places limited)

To book visit the events page at www.ukela.org.

LONDON MEETING: "Working Through the Credit Crunch – Issues for Environmental Lawyers".

The next London meeting is on the Credit Crunch and will be held on March 10th at Herbert Smith, Exchange House, Primrose Street, Exchange Square, London EC2A 2HS

The Meeting will last for approximately 90 minutes after which refreshments will be provided to enable those attending to discuss the issues informally.

Registration is 5.30 pm with seminar due to start at 6 pm

Speakers include Stephen Sykes of Sykes Environmental LLP. Others are being confirmed and will be announced on the website www.ukela.org.

There will be a small contribution to cover costs at £10 for Members and £20 for Non-members. Students and Unwaged members are free. Your booking is not confirmed until a cheque has been received.

If you wish to attend please contact by e-mail Angela Pallett at Herbert Smith: angela.pallett@herbertsmith.com

All cheques should be made payable to UKELA and sent to:

UKELA
c/o Angela Pallett
Exchange House
Primrose Street
London EC2A 2HS
(DX 28 London)

West Midlands Regional Group

The West Mids Regional Group is now meeting on Wednesday 11 February 2009 at Pinsent Masons in Birmingham. PLEASE NOTE THIS IS A REARRANGED MEETING.

UKELA's West Midlands Regional Group is holding an early evening seminar in Birmingham on 11 February 2009 to discuss implementation of the ELD. To book your place, go to www.ukela.org and click on the link on either the West Midlands regional group page or the events page.

North East Regional Group

The NE Regional group is hosting a video link-up with the West Midlands event detailed above. To book your place, go to www.ukela.or and click on the link on either the North East regional group page or the events page.

Scottish Regional Group

The Scottish regional group is hosting an event on 10 March in conjunction with Practical Law Company on "What's coming up in Environmental Law in 2009". It will be held at the offices of Pinsent Mason in Edinburgh. The seminar will start at 6pm (with registration from 5.30pm) and will conclude at 7.30pm with refreshments to follow. To book your place at this event go to www.ukela.org

East Anglia Regional Group

The East Anglia Group is planning a joint event with ENDS on the subject of waste. Further details to follow soon.

UKELA Corporate Due Diligence Working Party

Please note that the next meeting of the UKELA Corporate Due Diligence Working Party will take place on Thursday, 2nd April from 4.30-6pm.

Full details will be confirmed closer to the date, but at the moment we have confirmed speakers from:

(i) EBRD - to discuss the new EBRD Environment and Social Policy and the Bank's due diligence requirements
(ii) BP's HSSE M&A team - to provide an overview BP's requirements on HSSE due diligence exercises.

Paul O' Connor
paul.f.oconnor@uk.pwc.com

What do Environmental Lawyers do?

Society of Legal Scholars/UKELA Joint Symposium

Friday, 24 April 2009
Landmark Chambers, 180 Fleet Street, London

10.30 am for 11am start
Event finishes at 4pm followed by drinks

This symposium brings together environmental lawyers in private and public practice and those working in academic institutions to exchange perspectives on what environmental lawyers actually do, what environmental lawyers in different sectors can learn from one another, and how they can better support each other.

Chairs and Speakers

Professor Colin Reid, University of Dundee
Donald McGillivray, Kent Law School,
Professor Bob Lee, Cardiff Law School

Stephen Tromans, 39 Essex Street
Liz Fisher, University of Oxford
Duncan Mitchell, Environment Agency

Laurence Etherington, York Law School

Delegates Fees:

Non members	£120
UKELA members (commercial/private sector)	£100
UKELA and SLS members (academic/public sector/students)	£35

CPD points: TBC

Places are limited, and are available on a first come first served basis. To book, go to www.ukela.org

Wild Law

The Wild Law international research report, "Is there any evidence of earth jurisprudence in existing law and practice?" will be launched in March. E-copies will be available to all UKELA members and some hard copies will be on sale. This paper, a joint project by UKELA and the Gaia Foundation, is probably the first ever attempt to review existing substantive law from a Wild Law perspective (Wild Law being the rules, regulations and constitutional principles that give effect to Earth Jurisprudence). The exercise has thrown up numerous challenges and difficulties, particularly in coming to a deep and consistent understanding of the implications of Earth Jurisprudence and then applying the understanding to existing laws. There will be a launch event, by invitation, to make sure the report reaches a wide audience. Thanks to Matrix chambers for hosting this.

Also, the next Wild Law weekend workshop will be held on September 25th-27th. The venue is being finalised so watch this space for full details…. And brush down your camping gear.

If you would like to get more involved in Wild Law work, please contact the convenor of the Wild Law group, Simon Boyle: simon.boyle@argyllenviro.com.

The Law, Environment and Development Centre at SOAS, with the British Institute of International and Comparative Law and the Institute of Advanced Legal Studies, School of Advanced Study, University of London, are pleased to announce the following lecture series on:

Law, Development and the Environment

…

Thursday 22 January 2009, 6pm-7.30pm

DR ANGELA WILLIAMS, University of Sussex

"Developing Justice within the International Climate Change Framework"

Website: www.sas.ac.uk/events/view/5467

…

Thursday 29 January 2009, 6pm-7.30pm

DR RADHA D'SOUZA, University of Westminster

"Agency in Regime Changes: Dams, Development and Movements for Water Justice"

Website: www.sas.ac.uk/events/view/5468

…

Thursday 5 February 2009, 6pm-7.30pm

PROFESSOR MALGOSIA FITZMAURICE, Queen Mary College, University of London

"Indigenous Peoples and Natural Resources in the Arctic"

Website: www.sas.ac.uk/events/view/5469

…

Tuesday 10 February 2009, 6pm-7.30pm

DAVID HALL, Director, Public Services International Research Unit, University of Greenwich

"Water and electricity privatisations: an international review of Court cases and political processe"

Website: www.sas.ac.uk/events/view/5470

…

Thursday, 19 February 2009, 6pm-7.30pm

JOY HYRVARINEN, Director, Foundation for International and Environmental Law (FIELD)

"International Environmental Governance - Where From Here?"

Website: www.sas.ac.uk/events/view/5471

…

Thursday 26 February 2009, 6pm-7.30pm

PROFESSOR UPENDRA BAXI, Professor of Law in Development, University of Warwick

"New Developments in Indian Environmental Law"

Website: www.sas.ac.uk/events/view/5472

…

All lectures will held in the Council Chamber, Charles Clore House, 17 Russell Square, London WC1B 5DR

If you wish to attend any of the above lectures please RSVP to IALS.Events@sas.ac.uk

Admission Free – All Welcome

Local Environmental Quality in a Low Carbon Age

London

18 February 2009 9.30 for 10am start

2009 will be a vital year for climate change negotiations, with climate change issues set to remain a central concern for national and local government, public bodies, businesses and individuals. This event will give the latest update on the UK position in global negotiations and document how the UK is planning on meeting the 80% reduction target.

The event will cover some of the hottest topics in mitigation and adaptation, such as the controversial Planning Act, micro-generation, biomass and local environmental challenges for airports. Vital for all planners, developers, regulators, local authorities and consultants.

The afternoon session will cover how businesses are responding to the challenge of maintaining local environmental quality while addressing the challenges of climate change. With presentations from one of the UK's largest businesses (Royal Mail), from the motoring industry (Connaught), from the supermarket sector and a case study of one of the largest urban regeneration projects in Europe (Thames Gateway), the afternoon will be inspirational for all those with an interest in environmental protection and climate change.

20% discount for UKELA members. For further details check this website http://www.environmental-protection.org.uk/events/details/?id=1714, email events@environmental-protection.org.uk or call 01273 878 776.

UK ENVIRONMENTAL LAW ASSOCIATION

Registered Charity number: 299498 (Registered in England and Wales), Company limited by guarantee: 2133283 (Registered in England and Wales)

For information about working parties and events, including copies of all recent submissions contact:

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E - LAW

The editorial team wants articles, news and views from you for the next edition due to go out in March 2009
All contributions should be dispatched to Catherine Davey as soon as possible by email at:
catherine.davey@stevens-bolton.co.uk by 13 March 2009
Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.

Letters to the editor will be published, space permitting