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ENVIRONMENTAL LAW UPDATE

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INTRODUCTION

Environmental law has continued to generate a steady flow of cases, raising new points or revisiting old ones. Some areas continue to be particularly prolific, notably EIA and waste; other areas such as nature conservation, are now giving rise to more litigation, reflecting their increasingly onerous nature; and we are starting to see the cases on Part IIA trickling in.

As usual, the case law material is dwarfed by new legislation. 2005 saw major changes in the field of waste (with new regulations on hazardous waste, the new List of Wastes, major overhaul of waste licensing exemptions and producer responsibility for packaging waste, and transposition of EC requirements on end of life vehicles),[1] revised regulations for greenhouse gas emissions trading and the renewables obligation,[2] new environmental information provisions,[3] new primary legislation on more down-to-earth problems such as fly-tipping,[4] and (for Scotland) new primary legislation of environmental assessment of plans and projects.[5] These represent just the tip of the iceberg in terms of ongoing initiatives to ensure compliance with EC and international requirements, which are themselves in a state of flux which is possibly unprecedented. Major items on the agenda include the application of the contaminated land regime to radioactively contaminated land, the application of waste controls to agricultural and mineral industry wastes, implementation of Directives on environmental liability, waste electrical and electronic equipment and strategic environmental assessment, the Water Framework Directive, and the Aarhus Convention on Public Participation and Access to Justice.

EIA

Reserved matters

In **R (Noble Organisation) v Thanet District Council** [2004] EWHC 2576 (Admin); [2005] EWCA Civ 782; [2006] Env LR 185, the issue (as in many cases) was how EC regime for EIA sits with the detail of domestic planning legislation. The local authority had given a negative screening opinion under the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 in relation to a bare outline application for a leisure development, which left details such as siting, design, means of access, appearance and landscaping to reserved matters approval. The need for an EIA for the outline permission was considered, and a screening decision that it was not was given in 2000. A further screening opinion was given following the application for reserved matters approval in 2004. In considering whether the Schedule 2 development required an EIA, the officers referred to the fact that outline planning permission had originally been granted for a business park, and to the fact that no EIA had been considered necessary for the grant of outline permission in 2000.

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1 Hazardous Waste (England and Wales) Regulations 2005 No 894; List of Wastes (England) Regulations 2005 No 895; Waste Management Licensing (Amendment and Related Provisions) Regulations 2005 No 883; Producer Responsibility Obligations (Packaging Waste) Regulations 2005 No 3468; End of Life Vehicles (Producer Responsibility) Regulations 2005 No 263

2 Greenhouse Gas Emissions Trading Scheme Regulations 2005 No 925; Renewables Obligation Order 2005 No 926

3 Environmental Information Regulations 2004 No 3391 (in force 1/1/2005)

4 Clean Neighbourhoods and Environment Act 2005

5 Environmental Assessment (Scotland) Act 2005.

The claimant sought judicial review of the decision to grant approval of the reserved matters, on the basis that the decision not to require an EIA was unlawful because irrelevant factors had been taken into account, whereas as a matter of EC law, the authority should have looked behind the formal validity of the earlier planning and screening decisions and examined the adequacy of the consideration given in them to the need for an EIA. At first instance, in the light of the reference to the ECJ in **R. v London Borough of Bromley v Barker** and the ECJ's decisions in **Case C-201/02 R (Wells) v Secretary of State for Transport, Local Government and the Regions**, Richards J considered the requirement of an EIA at the reserved matters stage remained an open question. In the present case, however, it had been considered at both stages, with the challenge being the way in which it had been considered. Richards J then dismissed the application as the decisions which should have been challenged were the grants of outline permission; such a challenge now being well out of time and no application to extend time having being made.

In the Court of Appeal, Auld LJ found that, in considering whether an EIA was necessary at the approved matters stage, the local authority's essential comparison had been with the leisure outline planning permission. It had been a matter for the planning judgment of the planning authority whether it had sufficient material before it at the outline planning stage to decide whether a proposed development would be likely to have such significant effects on the environment as to require an EIA. There had been no application for a **Wednesbury** challenge to the authority's decision not to require an EIA at the outline permission stage, nor was there any basis for one. Neither had there been anything perverse about the local authority conducting a screening exercise at the reserved matters stage even though it had already done so at the outline permission stage and concluded that an EIA was not necessary; that decision had been eminently rational given the legal uncertainty over the necessity for an EIA at the reserved matters stage (the issue being one under consideration in the ECJ in **R. v London Borough of Bromley v Barker**).

It was clear that neither of the two outline planning permissions nor the screening decision in respect of the second of them could be challenged, directly or indirectly, and the challenge to the decision not to require an EIA at the approval of reserved matters stage was, in the way it had been formulated, an impermissible collateral challenge to those decisions. There was no scope for a challenge to the approval of reserved matters on the basis that it was a later decision adopting an earlier erroneous decision, because the local authority had simply taken the 2000 screening decision into account as a relevant factor, and had not relied on it.

Adequacy of information

An example of a successful EIA challenge is **Hereford Waste Watchers Ltd v. Herefordshire Council** [2005] EWHC 191 (Admin). Planning permission for the development of a waste treatment and recycling facility in Hereford was quashed by the High Court on the grounds that the local planning authority had failed to undertake environmental impact assessment properly prior to granting permission. The defendant authority granted permission for the facility, which was intended to process 100,000 tons per year of municipal solid waste, subject to a range of conditions. The process used was the 'fibre cycle process', which neutralised the putrescible element of the waste, leaving it in a state where it could be disposed of more readily. It was common ground that there was no similar facility operating in the world. However, each component had been tried and tested, as has the combination of components, albeit on a somewhat smaller scale than the proposed development. A demonstration plant was operated on the site and observed by staff of both the defendant and the Environment Agency.

The claimant was a company limited by guarantee, which was formed specifically to challenge the development in this case, although it proposed in the future to take an interest in and to monitor planning applications in its area which had an impact on the environment. It contended that the process was not sufficiently tried and tested for it to be developed in a sensitive area. The first ground for the application

for judicial review was that the environmental statement failed properly and fully to provide relevant information, so that the defendant had been unable to assess whether the effects were significant or not. It was alleged that the authority ought not to have granted permission subject to conditions without first having the material information available, and that by so doing they had potentially deprived consultees of the opportunity to be consulted about the environmental impact.

Elias J found that the grant of permission had been flawed in that the information which the planning authority required, and which it had stipulated should be made available prior to the development commencing, should have been made available prior to the planning permission being granted. The authorities were clear that that if the planning authority considered that a process or activity would have significant environmental effects then the environmental statement needed to include the detailed information identified in schedule 4 to the Regulations. It could not leave the matter to be covered by conditions at a later stage; even if that might otherwise be a satisfactory way of dealing with the problem, it frustrated the democratic purpose of the consultation process. The defendant authority had not found that there were no significant effects on the environment, but had made provision for further assessment of these through the imposition of conditions. Devising a condition which was capable of bringing the development below the relevant threshold of no significant effects did not necessarily lead to a decision that an E.I.A. was unnecessary. It might be that the information would confirm the assessment made by the developer, but the court could not properly make that assumption, and should not deny the claimant and any other potential consultees the possible opportunity to respond to whatever was forthcoming, such as proposed mitigation measures.

This was not a case where the planning authority could conclude, having regard both to the process and the mitigating measures adopted with respect to it, that it did not require further details of a matter because it was satisfied that such details, provided they were sufficiently controlled by condition, were not likely to have significant effects.

In other cases, arguments based on shortcomings in the EIA process have been less well-received. In **R (on the application of Kent) v. First Secretary of State** [2004] EWHC 2953 (Admin), the claimant was an objector to a proposed waste disposal development at the Winsford Rock Salt Mine. Planning permission subject to conditions had been granted by the Secretary of State following an inquiry, and the operation was to be controlled through a permit under the Pollution Prevention and Control (England and Wales) Regulations 2000. The application had been accompanied by an environmental statement which illustrated those types of wastes which would, and would not, be accepted at the site, and contained a qualitative risk assessment. The inspector's report concluded that there were no indications from the planning perspective that the risks associated with the proposal would constitute a sound reason to refuse the planning application, and that overall there was no reason to doubt the physical suitability of the site for the development proposed. The First Secretary stated in his decision letter that one of the main issues on which he had sought information, and on which representations had been received, concerned the types and volume of waste to be disposed of at the mine, and that he considered that new conditions attached to his decision letter provided sufficient clarity on that matter.

The claimant sought to quash the grant of planning permission under section 288 of the Town and Country Planning Act 1990, on two main grounds: first, that the Environmental Statement had been inadequate in that it had not specified the types of waste to be deposited with sufficient particularity and had not included a quantitative risk assessment, and instead leaving the details of the waste types to be dealt with under the PPC permit application; and secondly, a condition requiring a monitoring scheme for airborne particulates was relied on as demonstrating that the inspector must have thought that there was a risk from airborne particulates which should have been dealt with as part of the EIA and should not have been left to the County Council by way of a condition.

Sir Michael Harrison dismissed the application, finding that whilst the environmental statement had to contain sufficient information to enable the decision maker to make an informed judgment as to whether the development was likely to have a significant effect on the environment, it was for the decision maker to decide whether the information contained in the document was sufficient to meet the definition of an environmental statement in regulation 2, whilst also bearing in mind that the document did not have to contain information about all the effects, only the "main effects" or "the likely significant effects". Both that decision and the judgment as to what was a "main effect" or a "likely significant effect" were for the decision maker, not the court. The decision maker in the planning process had to set the parameters within which the likely significant effects of the development could be assessed, but within those parameters was entitled to take into account that there were matters which could properly be left for subsequent consideration and determination, whether by way of a planning condition or in the PPC permit process. Provided that those parameters were determined as part of the planning process, within which the future details could properly be worked out, reliance could be placed by the decision maker in the EIA planning process on the proper operation of those further controls.

The important point in this case was that the generic waste types which formed the basis of the planning application and which were considered in the risk assessment in the environmental statement had been tied into the planning permission by a condition, so that the parameters had been set, within which the likely significant effects were assessed, and which were safeguarded by the relevant condition, leaving over subsequent matters of detail, including detailed consideration of waste types, to be dealt with by other planning conditions and by the PPC process. It was held that the monitoring of airborne particulates could also be left to the control of another authority, and had to be viewed in the context of the inspector's conclusion that he considered it to be a low risk consideration, in so far as it was relevant to planning considerations relating to the use of land,[6] so that it had been lawful to deal with it by way of a monitoring condition in the planning permission.

Another case on taking into account planning conditions and other mitigation measures in making screening opinions was **R (Anderson & Others) v City of York Council** [2005] EWHC 1531 (Admin). The claimant submitted that the Council had erred in law in assuming that the subsequent steps in the planning process, including the imposition of conditions, would enable the elimination or successful mitigation of adverse environmental effects so as to justify negative opinions. The claimant also submitted that insufficient information had been available at the screening stage to decide properly that no EIA was required. Elias J dismissed the claim, finding that a screening opinion did not have to state exhaustively the reasoning of the officer involved and should not be read like a statute. On the issue of taking into account of mitigation measures, the officer had been clear in the view that there would be no significant adverse environmental effects, but that it was desirable that there be some further consideration of the detailed proposals in order to minimise fully any adverse effects which there might be. This was compatible with the finding as to no adverse effects and it had been proper for the officer to rely on the fact that there would be mitigating measures. Whilst the position might be otherwise if such measures were unusual or novel, those in the present case had been tried and tested and commonly adopted for the difficulties in question.

The question of adequacy of the environmental statement also arose in another unsuccessful challenge in **Humber Sea Terminal Limited v. Secretary of State for Transport** [2005] EWHC 1289 (Admin); [2006] Env LR 86. The case of concerned a challenge to a harbour revision order permitting Associated British Ports (ABP) to construct five roll-on, roll-off births at Immingham and its impact on the Humber Estuary special protection area (SPA). Amongst the issues for consideration was whether ABP's

[6] There is a possible point of difficulty here, in that the test for EIA is the environmental effects stated in the Directive, which is not limited by the domestic concept of what is a "material consideration" in planning terms. It could of course be argued that given the obligations of the decision-maker to ensure effectiveness of the Directive, anything within the scope of the Directive must become material as a planning consideration.

environmental statement had been inadequate, giving insufficient details of the proposed compensatory measures, in respect which ABP had entered into an agreement with English Nature and other bodies. On this point, Ouseley J held that a rigid distinction should not be drawn between a project and the compensatory measures to be taken in consequent of it. However, he found that there was no evidence that the proposed compensatory measures (involving recharge and flooding schemes to create new mud flat habitat) would be main or likely significant effects of the project, in consequence of which the omission of some of them from the ES did not prevent it from being an ES in law.

Phased schemes

The issue of staged or phased schemes is one with potential for difficulty where EIA is concerned. In ***R (Candlish) v. Hastings Borough Council and Hastings and Bexhill Renaissance Ltd (t/a Sea Space) [2005] EWHC 1539 (Admin)*** *a local resident, Ms Candlish, applied for judicial review of the defendant local authority's decision to grant planning permission for Phase 1 of a two-phase development project undertaken as part of the Millennium Communities Programme. Phase 1 consisted of the development of a spine road, associated mini-roundabout and surface water attenuation works. The planning application for the Phase 1 acknowledged that a separate planning application was required for the Phase 2 of the project, and that the Phase 2 would require an environmental impact assessment, which would also include Phase 1. In granting permission for Phase 1 the local authority took the view that no EIA was required. The area of the works to which the application for Phase 1 related was less than one hectare and no part of the development fell within a "sensitive area". Essentially the claimant's case was that as Phase 1 was part of an overall project, the application had to be treated cumulatively as part of that overall project, so that Phases 1 and 2 combined were the EIA development for the purpose of Schedule 2 of the Regulations.*

Davis J disagreed, and held that the EIA Regulations were geared towards the actual application for planning permission. There was no justification for treating the word "development" in the Regulations as though it meant "project": ***Bund Naturschutz in Bayern BV v Freistaat Bayern (1994) ECR I - 3717*** *was applied. The local authority's decision that this was not an EIA development, by reference to the Phase 1 application alone, was in accordance with the wording of the Regulations, and the wording and purpose of the EIA Directive. It is important to emphasise here that it was accepted that there was no question of the developer having sought to avoid or circumvent the EIA requirements by splitting up or "salami-slicing" what was in reality a single project.*

Enforcement

A number of issues remain pending for determination at European level. The question of reserved matters, before the ECJ in **Barker**, has already been mentioned. Another issue is that of enforcement decisions, discussed in **Prokopp** (the Bishopgate goods yard case).

The question of enforcement arises in **Case C-98/04 Commission v United Kingdom**, in which the Commission had taken proceedings following a complaint concerning the practice in the United Kingdom of issuing Lawful Development Certificates (LDC) to confirm that a particular use of land (in this case a scrapyard) was lawful for development control purposes. The Commission argued that the issuing of LDCs effectively by-passed the development consent procedure and as a result the requirements of the EIA Directive. Advocate General Ruiz-Jarabo Colomer gave an Opinion on 14 July, 2005 that the UK is in breach of its obligations under the EIA Directive in relation to LDCs. As the Advocate General put it in para 27, Community law precludes implementation of such projects without prior authorisation and, if appropriate, without assessment of their impact, where implementation becomes irreversible with the passage of time. That, he held, was however precisely the effect of the United Kingdom system, which, as the case of the scrap yard over which the proceedings arose demonstrates, and as the UK accepted,

allows action to be taken in breach of the Directive, without prior evaluation or impact assessment, and to be legitimised by the passage of time, so that the situation can no longer be remedied.

The Advocate General somewhat caustically remarked that the matter should have ended there, but that, "since the parties have become embroiled in a dispute as heated as it is pointless", he felt obliged to clarify a few matters. The issue as the Advocate General saw it was not the status of the LDC, or the fact that there were limitation periods for enforcement; rather it was the simple fact that a planning authority might decide not to take enforcement action against a development which would have required EIA if planning permission had been sought:

> "33. If those responsible for monitoring the lawfulness of town planning do not react on learning that a facility is operating without an assessment of its effects on the environment having been carried out, or, where its scale is evident, do not require its assessment, they are tacitly consenting to it and, thereby, contravening the directive. The fact that, by reason of the passage of time and in the light of the principle of legal certainty, it was not appropriate to take enforcement action, does not make conduct which was previously on the margins of the law 'lawful'; it merely precludes any reassessment of the past in order to safeguard the stability of legal relations, which is one of the pillars of our coexistence in society. That conclusion does not preclude those harmed by the unlawful conduct from obtaining compensation on other grounds such as the responsibility of the State in breach to safeguard property rights, which the position of the United Kingdom Government would undermine."

Substitute fuels

Two cases during 2005 have involved EIA arguments in relation to the use of substitute fuels at cement kilns. In **R (Edwards) v. Environment Agency** [2005] EWCA 657; [2006] Env LR 56 the issue was the use of waste chipped tyres, which was the subject of a PPC permit. Lindsay J held that the use of tyres in this way could not be regarded as a "project", and further the references to waste "disposal" in the Annexes to the Directive were to be read as meaning disposal in the technical sense of the Waste Framework Directive, whereas the use of tyres for fuel was "recovery". This approach was followed by Ouseley J in **R (Horner) v. Lancashire CC** [2005] EWHC 2273.

Thresholds

Horner also raised the tricky issue of thresholds. In that case the challenge was to the grant of planning permission for the equipment (a silo, tanker off-loading area and pipework) to feed "animal waste derived fuel" into a calciner. The relevant threshold in Schedule 2 was 1,000 m^3 of new floorspace (in relation to a change or extension to an existing cement works). The planning application stated the area of the site to be 1,000 m^3, but the structures did not occupy the whole area. Ouseley J held first that the silo had "floorspace", albeit not in normal sense, and was below 1000 m^2, and alternatively it did not have any "floorspace" so could not be above the threshold. There could be potential problems with this approach in relation to "changes" as opposed to "extensions", given the fact that the ECJ has stressed that Member States are not entirely free agents in setting thresholds, but must act in accordance with the purpose of the Directive. Setting a threshold based on an area of new floorspace may be an acceptable approach to extensions to plants, on the basis that the government can be satisfied that an extension below that size could not individually or cumulatively have significant effects. However, a new floorspace threshold is not necessarily relevant to the likely impact of changes to an existing facility – an obvious example would be a new stack at a cement works or power station, which would not involve any new floorspace, but obviously might have significant environmental effects, whether visually or in terms of emissions.

Finally, as a footnote on the subject of thresholds, it is worth noting the decision of the Sixth Chamber of the ECJ in **Case C-83/03 Commission v. Italy** (June 2, 2005). The Italian law on EIA, like the UK's, set thresholds in terms of size for projects (in this case, marinas) but in a different way. Projects above the thresholds required EIA, whereas those below were to be subject to ad hoc assessment. In this case consent had been given for a marina project with mooring for 390 vessels within a special conservation area on the Abruzzo coast. The Court held that where in exercise of the power under Article 4(2) a Member State defines general rules on EIA, the infringement of those domestic rules will necessarily constitute an infringement of the Directive

HABITATS

The Habitats and Birds Directive are controversial areas for Member States and the Commission, which is not surprising given the serious constraints which they can impose on economic development in the form of projects such as ports. The UK has become the first Member State to formally designate all of its 608 protected areas of European importance as Special Areas of Conservation under the Habitats Directive, less than six months after the European Commission's decision to adopt the proposed areas as sites of Community importance.

UK in breach

Notwithstanding this, there have been found to be significant problems with the UK's approach to transposition of the Directive in a number of respects. In **Case C-6/04**, **Commission v. United Kingdom** the Commission alleged that the UK had failed to transpose adequately various provisions of Directive 92/43/EEC: some of the complaints relating to specific geographical areas, such as Gibraltar, and others were of a general nature.

The Second Chamber of the ECJ (judgement of 2 October, 2005) found the UK to be in breach of the Directive in a number of respects. Of particular note is the Court's forthright rejection of the UK's arguments that the relevant competent authorities being under a statutory obligation to exercise their functions so as to secure compliance with the Habitats Directive, resulting from regulations 3(2) and (4) of the Habitats Regulations 1994 and equivalent provisions:

"25 … it is apparent from the 4th and 11th recitals in the preamble to the Habitats Directive that threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Consequently, as the Advocate General has observed in point 11 of her Opinion, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see by analogy, in respect of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), Case 262/85 Commission v Italy [1987] ECR 3073, paragraph 39, and Case C-38/99 Commission v France [2000] ECR I-10941, paragraph 53).

26 It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by Articles 11, 12(4) and 14(2) of the directive.

27 However, it is apparent on examination of the legislation relied upon by the United Kingdom that it is so general that it does not give effect to the Habitats Directive with sufficient precision and clarity

to satisfy fully the demands of legal certainty (see, by analogy, Case 291/84 Commission v Netherlands [1987] ECR 3483, paragraph 15) and that it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the directive and allow harmonised and effective implementation of the rules which it lays down (see, by analogy, the judgment of 10 March 2005 in Case C-531/03 Commission v Germany, not published in the ECR, paragraph 19).

28 It follows that the general duties laid down by the United Kingdom legislation cannot ensure that the provisions of the Habitats Directive referred to in the Commission's application are transposed satisfactorily and are not capable of filling any gaps in the specific provisions intended to achieve such transposition. Consequently, there remains no need to consider the United Kingdom's arguments based on the general duties contained in that legislation when analysing the specific complaints relied upon by the Commission."

Among the breaches found by the Court was failure to transpose adequately Art. 6(3) and (4) in relation to certain water abstraction plans and projects. There were similar breaches in relation to the failure within the UK to treat development plans as a 'plan' or 'project' within the meaning of Art. 6(3), particularly given their development control significance under s.54A. With regard to monitoring obligations under Arts. 11, 12(4) and 14(2), there were failures to transpose adequately by not imposing clear obligations on identifiable authorities. In relation to Gibraltar, the measures in place prohibited only the *deliberate* damaging or destruction of breeding sites and resting places, which fell short of the Art. 12(1)(d) obligation to prohibit *deterioration*, whether deliberate or not. Contrary to the view of the United Kingdom Government, it was found that the concept of deterioration was not restricted to 'non-natural' deterioration, so that changes in sea level, climate change, and natural deterioration should be covered, as well as 'non-natural' deterioration, resulting, for example, from poor husbandry. Further failures were found in relation to: prohibition of indiscriminate means of capture and killing (Art. 15); derogations from species protection (Art. 16(1)); and application of the Directive outside territorial waters.

Protective measures

The ECJ has consistently taken a very protective approach to the Natura 2000 network which Directive 92/43/EC seeks to safeguard in terms of their favourable conservation status. Another recent example is **Case C-117/03 Societa Italiana Dragaggi and Others** (Second Chamber, January 13, 2005). The case, interestingly, arose in the context of a commercial contract dispute. A contract was awarded to Dragaggi relating to dredging works and the dumping of the sediment on reclaimed land in the port of Monfalcone. Four months later the contracting authority annulled the entire tender procedure on the ground that the reclaimed land on which the sediment resulting from the works was intended to be deposited was classified as a site of Community interest, requiring an impact assessment under the relevant national legislation. According to the authority, such an assessment could not have a positive outcome. Dragaggi challenged the legality of the decision annulling the tender procedure before the Regional Administrative Court, contending that the procedure for classifying as a site of Community importance the site where the reclaimed land in question was situated had not yet been completed. Although the Italian authorities had proposed a list of sites, including the site, to the Commission, the latter had not yet adopted the Community list under the third subparagraph of Article 4(2) of the Directive.

The ECJ found that on a proper construction of Article 4(5), the protective measures prescribed in Article 6(2), (3) and (4) were required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, were on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive. However, in the case of sites eligible for identification as sites of Community importance which were included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types

or priority species, Member States were, by virtue of Directive 92/43, required to take appropriate protective measures, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest of the sites at national level.

Domestic litigation

Turning to domestic case-law, the saga of litigation between the Trustees of the 4th Duke of Westminster's 1964 Settlement and the Welsh Assembly Government has continued. In **R (Newsum and others) v. Welsh Assembly** [2004] EWHC 50 (Admin); [2004] Env LR 39; [2004] EWCA Civ 1565; [2004] Env LR 16, Pitchford J and the Court of Appeal had grappled with the concept of imperative reasons of overriding public interest when applied to licensing for translocation of species. In the further case of **R (on the application of Newsum & Others) v Welsh Assembly Government** [2005] EWHC 538 (Admin) the focus shifted to the designation of a site as a candidate Special Area of Conservation. The original list of cSACs submitted to the European Commission did not include the site, but following an ecological report which identified significant communities of vegetation on the land, including caliminarian grassland and a large population of great crested newts, the land was included in a provisional list of additional sites, and in the final list of cSACs. The land was subsequently designated as a SAC pursuant to the Habitats Directive. The claimant sought judicial review of the listing decision on procedural and substantive grounds, arguing that: the consultation exercise undertaken by the National Assembly had been unfair and insufficient; the haste with which the further list of cSACs was produced (which included the previously omitted site) had been at the expense of proper scientific justification. The claimant also made an application against the Commission (**Case T-57/**05, Court of First Instance) for annulment of the list, where essentially the same grounds were relied upon. The National Assembly disputed those grounds, and also submitted that the proceedings would serve no useful purpose as the site had been designated as an actual SAC.

Richards J. found that the fact that the claimant would seek to rely on any findings against the National Assembly in its proceedings against the Commission gave a legitimate purpose to the continuation of the present proceedings. He also found that the failure to seek judicial review of provisional list of additional sites did not preclude a challenge to the final list of cSACs. Whatever the precise analysis of the two decisions, the second decision should be treated as having a similar legal status to the first and as being equally amenable to judicial review. However, the consultation process, taken as a whole, had been adequate and had given the claimant a fair opportunity to put forward representations on the proposal and on the matters relied on in support of it. In the circumstances it had not been unreasonable or unfair for the National Assembly to take the view that an adequate period for representations had been allowed and to proceed with making a decision.

On the issue of whether the land should have been classified as a cSAC, there was a wide scope for the exercise of judgment in relation to the selection of semi-natural sites in the classification process, which required a judgment to be made as to whether a semi-natural site should be included on the basis that it sheltered "characteristic or outstanding plant species". The conclusion that the land merited inclusion had been consistent with the classification criteria, and had been a decision which had been reasonably open to the National Assembly on the basis of the available information.

pSPAs and IROPI

In **Humber Sea Terminal Ltd v SST and Associated British Ports Ltd** [2005] EWHC 1289 (Admin); [2006] Env LR 86 Ouseley J dismissed an application by a competing port operator, challenging a Harbour Revision Order made under section 14 of the Harbours Act 1964, on the basis that it failed to comply with the Birds Directive (79/409/EEC), the Habitats Regulations, and had been the subject of an inadequate environmental statement. The Order had been sought in order for Associate British Ports to develop the Outer Harbour at Immingham. The claimant operated a terminal upstream from Immingham,

and stated that it would make an application for a Harbour Revision Order, in order to offer alternative facilities to those proposed at Immingham. The application for the Immingham Order was considered without a public inquiry, and the Secretary of State authorised its making in a letter in which he dealt with the objections raised by the claimant. He accepted that there would be an adverse effect on a pSPA, to which he applied the provisions of the Habitats Regulations, because of the loss of 22 hectares of habitat. The Secretary of State took the view that the need for the development constituted imperative reasons of overriding public interest (IROPI).

The claimant relied on the decision of the ECJ in **Case C-374/98 Commission v France (the Basses Corbières case)** to suggest that the Secretary of State had no power to make the order in reliance on IROPI, because the flexibility to do so only applied to SPAs actually classified under the Wild Birds Directive, and did not apply to sites which should have been classified, or were treated as classified, but were not in fact so classified. However, Ouseley J held that this proposition could only apply where a breach of Community law by the Member State concerned had been proved, so that the lack of classification of the site involved a failure to comply with the Directive obligation, which was not the case here. The application of the Habitats Regulations as a matter of policy for the purposes of PPG9 involved no allegation of breach, and it would be very strange if the mere fact that the Secretary of State as a matter of policy treated those sites which were under consideration for SPA classification as benefiting from the protection afforded by the Habitats Regulations tests meant that he had to disapply the limited flexibility in the Habitats Directive in favour of the very much tighter tests of the Birds Directive. It would create a real and perverse incentive to cease that precautionary policy.

The submission that the compensatory measures agreed failed to ensure the continuing coherence of the Natura 200 network was also rejected, together with further submissions.

Sea fisheries

Species conservation featured in a marine context in **R (Greenpeace Limited) v. Secretary of State for the Environment, Food and Rural Affairs** [2005] EWHC 2144 (Admin). Greenpeace was concerned about the unintentional killing of cetaceans by offshore fishing. As originally framed, the claim included an application for judicial review of an alleged failure to fulfil the UK's obligations under Art 12(4) of the Habitats Directive to ensure that incidental capture and killing of the common dolphin did not have a significant impact on the species. That part of the claim was not in the event proceeded with, but Greenpeace did pursue a challenge to the South-West Territorial Waters (Prohibition of Pair Trawling) Order 2004. This order prohibited bass pair-trawling within the 12 nautical mile limit. The concern of Greenpeace was that by limiting the Order to 12 miles, fishing effort would be directed further offshore, to areas where bycatch is heaviest. It may be noted that the EC Commission refused the UK's request to extend the closure of the fishery under Regulation (EC) 2371/2002 (the Common Fisheries Framework Regulation) to vessels of all member states. Greenpeace alleged that the Order was motivated purely by political goals, to give the false impression that the Government was taking effective action to save dolphins. Stanley Burnton J held that the Minister had acted genuinely, albeit politically, seeking to bring pressure to bear on other member states through the Order. However, it was clear that there was no substantial scientific basis for the prohibition. This, according to Stanley Burnton J, did not make the Order unlawful. The statute under which it was made (the Sea Fish Conservation Act 1967) did not require scientific validation of an Order; the power was simply to make orders "for marine environment purposes". The judge was satisfied that the order had been made for such purposes, and that the Minister had acted reasonably in making it. It was found that the question of displacement of fishing outside the 12 mile limit had been considered by the Minister.

WASTE

Introduction

The issue of what is and is not waste continues to be something of a running sore between regulators and industry. Having had a series of decisions from the ECJ which have been taken as strengthening the justification for an expansive definition of waste, it may be that there are some signs that the pendulum may be if not swinging, at least trembling the other way. At the same time, the Commission, in its "non-official" Communication and draft Waste Directive, issued on 21 December 2005, is clearly re-appraising the definition, and the problems which it creates for legal certainty. As the Commission puts it:

"The current definition of waste sets no clear boundaries for when a waste has been adequately treated and should be considered a product. This is problematic, as it creates legal uncertainty and administrative costs for businesses and competent authorities. It can lead to diverging views from Member State to Member State and even from region to region, which creates problems for the internal market. On top of this, poor-quality recycled material circulates on the market, generating difficulties both for potential purchasers and also for reputable sellers."

Case C-457/02 Niselli (Second Chamber, November 11, 2004) provides a useful summary of the orthodox approach to the question, developed in cases such as **ARCO Chemie**. Niselli's vehicle had been found to be carrying ferrous materials from the dismantling of machines and vehicles, which were intended to be reused. The Court found, as in previous cases, that the scope of the meaning of "waste" depended on the meaning of the verb "to discard". This had to be interpreted in the light of the aim of the Directive which was the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, and Article 174(2) EC, which provided that Community policy on the environment was to aim at a high level of protection and was to be based, in particular, on the precautionary principle and the principle that preventive action should be taken.

As in the previous cases, the Court rejected the argument that the question of whether material was waste could be settled by reference to whether it was undergoing a disposal or recovery operation under the Waste Framework Directive. Thus, if any substance or any object which was subject to one of the types of operations mentioned in Annexes II A and II B to Directive 75/442 must be classified as waste, it would lead to the classification as waste of substances or objects which were not waste within the meaning of that directive. For example, on that construction, fuel oil used in combustion would always be waste, since it was subject, when burnt, to the operation in category R 1 of Annex II B to Directive 75/442. But perhaps more importantly, the other side of that coin would restrict the meaning of waste. A substance or object not subject to a disposal or recovery requirement whose holder discarded it by simple abandonment, without subjecting it to such an operation, would not be classified as waste.

The Court had already held that the fact that a used substance was a production residue was, as a rule, evidence that it had been discarded or of an intention or requirement to discard it (**ARCO Chemie Nederland**), and the same appraisal had to apply as regarded consumption residues. Although genuine 'by-products' could fall outside the definition of waste, having regard to the obligation to interpret the concept of waste widely in order to limit its inherent undesirable or harmful effects, recourse to the reasoning applicable to by-products should be limited to situations in which the reuse of the goods, materials or raw materials was not a mere possibility but a certainty, without any prior processing and as an integral part of the production process (**Palin Granit** and **AvestaPolarit Chrome**).

On this basis the Court held that materials such as those at issue in **Niselli** were not reused definitely and without prior processing, as an integral part of the same process of production or use, but were substances or objects whose holders had discarded them. The materials were then sorted, and sometimes treated, and they constituted a secondary raw material to be used in steelmaking. In such a context, they had to continue to be classified as waste until they had actually been recycled into steel products. In the earlier phases, they could not be regarded as recycled, since the reprocessing had not been concluded.

Niselli is one in a line of cases to have taken a restrictive view of when a material can be regarded as a by-product rather than waste. However, it is not impossible to meet these criteria, as was shown by **Case C-235/02 Saetti and Frediani** [2004] ECR I-1005 where the Court held that petroleum coke produced intentionally or in the course of producing other fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste.

Commission v. Spain

The ECJ has however more recently drawn back from the highly restrictive criteria for distinguishing between a waste and a by-product. **Case C-416/02 Commission v. Spain** (Third Chamber, September 8, 2005) in which the UK appeared as an intervener. This was a case involving a number of infractions by Spain relating to the management of animal effluent from pig farms, including its use as fertilizer on agricultural land. Directives on waste, nitrates, groundwater, urban waste water and EIA were all said to have been breached. On waste, Spain argued that the use of slurry as a fertilizer in a farm's vicinity could exclude it from being categorized as waste.

The Court accepted the UK's statement in intervention that livestock effluent could fall outside the classification of waste, if it is used as a soil fertilizer "as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations" (para. 89). It is noteworthy that the Court expressly rejected the Commission's submission that it was appropriate to limit that analysis to livestock effluent used as fertilizer on land forming part of the same agricultural holding as that which generated the effluent (para. 90). The Court relied on its previous decision in **Saetti** that it is possible for a substance not to be regarded as waste if it is certain to be used to meet the needs of economic operators other than those which produced it. In this case the slurry, which was spread on clearly identified land and stored in a pit in the interim, was not being discarded, and was not waste. The Court expressly contrasted the case of livestock which died on the farm and could not lawfully be used for human consumption. In that case the farmer was obliged to discard them, and they must be regarded as waste. They were however regulated not by the Waste Framework Directive, but by the Animal Waste Directive 90/667/EEC.

UK (and others) in breach

A less happy outcome for the UK was **Case C-62/03 Commission v. UK** (Third Chamber, December 16, 2004) in which the U.K. was found to have failed to fulfil its obligations under the Waste Framework Directive. The management of waste from the activities of mines and quarries, and the management of a number of types of waste from premises used for agriculture was not covered by the necessary measures of organisation and control. The UK Government has been aware of these shortcomings for many years – they were referred to in Circular 11/94 on Waste Management Licensing. The intention is that agricultural and mining wastes will be brought under control at some point in 2006. In relation to waste on domestic properties, the Court held that a Member State was fully entitled to give responsibility for recovery or disposal operations in relation to a category of waste to public authorities. However, according to Article 8 where public authorities were exclusively responsible for the collection, transport, disposal or recovery of a category of waste, then Member States had to take the steps necessary to ensure that the producers or previous holders of that waste were required to hand it over to them, and it

did not appear that the legislation relating to household waste in force in the UK imposed such an obligation on the occupiers of domestic property.

The decision was however probably not as painful for the UK as the judgment of the Grand Chamber of the Court in **Case C-494/01 Commission v. Ireland** (April 26, 2005) was for the Emerald Isle. The Court found systemic failures by Ireland in regulating waste management, resulting in massive illegal dumping of waste in Limerick, County Wicklow, Cork, Wexford, Donegal and other locations – in many cases involving important wetlands. Evidence showed that the Irish network of licensed disposal sites was close to saturation and that hundreds if not thousands of illegal dumps were operating, some of which were large scale and taking hazardous waste originating from hospitals. In a passage of general importance, the Court emphasized that the responsibility of Member States is not only to legislate, but

"… the task of making sure that the permit system set up is actually applied and complied with, in particular by conducting appropriate checks for that purpose and ensuring that operations carried out without a permit are actually brought to an end and punished" (para. 117)

Greece has also been found wanting (again) in its implementation of Community rules on waste management in Case C-502/03 Commission v Greece **(Fifth Chamber, October 6, 2005). The Greek government accepted that in February 2004, 1125 uncontrolled waste removal sites were being exploited on its territory and that the closure of all unlawful and uncontrolled waste tips would not take place before 2008.**

Waste and sewage

Another interesting area is the potential overlap between waste and liquid effluent/sewage. In **R. (on the application of Thames Water Utilities Ltd) v Bromley Magistrates' Court** [2005] EWHC 1231 (Admin)the Administrative Court made a reference to the ECJ on the question of whether sewage escaping from the sewage network amounts to "directive waste" for the purposes of the Waste Framework Directive (May 18, 2005). The Environment Agency has been pursuing the practice of prosecuting sewerage undertakers under the waste provisions of Part II of the Environmental Protection Act 1990 in cases of overflowing sewers or escapes of sewage from works, which do not result in water pollution. Rose LJ found that the district judge did have jurisdiction to rule on a preliminary point of law in relation to which it was not necessary to find any facts.[7] In order to resolve the question of law, it was necessary for an authoritative decision to be made by the European Court of Justice. Accordingly, the following two questions were referred: (1) whether sewage which escapes from a sewage network maintained by a statutory sewerage undertaker amounts to directive waste and (2) if the answer to (1) is in the affirmative, whether the sewage: (a) is excluded from the scope of directive waste under the WFD by virtue of article 2(1)(b)(iv)of the WFD, in particular, by virtue of the UWWTD and/or the WIA 1991;[8] or (b) comes within article 2(2) of the WFD and is excluded from the scope of directive waste under the WFD, in particular, by virtue of the UWWTD.[9]

However, in the meantime the domestic courts have considered the same questions in a case involving a different factual context and a different undertaker, **United Utilities Water plc v. the Environment Agency for England and Wales** [2006] EWHC 9. The claimant brought proceedings for a declaration

[7] Sections 8A and 8B of the Magistrates' Courts Act 1980 (inserted by Schedule 3 of the Courts Act 2003) now expressly confer powers to make preliminary rulings.

[8] Providing that "waste waters, with the exception of waste in liquid form" is excluded where it is "already covered by other legislation".

[9] Providing that specific rules for the management of particular categories of waste may be laid down by means of individual Directives.

that it was not required to obtain permits pursuant to the Pollution Prevention and Control Regulations 2000, in respect of work performed at six of its plants, chosen as test cases designed to determine the main issues of principle between the parties. A number of issues were identified for determination including: (1) whether the provisions of the PPC Regulations were applicable to the waste water treatment activities or whether, as the claimant contended, they were not intended to be of general application but to apply to limited identified industrial activities and not to waste water treatment including sludge treatment; (2) whether sewage sludge was "waste" under the Waste Framework Directive, and if so, whether it was excluded under art 2(b)(iv).

Nelson J held: (1) The proper interpretation of the 2000 Regulations was that they were intended to and did apply to waste water treatment activities. It was important to take into account the fact that one of the aims of Directive 96/61 was to provide an integrated approach to pollution control to prevent emissions into air, water or soil wherever practical. (2) There could be no doubt that sewage sludge was waste under Art 1(a) of the Waste Framework Directive. Moreover, once it had been extracted from waste waters it was waste in liquid form, and therefore was not excluded under Art 2(b)(iv). It could not be accepted that sludge was either an integral part of waste water, simply being part of it, or was a solid once it had become cake. Sludge was waste and aqueous. Once it had been extracted from waste waters it was more concentrated than such waters, and was therefore waste in liquid form. It is understood that both sides have been given permission to appeal.

Landfill

The Landfill Directive 1999/31/EC has been the source of much debate and conflict between the Environment Agency and operators as to what its detailed requirements mean in practice. A refreshingly robust and pragmatic approach was taken by Sullivan J in **R (Lewis) v. Environment Agency and Onyx** [2005] EWHC 1110 (Admin). The Claimant challenged a decision by the Agency to grant a PPC permit for a sub-water table engineered landfill in a former quarry. The permit required a leachate management system to be maintained so that the hydraulic gradient would draw surrounding groundwater into the landfill, thereby preventing leachate flowing out. It was argued that this arrangement was contrary to the Landfill Directive and the Groundwater Directive in that it did no prevent groundwater entering the landfill.

Sullivan J held that "prevent" in this context meant to prevent as far as was possible through the use of engineering techniques. The focus of the Landfill Directive was on the risks of leachate escaping into the water environment. It did not ban sub-water table landfills. In relation to the Groundwater Directive, the seepage of water gradually into the site through the clay liner could not be described as the introduction into groundwater of the listed substances, and the measures taken could be described as technical precautions falling within Article 4 of the Directive.

The ECJ has held, in **Case C-6/03 Deponiezweckverband Eiterkopfe** (First Chamber, 14 April 2005) that Member States may adopt stricter rules than the standards in the Landfill Directive under Art 176 (ex 130t) of the EC Treaty (e.g. requiring pre-treatment, applying to non-biodegradable organics, setting stricter time limits, extending the scope beyond municipal waste). The Court stated that the Directive does not seek to effect "complete harmonisation" and that the proportionality principle was not applicable to national measures adopted under Art 176.[10] In that context, of ensuring that the minimum requirements laid down by the Directive are enforced, "… the Community principle of proportionality demands that measures of domestic law should be appropriate and necessary in relation to the objectives pursued"; the Court however held that " …in contrast, and inasmuch as other provisions of the

[10] "The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaty. They shall be notified to the Commission."

Treaty are not involved, the proportionality principle is no longer applicable so far as concerns more stringent protective measures of domestic law adopted by virtue of Article 176 EC and going beyond the minimum requirements laid down by the Directive". This seems a somewhat curious reasoning, since Art 176 expressly states that more stringent protective measures adopted under the Article must be compatible with the Treaty. The issue of national measures also arose in another context in a case involving the Dangerous Substances Directive (76/769/EEC). In **Joined Cases C-281/03 & C-282/03 Cindu Chemicals & Others**, a question was referred to the ECJ asking whether the Directive permitted a Member State to lay down additional conditions for the placing on the market and use of a biocidal product where the active substance within it was included in Annex I to the Directive. The ECJ held that the Directive did not permit a Member State to lay down additional conditions for the placing on the market and use of such a biocidal product.

EU LAW GENERALLY

Crime and punishment

One of the less well-understood decisions has been the annulment by the ECJ of Council Framework Decision 2003/80 on the protection of the environment through criminal law, on the grounds that there was no legal basis for the adoption of the Decision. The Framework Decision provided that certain conduct which was detrimental to the environment was to be criminal, leaving the choice of the criminal penalties to the Member States, subject to these being effective, proportionate and dissuasive. The Decision was adopted by the Council on the basis of Articles 29, 31(1)(e) and 34(2)(b) of the Treaty, as an aspect of police and judicial cooperation between governments in criminal matters,. The Commission objected that the correct legal basis was actually Article 175(1) and that it had put forward its own proposed directive on the matter using that legal basis. The European Parliament concurred with the Commission's view. The Commission then brought proceedings, submitting that the Community had competence to require Member States to introduce criminal sanctions at national level where this is necessary to attain a Community objective, which included environmental matters. The Council submitted that the Community did not have power under the Treaty to require the Member States to impose criminal penalties in respect of the conduct covered by the Framework Decision. In **Case C-176/03 Commission v. Council**, the Court found that the protection of the environment constituted one of the essential objectives of the Community and that as a general rule, Articles 174 to 176 (EU) comprised the framework within which Community environmental policy had to be carried out. The Framework Decision had as its main purpose the protection of the environment and the majority of its provisions could have been properly adopted on the basis of the EC Treaty (i.e. Article 175). Whilst as a general rule, neither criminal law nor the rules of criminal procedure fell within the Community's competence, that did not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities was essential for combating serious environmental offences, from taking necessary measures that related to the criminal law of the Member States. As the Framework Decision encroached on the powers which the Article 175 conferred on the Community and thereby infringed the Treaty on European Union, which gave priority to such powers, the Court annulled that decision in its entirety. The decision was portrayed by the media in some quarters as a major inroad into national sovereignty by the Court. This both exaggerates and misrepresents the decision. In fact many environmental directives have for some years contained standard provisions requiring Member States to support the measure by providing criminal penalties that are proportionate, effective and dissuasive.

Greenhouse gas allowances

In **Case T-178/05 United Kingdom v Commission** (Court of First Instance, November 23, 2005) The UK won an important victory against the Commission regarding the proposed amendment of the UK's National Allocation Plan for greenhouse gas emission allowances, required under Directive 2003/87/EC.

The Commission had rejected the UK's proposals for the total quantity of allowances in the Allocation Plan for Phase 1 (2005-2007) of the EU Emissions Trading Scheme (EU ETS). The amendment proposed a total quantity of 756 million allowances to be allocated to installations in the UK - an increase of around 20 million allowances on the total submitted in the provisional allocation plan. The UK's case was based upon the fact that it was in a unique position as it was the only Member State to submit a provisional plan. That provisional plan had been based on interim projections and gave a provisional figure for the total cap on emissions for the first three years of the scheme. The UK submitted that it had made clear at the time that work on the projections was continuing, and could lead to further revision of the total cap. Accordingly, the UK claimed that the Commission was required to consider the amendment to the plan and should not have rejected it as inadmissible. The Court held that the UK had been entitled to propose amendments to the provisional plan submitted to the Commission, even though they increased the total quantity of emission allowances, after the adoption by the Commission of a decision concerning the national plan. The Commission could reject the proposals on the merits if they were incompatible with the Directive, but could not restrict a Member State's right to propose amendments. Such a restriction would deprive the public consultation provided for by the Directive of its effectiveness. The ruling does not comment on the UK's amended total cap on carbon dioxide emissions, but it does require the Commission to consider the amended plan and to make a fresh decision on its compatibility with the EU Emissions Trading Directive's requirements.

Free movement of goods

Another case with a constitutional aspect is **Case C-320/03 Commission v. Austria** which involved a complaint by the Commission that a ban on lorries over 7.5 tonnes carrying certain goods such as waste, stone, soil, motor vehicles, timber or cereals from using a section of the Inn valley motorway was incompatible with the free movement of goods, so that Austria had failed to fulfil its obligations under Arts 28 to 30 EC Treaty. The road was one of the main land routes between the south of Germany and the north of Italy. The Court held that the ban obstructed the free movement of goods. An obstacle to the free movement of goods could be justified by requirements relating to the protection of the environment, but the ban infringed the principle of proportionality. The Austrian authorities should have carefully examined the possibility of using less restrictive measures, such as looking to see whether goods could be transported by other means of transport or via other routes and whether there was sufficient and appropriate rail capacity. A transitional period of only two months for implementing the ban was insufficient to allow the undertakings concerned reasonably to adjust to the new circumstances.

CONTAMINATED LAND

The Administrative Court had its first opportunity to consider an appeal against the service of a contaminated land remediation notice under Part IIA of the Environmental Protection Act 1990 in **Circular Facilities (London) Ltd v. Sevenoaks District Council** [2005] EWHC 865 (Admin). The Council had served Circular Facilities with a remediation stating that it was an "appropriate person" under Part IIA by reason of having "… caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land". The land, which was comprised of an old landfill site in Tonbridge, Kent, had been purchased by a Mr Scott in 1978 with the support of, and intention to sell on to, Circular. Having secured planning permission, the site was transferred to Circular in 1979, but Mr Scott continued to be involved in the project to develop it for residential purposes which was undertaken in the early 1980s. Investigations undertaken on behalf of the Council in 2002 had identified that methane and carbon dioxide were being produced at the site in considerable concentrations. The Council then identified that there was a significant possibility of significant harm being caused by the presence of decomposing organic matter at the site, determined that the land was "contaminated land" within the meaning of section 78A of the 1990 Act, and subsequently served a remediation notice on Circular under section 78E.

Whilst not disputing that the land was “contaminated land”, Circular appealed against the service of the remediation notice on the basis that it had not caused or knowingly permitted the presence of the substances. The Council’s case was that Circular, being the owner and developer of the land in 1980, had provided the Council with a report written in 1978 in March 1980, so that it was to be inferred that the contents of the report were known to the company. As the report identified the presence of organic material and gases at the site, the contention was that Circular had knowingly permitted the presence of the organic material to remain on site and that, pursuant to section 78F(9),[11] was to be regarded as having knowingly permitted there to be a substance by which the land was to become contaminated. Circular’s case was that the person who should be considered to be the ‘controlling mind’ of the company had not himself read the report until some time in 2002, and that Mr Scott (who was dead at the time of the proceedings) had dealt with those matters, so that it had not had the requisite knowledge to make it a “knowing permitter” at the relevant time.

The District Judge found that the 1978 report had been available on the planning register and must have been available to Circular, and that Circular must have considered the risks of investing in land for development which had consisted of old clay pits and in assessing the risk the report must have been considered. In his view, the company must have been aware of the organic material and the gas and ought to have been aware of the risk posed by landfill sites such as the site in question. Accordingly, he found that Circular had been an “appropriate person”.

On appeal by Circular, Newman J found that the director who was the controlling mind of Circular had denied personal knowledge of the report’s contents in his evidence, that the relationship between Mr Scott, Circular, and the controlling mind was not clearly established, and that the District Judge had not made findings as to what the controlling mind had, and had not, known. He found that it was not clear on what basis the District Judge had reached the conclusion that Circular must have been aware of the organic material. The evidence suggested that Mr Scott had been the agent of Circular and not its controlling mind, and the basis for which the company should be fixed with imputed or constructive knowledge had not been argued and findings had not been reached on that issue. The fact that the report was on the planning register and was accordingly available to Circular, would not in Newman J’s view have been sufficient to impute knowledge of the contents of the report to Circular. It had been incumbent upon the District Judge to state whether or not he found, as a fact, that Mr Scott knew of the contents of the soil report and, if so, what legal conclusion that gave rise to.

In view of this, the appeal was allowed, but the Court had the power to order a re-trial, and the circumstances warranted this. The underlying ambit of the evidence and applicable legal principle, when fully explored and considered, was capable of giving rise to a legitimate conclusion that Circular was an “appropriate person”, and as there had been expenditure by the Council on remediation, the Court’s discretion was exercised to order a re-trial. Newman J acknowledged that in the context of magistrates' courts proceedings, without the benefit to be gained from disclosure obligations, trials on matters as historic as this, without reference to adequate documentation, and giving rise to complex principles of law, presented a demanding set of proceedings for a district judge to resolve. Nevertheless, having weighed all these considerations, it seemed that, subject to any specific representations from the parties, the matter should be re-tried.

Although it was not necessary to deal with the other grounds of appeal, for the purposes of clarification, it

[11] Subs. 78F(9) provides: "A person who has caused or knowingly permitted any substance ("substance A") to be in, on or under any land shall also be taken for the purposes of this section to have caused or knowingly permitted there to be in, on or under that land any substance which is there as a result of a chemical reaction or biological process affecting substance A."

was held that there was no basis for limiting the ambit of section 78F(9) to exclude responsibility of those who did not know of the potentiality for the chemical reaction or biological process which could affect substance A. The knowledge of the substance was taken to be the knowledge of the substance generated by the process.

The case provides a graphic illustration of the problems with undertaking the kinds of investigations and making the kinds of determinations often required to fix and apportion liability under Part IIA; Newman J explicitly referred to the evidential difficulties raised by cases of historic pollution, and exacerbated by the limited disclosure requirements in the Magistrates' Court. The Government has now acknowledged this problem by providing that appeals should in all cases be to the Secretary of State rather than the magistrates' court.[12]

Whilst the case primarily concerns the facts and evidential difficulties in the specific circumstances, a couple of interesting and more general points are raised. The first is the *obiter* finding that section 78F(9) fixes liability (potentially) on those who have caused or knowingly permitted the presence of substances which later change by chemical reaction or biological process to form a different substance with regard to both the original and the new substance. Although it has always been considered to be the case by commentators, and would undermine the strict liability approach if it was not, it is helpful to have some clarification that liability is not limited to cases where the causer/knowing permitter had knowledge of the potential for forming of a new substance by chemical reaction or biological process. It is also worth noting that Newman J regarded it as well arguable that Mr Scotts's knowledge, as agent of Circular, might be attributed to Circular:

"The phrase 'directing mind and will' can, according to authority, be the directing mind and will of a company which reposes in different persons in respect of different activities": **El Ajou v. Dollar Land Holdings plc** [1994] 2 All ER 685 (Hoffmann LJ). [13]
The second point of interest is that in interpreting this section, Newman J was not interested in submissions based on the Guidance found in Annex 2 to DETR Circular 2/2000. Again this is not surprising, given the fact that the guidance in that Annex is not "Statutory Guidance" (which is found in Annex 3), although it does set out the "Department's views and interpretations".

PPC

Cases on IPC and PPC are not particularly common, so it is instructive to note **R (on the application of Rockware Glass Ltd) v Chester City Council and Quinn Glass Ltd** (2005), in which the glass manufacturer Rockware successfully applied for judicial review of a decision of the local authority to grant an PPC permit to a competitor, Quinn Glass Ltd, for a new 368 million Euro (£260 million) glass bottling and filling plant at Elton, Cheshire.[14]

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[12] Clean Neighbourhoods and Environment Act 2005, s. 104.

[13] See also Bank of India v. Christopher Morris and others [2005] EWCA Civ 693 involving transactions between BCCI and Bank of India 1981-85; issue whether BOI involvement in fraud was "unknowing" and whether knowledge of BOI employee of fraudulent purpose behind transaction could be attributed to BOI, for purposes of s. 213(2) Insolvency Act 1986 (allowing the liquidator to seek contribution from BOI) where the CA held that s. 213 was one of the cases requiring formulation of a "special rule of attribution": see Lord Hoffmann in Meridian Global Funds Management Asia ltd v. Securities Commission [1995] 2 AC 500 and also on the issue of constructive knowledge, see: Vehicle Inspectorate v. Nuttall [1999] 1 WLR 629 (shutting eyes to the obvious)

[14] This was not the plant's only problem. It has a capacity of 1.2 bn bottles a year, yet was actually built without planning permission, in that as built it represented a 60% increase in size over the scope of its planning permission. A retrospective planning application was made which was called in by the ODPM. What looks to be a highly acrimonious planning inquiry

Deputy Judge Andrew Gilbart QC held that when considering whether to grant a PPC permit for the manufacture of glassware, a regulator had to have regard to, but was not confined to, the particular furnace size, configuration, design or process proposed in the application for the permit. When considering the best available techniques to prevent or reduce emissions, a test under the IPPC Directive and the PPC Regulations, the local authority had wrongly failed to consider whether alternative configurations, size or design to that proposed would have produced lower emissions of specified pollutants, and in particular oxides of nitrogen. Further, the local authority had misinterpreted and misapplied statutory notes and relevant documents on achievable emission limits and took into account an immaterial consideration, namely the emission limits set at other existing UK plants, when considering whether the levels permitted at the application site satisfied the best available techniques test. It also failed to consider whether oxides of nitrogen were global pollutants or were to be treated as greenhouse gases and had failed to give adequate or intelligible reasoning for its conclusions. Finally, the chief executive of the local authority had, in the circumstances, acted beyond his delegated powers in issuing the permit. The errors of law, procedural defects and the flaws in the reasoning were so substantial, and the interests of Rockware sufficiently affected, that the court saw fit to exercise its discretion and quash the permit, even though the plant had opened and was operating.

STATUTORY NUISANCE

Statutory nuisance remains a potent tool in local environmental protection and in **Newcastle Upon Tyne Council v The Barns (NE) Ltd** [2005] EWCA Civ 1274the Court of Appeal has given guidance on the use of injunctions under section 81(5) of the Environmental Protection Act 1990. The Court held that a local authority could not seek injunctive relief under the Environmental Protection Act 1990 s.81(5) unless it had first served an abatement notice under s.80(1). The local authority had started an action against The Barns alleging that the collection and burning of waste on its land amounted to a statutory nuisance and seeking an order under s.81(5) prohibiting any repetition. The Court of Appeal held that were a series of provisions in the Act that were intended to be consecutive steps when dealing with a statutory nuisance: (i) service of an abatement notice; (ii) where there was no compliance, either prosecution in the magistrates' court or self-help by the local authority requiring the wrongdoer to compensate the local authority for its expenses; (iii) as a last resort, action in the High Court for an injunction under s.81(5). Section 80(1) imposed a duty on a local authority to serve an abatement notice once it was satisfied that a statutory nuisance existed. If Parliament had intended to empower a local authority to apply to the High Court without first serving an abatement notice then clear provisions to that effect would be expected.

POLLUTION AND HUMAN RIGHTS

Claims that human rights have been violated by pollution caused or tolerated by the state have been successful in only a limited number of extreme cases. An example is **Őneryildiz v. Turkey** (2005) 41 EHRR 325, involving a methane explosion and consequntial landslip at a municipal household refuse site, which engulfed the applicant's adjacent slum dwelling, killing members of his family. A further example of such cases occured in **Fadeyeva v Russia** (Application No. 55723/00) ECHR June 9, 2005,

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opened in December and will resume in February. Quinn indicated at the inquiry that if retrospective permission is not given, it may walk away from the plant (which employs over 300 people) and relocate in France. The case has a distinctly Irish feel, as Quinn Glass is controlled by Irish billionaire Sean Quinn, and Rockware (though based in West Yorkshire) is the UK arm of Ardagh Glass, controlled by another Irish entrepreneur through Caona, a special-purpose company.

when the European Court of Human Rights found the Russian Federation guilty of violating the human rights of Ms. Fadeyeva, in relation to health impacts from a polluting steel plant.

Ms. Fadeyeva had complained that her health had been harmed by long-term exposure to pollution from a steel plant in the town of Severstal. The Severstal steel plant was built in Soviet times and was the largest iron smelter in Russia and the main employer of approximately 60,000 people. In order to delimit the areas in which pollution caused by steel production could be excessive, the authorities established a buffer zone around the Severstal premises – "the sanitary security zone". This zone covered a 5,000 metre-wide area around the territory of the plant (reduced to 1,000 metres in 1992), and the applicant lived in a council flat within this zone with her family since 1982. Although this zone was, in theory, supposed to separate the plant from the town's residential areas, in practice thousands of people lived there. A Decree of the Council of Ministers in 1974 obliged the Ministry of Black Metallurgy to resettle the inhabitants of the sanitary security zone who lived in certain districts by 1977. However, this was not undertaken. In the following years the Government adopted several new programs aimed at the improvement of the environmental situation in Cherepovets, with the objective being for the Severstal plant to attain safe levels of air quality by 2010-2015. In 1993 the steel-plant was privatized and the apartment buildings owned by the steel-plant and situated within the zone were transferred to the local council.[15]

In 1995 the applicant and other people living within the zone brought a court action against the steel works, seeking resettlement outside the sanitary security zone in an environmentally-safe area. In 1996 the Town Court found that, under domestic law, the applicant had the right in principle to be resettled at the local authority's expense. However, the court made no specific resettlement order, but required the local authorities to place her on a "priority waiting list" for new accommodation, making her resettlement conditional on the availability of funds. The applicant was put on the general waiting list for new housing, and was no. 6820 on that list. In 1999 the applicant brought new proceedings against the local council, seeking her immediate resettlement in accordance with the 1996 judgment of, but this action was dismissed on the basis that there was no "priority waiting list" and no allocated council housing. The court concluded that, as the applicant had been put on the general waiting list, the 1996 judgment had been executed. This decision was upheld by the regional court in 1999.

The European Court of Human Rights found that governments are legally responsible for preventing serious damage to their citizens' health caused by pollution from industrial installations, even when they are privately owned and run. The Court said the state had failed to protect Ms. Fadeyeva by either resettling her away from the plant or reducing its pollution levels, in breach of Article 8 (right to respect for private and family life), and ordered the Russian government to pay her €6,000 in compensation, costs, and to ensure it resolved her situation.

The case represents an important step in that the ECHR found a state responsible for air pollution caused by a private company, the nearest equivalent being the well-known **López Ostra** case in 1994, which involved pollution from a partly-public, partly-private waste treatment plant in Spain. Much the same theme emerges from another recent case, **Moreno Gómez v. Spain** (2005) 41 EHRR 40[16] the applicant had moved into a flat in a residential part of Valencia in 1970. Over a long period, the local council gave permission for large numbers of licensed premises, bars and nightclubs, to operate in the area – apparently as many as 127 nightclubs. The applicant complained of inability to sleep and

[15] Pollution levels were officially monitored within the security zone, and from 1990-1999 the average concentration of dust in the air was 1.6 to 1.9 times higher than the "maximum permitted limit" (MPL); the concentration of carbon disulphide, 1.4 to 4 times higher; and, the concentration of formaldehyde, 2 to 4.7 times higher. Atmospheric pollution from 1997-2001 was rated as "high" or "very high". In particular, an excessive concentration of hazardous substances (such as hydrogen sulphide, ammonia and carbolic acid) was registered.

[16] See Paradissis, *Noise Nuisance and the Right to Respect for Private and Family Life* [2005] JPL 584.

consequent health problems. It was held unanimously by the Court that there had been a violation of Art 8. Respect for the home covered not just the physically defined area of the home, but quiet enjoyment of the surrounding area. Non-physical invasions, such as noise, smells or emissions, which prevented enjoyment of the amenities of the home could breach Art 8. The state was obliged not only to refrain from causing such interference, but to take steps to secure respect for home and private life against interference by private parties. In that case, the principles were essentially the same – whether a fair balance had been struck between the interests of the individual and the community as a whole. Here the state had not struck such a balance: the authorities were aware of the high noise levels and serious disturbance, but had tolerated the repeated flouting of rules on maximum noise levels over a long period.

Another example of the same principle, but where a different conclusion was reached, is **Kyrtatos v. Greece** (2005) 40 EHRR 390, where permits had been granted for building on a swamp near to the applicant's home on the island of Tinos. The Greek Supreme Administrative Court quashed the permits, but the local authority failed to require demolition of the houses built under the permits. It was held there had been no violation of Art 8. Whilst the scenic and natural value of the swamp had been affected, this was not in itself a violation of Art 8, which is not concerned to prevent general environmental deterioration, or protect general environmental quality. The interference with the conditions of animal and plant life in the swamp was not an attack on the private or family life of the applicants. The Court did however leave open the possibility that if there had been a destruction of a forest area in the closer vicinity of the applicants' house, that could have affected more directly their own well-being. The Court was also of the opinion that the disturbances from development (lights, noise, etc) had not reached a sufficient degree of seriousness to be taken into account under Art 8.

THE COMMON LAW

The great preponderance of environmental litigation is currently in the public law sphere. Yet the underlying common law of nuisance is capable of generating new and interesting points.

One case which has something of the feel of the Year Books about it is **Anthony v. The Coal Authority** [2005] EWHC 1654 QB, in which claims in public and private nuisance were brought by a number of homeowners in villages near to a spoil tip which had been closed in 1971 and declared disused in 1983. In 1987, the defendant's predecessors, the NCB, had re-shaped and partially landscaped the tip, and in 1995 the land on which it was situated was conveyed to a group of Commoners for a nominal sum. During 1996, fire broke out on part of the site with the result, the claimants alleged, that clouds of smoke and noxious fumes adversely affected the use and enjoyment of their properties. Remedial works by the County Council were carried out which finally extinguished the fire in 2000. At times the effects were so bad that the nearby M4 motorway had to be closed temporarily because of reduced visibility.

The claimants submitted that tipping operations by the defendant's predecessors between 1957 and 1972 had created an unreasonable fire hazard because, as formed, it was foreseeable that the tip was likely to catch fire, either by spontaneous combustion or from ignition by a third party. They argued that the National Coal Board had created the nuisance, so that the test was one of foreseeability only (rather than of a measured duty of care to abate a nuisance) and, in the alternative, that when it re-formed the tip in 1987 the NCB knew, or should have known, that it presented a fire hazard and had failed to take reasonable steps to render it safe. The defendant accepted that it was liable for the acts of its predecessors, but claimed that the use of the land had been reasonable. It submitted that spontaneous combustion had been unforeseeable, that ignition had been by a third party, and that even if the tip had been liable to spontaneous combustion the risk of fire was so small that the use of the land had been reasonable. It further submitted that nothing done in 1987 had enhanced the risk.

Pitchford J found that the defendant's use of its land would not have been unreasonable in so far as it exposed neighbours to the risk of fire caused by the acts of trespassers. Such risk was no more unreasonable than the use of land for the storage of a large quantity of any other combustible material, such as wood. If the fire had been caused by trespassers, the authority would not have been liable in nuisance or negligence. The fact that the tip was combustible by means of a fire lit on its wooded flank by a trespasser did not make it an unreasonable use of land. An occupier was not liable for each such risk that might be realised. It was only the risk associated with the unreasonable quality of the occupier's use that entitled a neighbour to a finding of nuisance. As to negligence, Pitchford J held that the Authority owed no duty of care to its neighbours to protect the flank from fires deliberately started by trespassers beyond the action it had taken to fence the foot of the flank following restoration and before transfer.

However, Pitchford J found that on the balance of probabilities, the fire in 1996 had combusted spontaneously and that risk of combustion or the prospect of damage to neighbours by the effects of fire was foreseeable; such a use was unreasonable and hence there could be a claim in private nuisance. As to the public nuisance claims, Pitchford J concluded that a nuisance to the public had existed, but given the findings as to private nuisance, there was no need to analyse whether compliance with a measured duty of care was a defence to an action for public nuisance.

In reaching these findings, Pitchford J rejected the claimants' submission that creation of the nuisance by the defendant resulted in the application of strict liability, rather than the "'measured duty of care" principle. Instead, Pitchford J considered that the spoil heaps had not comprised a foreseeable nuisance at the time of their creation, so that the use of land was reasonable at that time. The subsequent foreseeability of the risk put the defendant in a situation comparable to an occupier who suffered the acts of trespassers or forces of nature which rendered his land a danger to that of a neighbour. Once fixed with knowledge of that risk, the question was one of what reasonable steps were required in the circumstances to abate it.

On this issue it was held that the NCB and British Coal had failed to take reasonable steps to abate the nuisance, which survived the 1995 transfer. An assessment of the risks had been required prior to restoration of the tip in 1987. The NCB was found to have had knowledge, or the means of knowledge, that there was a foreseeable risk of spontaneous combustion in the tip, causing nuisance to neighbours. If that risk assessment had been performed, the NCB would have concluded that remedial action was required. Up until then, nuisance had been avoided by prompt action by employees. That level of control however ended upon closure of the colliery, after which special arrangements to continue with weekly inspections indefinitely, or civil engineering steps to remove or significantly reduce the risk of spontaneous combustion, were necessary. As it had been the NCB's intention to restore the tip to grazing land for the commoners, that had provided an opportunity to take action at a reasonable cost to remove the risk or reduce it to negligible proportions. Accordingly, the use of land was unreasonable by virtue of the exposure of neighbours to the risk of spontaneous combustion. The claimants had suffered loss of amenity and enjoyment of their properties and were each awarded £3,500 in damages.

Continuing the apocalyptic theme of fire and disaster, the Court of Appeal in **DEFRA v. Kevin Feakins** [2005] EWCA Civ 1513 considered the relationship between environmental protection and the powers of Ministers to use land for the purpose of disposing of carcases during the FMD outbreak. Mr Feakins claimed that the Department was guilty of trespass on his land, on the basis that whilst s. 34 of the Animal Health Act 1981 provided power to use land for that purpose, this was subject under the section

to the requirement that the land be "suitable in that behalf" and that the operations had been unlawful because there had been breaches of relevant EU provisions, in particular the TSE Regulation and the Groundwater Directive. The Court held that the statutory scheme provided no general power to interfere permanently with private property rights. The only authority conferred by the statute to interfere permanently with private property rights was the power to bury carcasses in s.34(4) of the 1981 Act. However, the words "suitable in that behalf" merely connoted an obligation on the part of the minister to bury a carcass in an appropriate position having regard to the private possession or occupation of the ground where the carcass was to be buried. It was too wide a proposition to suggest that the statutory authority conferred by s.34(4) was invalidated once any breach of the relevant EU provisions was established. Breaches of those provisions were relevant only if they affected the nature or extent of the Department's interference with the rights of the owner of the farm. On the facts, the Department's activities on the farm did not create any risk of transmission of TSE to humans, nor was there evidence that there had been any pollution of groundwater.

Another issue which can reignite periodically is the relationship between the reasonable user of land in common law terms, and the panoply of planning, environmental and other legislation which governs the use of land. In **Hughes v Riley** [2005] EWCA Civ 1129, the appellant lived in a converted barn, separated from a post office/shop (the property also included a dwelling for the shop owners) by a yard area, and sought an injunction prohibiting deliveries to the next-door post office before 8 a.m. and after 7 p.m. The appellant had lived at the property since 2000, whilst the post office and shop had been operating since 1994. The noise problems began with changes to the operation of the post office and shop, and in particular because the sorting office to the post office was moved to a room immediately adjacent to the dwelling, which gave rise to noise from the sorting office and early-morning deliveries by vehicles parking in the yard. The post office property was the subject of a restrictive covenant which expressly prohibited the use of the property for purposes which might amount to a nuisance or annoyance, or which tended to diminish the value of the neighbouring (barn conversion) property. The appellant claimed that a nuisance had been created which had impacted adversely the value of the dwelling.

The County Court dismissed the claim on the grounds that the defendant shop-owner had good health and safety reasons for making the changes to the operation of the post office, at the instigation of the environmental health officer, and that, in the circumstances, the operation amounted to a reasonable user of the premises. The trial judge referred to the effects on struggling local businesses of a nearby supermarket. As the covenant had been imposed on a property used as a post office and shop, the question was whether the sorting office operations were within the contemplated use as a post office, and whether the use of parts of the property not previously used for post office purposes (the yard and the sorting office room) was a breach of the covenant.

The Court of Appeal found that the trial judge had dealt adequately with all the issues raised by the appellant, including the consideration of valuation evidence and expert evidence regarding the volume of the noise, and had been entitled to find on that evidence that the noise fell below the nuisance threshold. In addition, the Court of Appeal found that the trial judge had dealt adequately with the balance of interest between the parties – whilst the appellant wished to use the former barn as a residence, it was located alongside a post office and village shop which were located there in order to serve the needs of its immediate community, and which inevitably gave rise to some interference by early-morning deliveries of both newspapers and post. It had been open to the trial judge to conclude that, on balance, the operation of the post office and shop was reasonable use of the land and did not amount to either a common law nuisance, or a breach of the restrictive covenant. The case is a reminder that whilst “coming to the nuisance” is no defence, the law of nuisance is all about seeking to arbitrate between the interests of adjacent owners, and to some extent that of the community at large where uses serve some public interest. With more and more city-dwellers seeking the “tranquillity” of country life, and encountering instead the reality of the rural economy, that is a salutary reminder.

ENVIRONMENTAL INDEMNITIES

Claims under an environmental indemnity given as part of a Sale and Purchase Agreement were the subject of an application to strike out under CPR Part 24, Part 3.4 in the case of **BAL 1996 Ltd & Others v British Alcan Aluminium plc** (Technology & Construction Court: October 27, 2005). The case involved a complex indemnity which covered five heads of liability and claims made under that indemnity in respect of an on-site landfill, and radioactive contamination discovered after completion. A clause excluded liability (except in three specified circumstances) unless proceedings had been commenced or there was "a serious threat of proceedings received in writing from a Third Party". The defendant vendor submitted that a serious threat of proceedings had not been received. Whilst the construction of other parts of the indemnity was also considered in detail, the "serious threat" issue is of particular interest. The Environment Agency had written to the purchaser on a number of occasions regarding the landfill site, with an implied, but not explicit, threat of legal proceedings. The clause distinguished "a serious threat of proceedings" and "and notice or communication received from or intimated by a Third Party (in either case falling short of proceedings)". The defendants submitted that a "serious threat" had to be explicit, whilst the claimants submitted that this could be implicit, that the proceedings threatened need not be imminent, and that correspondence had to be read in the context of the state of the site and discussions with the Agency. Thus, it was submitted, the test was whether a properly informed reader would have understood from the correspondence that unless appropriate action was taken formal proceedings would be likely to follow. The Court found that it could not be said that the claimants had no reasonable prospect of persuading a court as to that construction, and that an express threat was not required.

ENVIRONMENTAL JUDICIAL REVIEW

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Types of proceedings

Recent years have seen a significant increase in public law litigation in the field of environmental law. A number of the most significant cases establishing public law principles stem from such litigation. Whilst these cases largely concern review of the lawfulness of action by Government, local authorities and other regulators, and as such could be termed "judicial review", in fact the judicial review procedures of CPR 54 are only one among a number of routes, which include:

- **Statutory challenges** under specific provisions to decisions of the Secretary of State by "persons aggrieved". Various statutes contain such provisions, for example section 288 of the Town and Country Planning Act 1990. For an example of a recent challenge under the provisions of the Harbours Act 1964, see Humber Sea Terminal Limited v. Secretary of State for Transport.[17]

- **Case stated proceedings in the Divisional Court** from decisions of magistrates' courts. These can be particularly important in the field of statutory nuisance: for example Hounslow London Borough Council v. Thames Water Utilities Limited, which established that odours from sewage works are subject to the statutory nuisance provisions of Part III of the Environmental Protection Act 1990.[18]

[17] [2005] EWHC 1289 (Admin). For another recent example, see Westminster City Council v. French Connection Retail Limited [2005] EWHC 933 (Admin); [2005] Env LR 957 (whether the transmission of music through a shop window functioning as a loudspeaker could be described as a loudspeaker "in the street" within section 62 of the Control of Pollution Act 1974.

[18] [2003] EWHC 1197 (Admin); [2004] Env LR 59.

- **Proceedings under CPR 8 for a declaration**. Such proceedings can be useful where it is desired to establish whether a particular form of conduct is or is not lawful, where the law is uncertain: for example Blackland Park Exploration Limited v. Environment Agency.[19]

- **Appeals to High Court**. A decision of the magistrates' court on appeal against a remediation notice under the contaminated land provisions of Part IIA of the Environmental Protection Act 1990 can be directly appealed to the High Court.[20]

Types of claims

The main types of environmental claim can perhaps be categorised as follows:

- **Disputes between the regulator and the regulated.** A typical example would be a case where the Environment Agency regards a particular material or process stream as being "waste" whereas its producer disagrees: see for example the litigation between industry and the Environment Agency over the status of metal scrap.[21] It is important to bear in mind that there are in many cases statutory provisions providing a "local remedy" by way of appeal, which may need to be exhausted. The courts have stated that declarations as to the legality under criminal law of a proposed course of conduct should be entertained only in exceptional cases;[22] however the circumstances where there is a legitimate difference of view between the regulator and regulated seem very far from exceptional, and it is submitted it is better for these matters, which often raise difficult issues of interpretation and EC points, to be resolved by the High Court rather than in the context of a prosecution in the Crown Court or, more likely, the magistrates' court.[23] Typically, such cases do not raise controversial factual issues and can be determined on the basis of agreed facts.[24]

- **Disputes between the regulated and a decision-maker.** The archetypal case is the challenge to a decision made on appeal, usually by or on behalf of the Secretary of State.

- **Challenges by interest groups or individual members of the public.** This is one of the most fertile areas of litigation, which has grown phenomenally in recent years. The challenge may be JR or statutory and the typical defendants will be the Secretary of State, local authorities or the Environment Agency.

- **Challenges by commercial competitors.** Increasingly used as a "spoiling tactic" in relation to rival schemes. For an example of an unsuccessful challenge, see Humber Sea Terminal Limited v. Secretary of State for Transport.[25] Auld LJ has recently in R (The Noble Organisation) v. Thanet District Council[26]expressed dissatisfaction in the way that the remedy of JR could be exploited as a

[19] [2003] EWCA Civ 1795; [2004] Env LR 652.

[20] The Contaminated Land (England and Wales) Regulations 2000, reg. 13. For the first such appeal, which resulted in a retrial being ordered, see Circular Facilities (London) Limited v. Sevenoaks District Council [2005] EWHC 865; [2005] Env LR 754.

[21] R v. Environment Agency, ex p Dockgrange Limited [1997] Env LR; R (Mayer Parry Recycling Limited) v. Environment Agency [2003] 3 CMLR 8; [2004] Env LR 106 (reference to ECJ).

[22] See Rushbridger c. HM Attorney-General [2003] UKHL 38; [2004] 1 AC 357.

[23] This certainly seems to be the view in other contexts, where a relatively flexible approach has been adopted, at least where criminal proceedings are not already on foot. See R v. DPP, ex parte Camelot Group Plc (1998) 10 Admin LR 93, and other cases cited by Fordham, *Judicial Review Handbook* (4th edn, 2004) para. 24.2.8.

[24] See for example, Scottish Power Generation Ltd. v. Scottish Environmental Protection Agency [2005] Env LR 872 (Outer House) concerning the status of fuel derived from sewage sludge.

[25] [2005] EWHC 1289 (Admin); [2006] Env LR 185.

[26] [2004] EWCA Civ 782; [2006] Env LR 185, para 68.

commercial weapon by rival developers (causing great harm to individual developers and potentially to the public interest in much-needed regeneration) and urged rigorous examination by the judge at permission stage.[27] A spectacular example of a successful recent challenge is R (Rockware Glass Limited) v. Chester City Council and Quinn Glass Ltd, in which Andrew Gilbart QC, sitting as a deputy High Court judge, quashed a decision of the defendant local authority to grant an integrated pollution prevention and control permit to the interested party, Quinn Glass, to operate an industrial installation for the manufacture of glassware, on the basis that the local authority had wrongly failed to consider whether alternative configurations, size or design of furnace to that proposed would have produced lower emissions of pollutants, that the local authority had misinterpreted and misapplied statutory notes and other relevant documents on achievable emission limits. It had acted in breach of statutory European and United Kingdom codes for pollution control by imposing emission limits for oxides of nitrogen that were higher than those that were achievable and that it had failed to have regard to a material consideration, namely the evidence before it that lower emission limits were achievable for oxides of nitrogen if alternative techniques were used. Moreover, the chief executive of the local authority was held to have acted beyond his delegated powers in issuing the permit. The errors of law, the failures in the process of consideration and the flaws in the reasoning were so substantial, and the interests of Rockware sufficiently affected, that the court saw fit to exercise its discretion and quash the permit. The plant, the largest container glass factory in Europe, had been operating for about 6 months at that stage.

Features of Environmental JR Claims

There are a number of generic features which environmental claims often raise.

- **Standing.** This seems to be much less of a bar to challenges than once was thought to be the case.[28] Judicial thinking now seems to be dominated by the approach of Sedley J in R v. Somerset County Council, ex p Dixon,[29] that public law is essentially about "wrongs" rather than "rights" and that a person or organisation with no particular stake in the issue or outcome may, without being a mere meddler, be well placed to bring an apparent misuse of power to the court's attention. This would seem to hold true both for local – or indeed not so local – residents, for well-established and expert bodies such as Greenpeace,[30] individuals with specific interests such as in historic railways buildings,[31] unincorporated associations or companies set up on an ad hoc basis to scrutinise and oppose a particular proposal.[32] One manifestation of this liberal approach has been to view standing in terms of the overall relief sought, rather than the specific grounds; thus a claimant who has standing will not be prevent from advancing or relying on grounds in which he has no personal interest. This may often be a practically important point in environmental cases.[33] Nonetheless, there are limits to standing. In R (Robert Feakins) v. Secretary of State for Environment, Food and Rural Affairs,[34] the claimant, a farmer whose land had been affected by DEFRA's activities during the FMD outbreak, brought JR proceedings alleging that DEFRA was proposing to act unlawfully in disposing

[27] See also Auld LJ in R (Mount Cook Land Limited) v. Westminster City Council [2003] EWCA Civ 1346; [2004] PLR 29at para 46: "judicial review applications by would-be developers or objectors to development in planning cases are by their very nature driven primarily by commercial or private motive rather than a high-minded concern for the public weal."

[28] For cases taking a restrictive approach see e.g. R v. Secretary of State for the Environment, ex p Rose Theatre Trust Co [1990] 1 QB 504; R v. North Somerset Council, ex p Garnett [1998] Env LR 91.

[29] [1998] Env LR 111.

[30] See R v. HM Inspectorate of Pollution, ex p Greenpeace Ltd [1994] 4 All ER 329.

[31] See R (Hammerton) v. London Underground Ltd [2002] EWHC 2307 (Admin).

[32] See Hereford Waste Watchers Limited v. Herefordshire Council [2005] EWHC 191 (Admin); [2005] JPL 1469.

[33] For example, R (Kides) v. South Cambridgeshire District Council [2002] EWCA Civ 1370; [2002] 4 PLR 66, applied in R (Hammerton) v. London Underground Ltd [2002] EWHC 2307 (Admin).

[34] [2003] EWCA Civ 1546.

of ash from pyres, removed from his land. The Court of Appeal held that a claimant's motive was not irrelevant and that if a claimant had no sufficient private interest to support a claim to standing, then he should not be accorded standing merely because he raised an issue in which there was a public interest. In this case, the claimant's motive in making the application was not (as alleged by DEFRA) solely or even principally to extract compensation and the claimant did have the required standing to make the application. The Court of Appeal has also recently emphasised (in a planning case) that refusal of permission for lack of "sufficient interest" can be an important weapon in the court's armoury in cases of a vexatious litigant with no sufficient interest in his own right seeking to set himself up as a "public champion": see Ewing v. Office of the Deputy Prime Minister.[35]

- **Funding.** This will generally not be a problem for the commercial litigant or the major interest group, but serious issues arise for individual claimants or small neighbourhood groups. The solution is sometimes to find an individual who is eligible for public funding, though as appears from R (Edwards) v. Environment Agency,[36] this can raise controversial issues in its own right. In that case Mr Edwards, a homeless man, was put forward as claimant in proceedings essentially instigated by members of "Rugby in Plume", a group opposed to the activities of Rugby Cement.[37] Keith J held that Mr Edwards as a local inhabitant had sufficient interest, and that the proceedings were not an abuse of process – essentially because there was nothing to prevent Mr Edwards having an interest in his own right[38] and because there was no evidence that the Legal Services Commission had been misled or uninformed when funding the claim. It remains to be seen how the principles on protective costs orders laid down in R (Corner House Research) v. Secretary of State for Trade and Industry[39] may be applied in the environmental context, where they can certainly be seen to have potential application. However, one issue is that there must be no "private interest", and this may in some cases present an important obstacle.[40] The decision of the Court of Appeal in R (Burkett) v. Hammersmith and Fulham LBC [41] is instructive at many levels. Having had success in arguments on time limits before the House of Lords, the claimant – who was publicly-funded – failed on the substantive merits of the claim (an EIA case) before Newman J. The defendant sought to set off the costs of the substantive hearing against the very considerable costs[42] (which were the subject of some adverse comment by the Court of Appeal) of the House of Lords proceedings. The Court of Appeal held that the judge was entitled to make a setting off order, there being no good reason why the defendant local authority should have to bear both the House of Lords costs in full and its own costs of resistance in full. The Court however went on in an addendum to the judgment[43] to express

[35] [2005] EWCA Civ 1583.

[36] [2004] EWHC 736 (Admin); [2004] Env LR 43.

[37] A leader of RIP, Mrs Pallikaropoulos, was reported in the local media as having said: "I'm too rich [to get legal aid], so someone in Rugby has to come forward who feels strongly enough to take the case forward under the legal aid scheme."

[38] Keith J distinguished school appeals cases such as R v. London Borough of Richmond, ex p JC [2001] ELR 21 and R (WB) v. Leeds School Education Committee [2002] EWHC Civ 884 on the basis that in those cases the right to appeal was in the parents, and the child, whilst plainly affected by the outcome, did not have standing in their own right.

[39] [2005] EWCA Civ 192; [2005] 1 WLR 2600. The principles are that protective costs order will only be made in exceptional cases on the following guidelines: (1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that (a) the issues raised are of general public importance; (b) the public interest requires that those issues should be resolved; (c) the applicant has no private interest in the outcome of the case; (d) having regard to the financial resources of the applicant and the respondent and to the amount of costs that were likely to be involved it is fair and just to make the order; (e) if the order was not made the applicant would probably discontinue the proceedings and would be acting reasonably in so doing. (2) If those acting for the applicant are doing so pro bono that will be likely to enhance the merits of the application for a protective costs order. (3) It is for the court, in its discretion, to decide whether it was fair and just to make the order in the light of the above considerations.

[40] See the ruling of Lindsay J in the Railtrack shareholders' action: Weir v. Secretary of State for Transport (Ch D, 20 April 2005).

[41] [2004] EWCA Civ 1342; [2005] JPL 525.

[42] Some £83,500 counsels' fees and £40,000 solicitor's costs.

[43] Para 74ff.

serious concern as to the way in which the rules on costs may impede access to justice where concerned citizens seek to protect their environment through the courts. The same concern was repeated by the Court in Ewing v. Office of the Deputy Prime Minister,[44] with specific reference to the costs which defendants and interested parties may incur in filing summary grounds for resisting the claim.[45]

- **Interested parties.** Challenge to a planning permission or pollution control permit will inevitably affect the beneficiary of that permission. Thus environmental cases will frequently involve interested parties, sometimes on a multiple basis. For example the recent case of R (Hardy and Maile) v. Pembrokeshire County Council and Pembrokeshire Coast National Park Authority,[46] which involved challenges to the grants of planning permission and hazardous substances consents for two separate large projects for liquefied natural gas (LNG) terminals at Milford Haven, brought in four interested parties (two developers, the Health and Safety Executive and Milford Haven Port Authority), resulting in a permission hearing involving five leading and six junior counsel. It is often the case that environmental challenges raises points on the UK's compliance with EC law, which results in DEFRA joining in as an interested party. The commercial interested party may have to incur large costs to defend their permission, and will often put in voluminous evidence (for example on relief) but stands little chance of obtaining an order for costs against the claimant. In Ewing v. Office of the Deputy Prime Minister,[47] the Court of Appeal warned defendants and interested parties against incurring excessive costs in drafting summary grounds, where their position has already been stated in pre-action Protocol correspondence. In that case, there were two public authority defendants and three commercial interested parties. Between them they had generated some 50 pages of summary grounds, four of which had been settled by counsel, and which in two cases resulted in costs of £6,400 and £10,700. Carnwath LJ commended the response of the local authority defendant, which made all the necessary points in two and a half pages as "a model of what is required".

- **Factual complexity.** Environmental cases tend to be among the most factually complex types of JR proceedings, involving voluminous factual, policy and technical material. By way of example, in R (Hardy and Maile) v. Pembrokeshire County Council and Pembrokeshire Coast National Park Authority,[48] which was admittedly an unusually complex case in the number of parties involved, in addition to the claim bundle, appendices to the grounds of challenge and supporting witness statements, there were eight volumes of supporting documents running to over 5,000 pages.

- **EC dimension.** Environmental cases tend to be Euro-heavy in terms of law, reflecting the importance of EC law in underlying the body of domestic legislation. Areas where EC law is particularly important include environmental impact assessment (EIA), waste (the definition of "waste" is a European construct), and habitats, all of which have produced their own crop of cases. Thus environmental cases will often involve detailed scrutiny of the language of Directives and judgments of the ECJ in search of the autonomous meaning to be given to concepts such as "development consent",[49] and the application of principles such as direct effect, effectiveness, and sympathetic interpretation. Non-compliance with EC law has evoked a strict approach from the courts to the exercise of discretion on remedies, with a tendency towards quashing decisions which are unlawful. An important aspect of EC law in this area, increasingly recognised by the UK courts, is the conferral

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[44] [2005] EWCA Civ 1583, para 41.
[45] Such costs being in principle recoverable under Mount Cook Land Limited v. Westminster City Council [2003] EWCA Civ 1346; [2004] 2 P & CR 22.
[46] [2005] EWHC 1872 (Admin).
[47] [2005] EWHC Civ 1583, paras. 42-47 (Carnwath LJ) and 51-54 (Brooke LJ).
[48] [2005] EWHC 1872 (Admin).
[49] R v. North Yorkshire Council, ex p Brown [2000] 1 AC 397 at p. 410D per Lord Hoffmann.

of procedural rights on the public to be informed and consulted.[50] As Lord Steyn has stated in relation to Directive 85/337/EEC on the assessment of environmental effects of certain projects:[51]
"The Directive seeks to redress to some extent the imbalance in resources between promoters of major developments and those concerned, on behalf of individual or community interests, about the environmental effects of such projects."

This approach can be seen for example in the acceptance by the Court of Appeal in Huddleston that an individual can assert the direct effect of a Directive against an organ of the State, even though the effect may be the loss of planning permission, or some other substantial disadvantage for another private party (the developer).[52] The rights of the public may be seen as either a "valuable opportunity" for individuals such as Mr Huddleston whose home and immediate environment may be affected by development,[53] or as a more general interest in seeing the environment protected through the rules of due process provided by EC legislation.[54] Other examples of this approach are the unwillingness to overlook breaches of EC law on the basis that the outcome might have been the same or to find that there has been "substantial compliance" by other means,[55] and the insistence that in the EIA context it is not possible to proceed in a way which effectively deprives the public of the opportunity to be informed of the likely environmental effects of projects or to make comments on mitigating measures.[56] As put by Sedley LJ in Smith, the regime ought not to be circumvented "… by the surrender of public judgment to private negotiation",[57] and by Elias J in BT v. Gloucester City Council, in holding that the process of debate about the merits of a development ought not to be frustrated:[58]
"[the Directive requires an] … inclusive and democratic procedure … in which the public, however misguided or wrong headed its views may be, is given the opportunity to express its opinion on the environmental issues."

- **Delay.** Environmental JR claims can often present challenges to legal advisers faced with the requirement to file the claim form promptly and in any event within three months of the decision under challenge. The issue frequently arises in a stark form because of the potential effect of delay on the third party involved. The compatibility of the obligation to act promptly with EC and ECHR law has been called into question at the highest judicial level in the planning/environmental context,[59] but for the present at least remains part of English law.[60] At a general level, there are signs of a more relaxed attitude and a greater sympathy for the difficulties which may be encountered by local residents or small interest groups in meeting the 3 month deadline. For example, in holding in Burkett that time runs from the actual grant of planning permission rather than any earlier resolution, as well as the interests of legal certainty, the Lords referred to the burdensome nature of preparing a JR

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50 For further discussion, see S. Tromans and K. Fuller, *Environmental Impact Assessment – Law and Practice* (Butterworths, 2003) paras. 2.53-2.63.
51 R v. Hammersmith and Fulham London Borough Council, ex p Burkett [2002] UKHL 23; [2002] 1 WLR 1593 at para. 15.
52 [2000] Env LR 488; later followed by the ECJ in Case C-201/02 R (Wells) v. Secretary of State for Transport, Local Government and the Regions [2004] 1 CMLR 31; [2004] Env LR 528.
53 See the approach of Brooke LJ, paras. 39, 40, 43.
54 See Sedley LJ, para. 23, drawing and analogy with domestic rules of standing in public law.
55 See Berkeley v. Secretary of State for the Environment [2001] 2 AC 603.
56 See by way of examples, British Telecommunications plc v. Gloucester City Council [2001] EWHC 1001; [2002] JPL 93; Smith v. Secretary of State for the Environment, Transport and the Regions [2003] EWCA Civ 262; Hereford Waste Watchers Limited v. Herefordshire Council [2005] EWHC 191; [2005] JPL 1469.
57 [2003] EWCA Civ 262, para. 58.
58 [2001] EWHC 1001; [2002] JPL 93, para. 68.
59 See R v. Hammersmith and Fulham London Borough Council, ex p Burkett [2002] UKHL 23; [2002] 1 WLR 1593 at para. 53 (Lord Steyn).
60 R (Young) v. Oxford City Council [2002] EWCA Civ 990; [2002] 3 PLR 86 at para. 38 (Pill LJ).

application, particularly in planning cases, and the potential unreasonableness of requiring a private applicant to move against a decision which may never take effect, or of being subject to the perils of a retrospective judicial assessment of the date on which the time limit commenced.[61] Similarly, in assessing promptitude, the Lords rejected as a "misconception" the approach which had grown up following the decision of Laws J in R v. Ceredigion County Council, ex p McKeown[62] as taking the six-week period for statutory challenges in planning cases as a yardstick for promptitude.[63] Beyond this, decisions on promptitude tend to be inevitably fact-sensitive,[64] involving scrutiny of the conduct of the parties and of prejudice to thirds parties or to good administration.[65] A striking example of considerations of delay and prejudice at the permission stage is provided by R (Hardy and Maile) v. Pembrokeshire County Council and Pembrokeshire Coast National Park Authority,[66] in which challenges were brought in March 2005 in respect of planning permissions granted in 2003 and hazardous substances consents granted in 2004; of the eight decisions challenged, only one was within the three month period. There was no evidence to support the contention that the proposals had been "kept quiet", no good reason for the delay, and very substantial prejudice to the developers who had entered into multi-million pound financing arrangements and development contracts in reliance on the planning consents and permission was refused.[67] The courts have evinced a general resistance to attempts to circumvent promptness requirements by basing challenges to an earlier consent on some later consent – for example a challenge to approval of reserved matters under an outline planning permission which is in reality a challenge to the earlier permission.[68]

Administrative law issues in recent environmental cases

Environmental JR has produced a number of cases which raise and advance general principles of public law.

- **Procedural fairness.** Environmental cases have made a significant contribution over the years to the body of jurisprudence on due process and procedural fairness. These include cases on public consultation,[69] public inquiries,[70] bias by public authorities,[71] fairness in voting procedures at

[61] R v. Hammersmith and Fulham London Borough Council, ex p Burkett [2002] UKHL 23; [2002] 1 WLR 1593 at para. 50 (Lord Steyn). Compare the approach of Laws J in R v. Secretary of State for Trade and Industry, ex p Greenpeace Limited [1998] Env LR 415, adopted by the Court of Appeal in Burkett.

[62] [1998] 2 PLR 1.

[63] R v. Hammersmith and Fulham London Borough Council, ex p Burkett [2002] UKHL 23; [2002] 1 WLR 1593 at para. 53 (Lord Steyn).

[64] "Promptness is simply a function of the factors, ranging from the systemic to the idiosyncratic, which affect the fairness of letting a particular application proceed in a particular situation after a particular lapse of time …": R (Lichfield Securities Ltd) v. Lichfield District Council [2001] EWCA Civ 304; [2001] 3 PLR 33.

[65] See for example R v. Waveney District Council, ex p Bell [2001] Env LR 465 (relatively short delay; no specific evidence of prejudice to developer); R (Malster) v. Ipswich Borough Council [2001] EWHC 711; [2002] PLCR 251 (challenge within one month, but in the meantime the developer (Ipswich FC) had without awareness of likely challenge, demolished its existing stand); R (Young) v. Oxford City Council [2002] EWCA Civ 990 (delay attributable to lack of co-operation by council in responding to questions from claimants).

[66] [2005] EWHC 1872 (Admin) (Sullivan J).

[67] On 19 October 2005 Chadwick LJ directed an oral hearing on the renewed application, limited to the question of whether the judge failed to give proper weight to the obligations imposed by Arts. 2 and 6 ECHR.

[68] For a recent example, see R (The Noble Organisation) v. Thanet District Council [2005] EWCA Civ 782. See also the approach of Jackson J at first instance in R (Barker) v. London Borough of Bromley [2001] Env LR 1, followed by the Court of Appeal [2001] EWCA Civ 1766; [2002] Env LR 631. The issue of reserved matters as an example of "staged consents" has however been referred by the House of Lords to the ECJ in that case (30 June 2003).

[69] R v. Secretary of State for Transport, ex p Richmond upon Thames London Borough Council [1995] Env LR 390; R (Medway Council) v. Secretary of State for Transport [2002] EWHC 2516 (Admin); R v. Falmouth and Truro Port Health Authority, ex p South West Water Ltd [2001] QB 445.

committees,[72] the extent to which procedural safeguards are properly to be read into legislation,[73] and the provision and adequacy of reasons.[74] An example of a recent case grappling with procedural fairness in the environmental context is R (Edwards) v. Environment Agency.[75] In that case the challenge was to a decision of the Environment Agency to issue a pollution prevention and control (PPC) permit to Rugby Limited under the Pollution Prevention and Control (England and Wales) Regulations 2000, authorising the operation of their cement works at Rugby. The original focus of the claim was that the Environment Agency had allowed the burning of chipped tyres as a partial substitute fuel and the possible effect on emissions from the main stack. However, during the hearing itself the claim transmogrified into a general attack on the whole permit, on the basis of alleged defects in the Agency's consideration of low level emissions from the works. The focus of attention became two internal reports by the Agency's own air modelling unit ("AQMAU 1 and 2"), which the Agency had used to assist its own decision making process, but had not disclosed to the public (or indeed to Rugby Limited). Lindsay J said that the reports "could only have been important cards" to objectors and posed the question as to whether they ought to have been "laid face up on the table".[76] In holding that indeed they should have been disclosed and that failure to do so was "a real shortcoming in the Agency's conduct"[77] Lindsay J rejected the submission for the Agency that the case fell within the principle of Bushell[78] that a Minister is under no obligation to disclose to objectors and give them an opportunity of commenting on advice, expert of otherwise, which he receives from his Department in the course of making up his mind. In so holding, Lindsay J focused on the content of AQMAU 1 and 2 as not being concerned with administrative policy, but with material facts, which broke new ground, raised subjects important to an adequate understanding of the application, were on matters on which the Agency might have requested further information from the applicant (in which case the information would have been in the public domain) and the conclusions of which were not so incontestably correct that consultation would have been plainly redundant. Consultation, said the judge, should:[79]

"… be on a reasonably informed basis on both sides and not some courtly charade concerned more with the appearance of discussion and interplay than with real dialogue."

- **"Hard-edged questions".** Many questions arising in JR cases are treated by the courts, as discussed below, as Wednesbury unreasonableness issues. However, there are examples of matters which the courts regard as hard-edged questions of law, which the authority either gets right or wrong, and indeed could get right but for the wrong reasons.[80] One example is whether as a matter of law a particular material is or is not waste.[81] Another example, discussed in R (Goodman) v. London Borough of Lewisham,[82] is whether development falls within one or other of the classes of projects which are subject to the requirements of environmental impact assessment – in that case

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[70] Bushell v. Secretary of State for the Environment [1981] AC 75.

[71] R v. Secretary of State for the Environment, ex p Kirkstall Valley Campaign Limited [1996] 3 All ER 304; Steeples v. Derbyshire County Council [1985] 1 WLR 256; R v. Sevenoaks District Council, ex p Terry [1985] 3 All ER 226.

[72] R (Tromans) v. Cannock Chase Council [2004] EWCA Civ; [2005] JPL

[73] R v. Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521.

[74] Save Britain's Heritage v. Number 1 Poultry Ltd [1991] 1 WLR 153; R v. Aylesbury District Council, ex p Chaplin [1997] 3 PLR 55; Gransden v. Secretary of State for the Environment (1985) 54 P & CR 86; Bolton Metropolitan Borough Council v. Secretary of State for the Environment [1995] 3 PLR 37; South Bucks District Council v. Porter (No. 2) [2004] UKHL 33; [2004] 1 WLR 1953.

[75] [2005] EWHC 657 (Admin); [2006] Env LR 56.

[76] Para. 50.

[77] Para. 64.

[78] Bushell v. Secretary of State for the Environment [1981] AC 75 at 102F, per Lord Diplock.

[79] Para. 63.

[80] See R (Horner) v. Lancashire County Council [2005] EWHC (Admin) (Ouseley J).

[81] See Castle Cement Limited v. Environment Agency

[82] [2003] EWCA Civ 140

whether a development of self-storage units was an "infrastructure project". As it was put by Buxton LJ:[83]

"However fact-sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgement. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the Regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions the concept of reasonable judgement as embodied in Wednesbury simply has no part to play."

This was however qualified by a further statement that some expressions might be so imprecise that in applying them to the facts (as opposed to determining their meaning) a range of possible conclusions might be legitimately acceptable; in such cases the court should substitute its own judgement for that of the decision-maker where "the decision is so aberrant that it cannot be classed as reasonable."[84] Another recent notable example of a "hard-edged" question in the environmental JR context is the "Ghost Ships" case of Gregan, in which Sullivan J held that Hartlepool Borough Council had erred in law in construing an existing planning permission for the "dismantling/refurbishment of redundant marine structures" as including ships.[85] Sullivan J held that a ship is not a "marine structure", any more than a car is a "highway structure" or a steam locomotive a "railway structure".

- **Wednesbury and discretionary judgement.** In relation to many questions arising in environmental JR, the courts have adopted a relatively "hands off" approach, interfering only where the decision-maker can be shown to have acted irrationally in the Wednesbury sense. Classic examples in the field of EIA are the question of whether a development should be subject to assessment because it is likely to have significant environmental effects, and whether the authority has sufficient information in the environmental statement to enable adequate consideration of the main likely significant effects. In Malster[86] it was argued for the claimant that the question of whether a development was likely to have significant effects was one of "jurisdictional fact" on which the court could substitute its own view for that of the authority. Sullivan J, in rejecting that submission, held that the EIA Regulations entrust the decision on that matter to the planning authority, and that the court does not possess the necessary abilities to second-guess that decision:[87]

  "A detailed knowledge of the locality and expertise in assessing the environmental effects of different kinds of development are both essential in answering that question, which is pre-eminently a matter of judgment and degree rather than a question of fact. Unlike the planning authority, the court does not possess such knowledge and expertise."

  A similarly deferential approach to the judgment of the Environment Agency as an expert body can be seen in the judgment of Silber J in Levy,[88] which was concerned with the exercise of the Agency's appraisal on what constituted best available techniques not entailing excessive cost (BATNEEC) in relation to the operation of a cement works. To some extent this judicial reticence may possibly be explained by the lack of a specialist environmental court, whereas in New South Wales the specialist Land and Environment Court has been seen to take a more interventionist approach.[89] Similarly, in the EIA field, the courts have held that the question of whether the information provided by the developer is sufficient in terms of the requirements for an environmental statement is not a question

[83] Para. 8.

[84] Applying R v. Monopolies and Mergers Commission, ex p South Yorkshire Transport Limited [1993] 1 WLR 23, para. 32G per Lord Mustill.

[85] [2004] EWHC 3278 (Admin); [2004] JPL 1088.

[86] R (Malster) v. Ipswich Borough Council [2001] EWHC 711 (Admin); [2002] PLCR 251.

[87] Para. 61.

[88] R (Levy) v. Environment Agency [200

[89] See Sullivan J in R (Malster) v. Ipswich Borough Council [2001] EWHC 711 (Admin); [2002] PLCR 251, discussing Timbarra Protection Coalition v. Ross Mining [1999] NSWCA 8 (New South Wales Court of Appeal).

of primary fact on which the court is free to differ from the view of the planning authority. In dealing with that question in Milne,[90] Sullivan J categorised the question, as he was later also to do in Malster, as pre-eminently a question of planning judgment, highly dependent on a detailed knowledge of the locality, planning policies and the characteristics of the various types of development to be assessed. For this reason, attacks on the adequacy of material in the environmental statement have generally been unsuccessful,[91] though there are possible exceptions.[92]

- **Factual errors.** A somewhat different issue to the adequacy of an environmental statement in the sense of its completeness is the question of an assessment which is found to have been based on factual errors. This is not a question of judgment. Here the courts have stressed that EIA is an iterative process, and that an error in an environmental statement need not be fatal if it is corrected by the authority gathering further information, whether from the developer, statutory consultees, or from its own research work. In other words, it is not correct to focus on alleged inadequacies in the environmental statement, without regard for the totality of the "dynamic process" of assessment.[93] The issue arose starkly in Belize Alliance of Conservation Non-Governmental Organisations (BACONGO) v. The Department of the Environment,[94] a case involving construction of the Chalillo Dam, a controversial and high-profile project in Belize, which also involved a remarkable divergence of judicial approach at the highest level. By a majority of 3/2 the Privy Council declined to quash the decision of the Belize regulator (the DoE) to grant environmental clearance for the project. The majority judgment (Lord Hoffmann, Lord Rodger of Earlsferry and Sir Andrew Leggatt) was delivered by Lord Hoffmann. Lord Walker of Gestingthorpe delivered a dissenting judgment, with which Lord Steyn was in "complete agreement". Lord Hoffmann acknowledged that the project, to provide a domestic source of electricity for Belize, would have severe environmental consequences. Some 10 km of riverine habitat comprising "one of the most biologically rich and diverse regions remaining in Central America" would be drowned, along with potentially important archaeological sites. Lord Hoffmann painted an almost poetic picture of the wildlife affected:[95]
  "The area has the highest density of the surviving big cats (jaguar, puma and ocelot) in Central America. Morelet's crocodile (a rare species) lives in the rivers. Shy and secretive tapirs lumber through the woods. Gorgeous Scarlet Macaws, of which only about 1000 still exist anywhere in the world, nest in the trees by the river banks."

  Under Belize legislation an EIA in prescribed format was required; this was then considered by the National Environmental Appraisal Committee (NEAC), which advised DoE as to its adequacy. An EIA, running to 1,500 pages, was prepared by consultants Amec. The core of the arguments of BACONGO was the inadequacy of the EIA. There were a number of matters where it was said that information was incomplete, and where surveys or mitigation measures on matters such as population, archaeology, wild life and rare plants had been unlawfully left until a later stage. On this point the majority cited and adopted the observations of Cripps J in the Land and Environment Court of New South Wales in Prineas v Forestry Commission of New South Wales:[96]

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[90] [2001] Env LR 406.

[91] See for example, R (Bedford and Clare) v. London Borough of Islington [2002] EWHC 2044 (Admin); R (Burkett) v. London Borough of Hammersmith and Fulham [2003] EWHC 1031 [2003] Env LR 37; R (PPG 11 Limited) v. Dorset County Council [2003] EWHC 1311 (Admin) [2004] Env LR 84; R (Kent) v. First Secretary of State [2004] EWHC 2953 (Admin); [2005] 2 P & CR 16; Humber Sea Terminal Limited v. Secretary of State for Transport [2005] EWHC 1289 (Admin).

[92] Most notably R v. Cornwall County Council, ex p Hardy [2001] Env LR 473, where the authority had reached a logically inconsistent position in that a survey was accepted as necessary to establish whether protected species were present, yet that survey was to be deferred until after the decision.

[93] R (Burkett) v. London Borough of Hammersmith and Fulham [2003] EWHC 1031, paras. 33 and 37 (Newman J).

[94] Privy Council [2004] UKPC 6; [2004] Env LR 38.

[95] Para. 6.

[96] (1983) 49 LGRA 402, 417.

"I do not think the [statute] … imposes on a determining authority when preparing an environmental impact statement a standard of absolute perfection or a standard of compliance measured by no consideration other than whether it is possible in fact to carry out the investigation. I do not think the legislature directed determining authorities to ignore such matters as money, time, manpower etc. In my opinion, there must be imported into the statutory obligation a concept of reasonableness … [P]rovided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public … to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations."

Adopting those observations, Lord Hoffmann went on to hold that it was impossible to say that the EIA was inadequate to meet the requirements of the relevant legislation:[97]
"It is not necessary that an EIA should pursue investigations to resolve every issue. This is not only common sense but contemplated by the terms of the Belize legislation itself. Thus regulation 5(f) says that an EIA should include an indication of "gaps in knowledge and uncertainty which may be encountered in computing the required information" and regulation 19(b), prescribing the form of an EIA, says it should contain a summary which highlights the 'conclusions, areas of controversy and issues remaining to be resolved'."

So far as this goes, the decision was not particularly controversial. There was however a further alleged deficiency in the EIA, which was that it contained an error as to the geology of the site for the dam. The EIA stated that whereas the sides of the valley were of sandstone, the floor was granite. This had provoked discussion within the NEAC as to the accuracy of classification of the rock as granite. The course agreed was to make the decision in principle subject to further assessment as part of the Environmental Compliance Plan (ECP) which would inform the issue of the conditions to be imposed. If the rock was in fact sandstone, then issues with respect to adjustments of design would be addressed in the ECP. A further independent report was then commissioned which concluded that the rock was in fact sandstone, but that subject to taking this into account in the detailed design, the site was geologically suitable for dam construction. This independent report was not referred to by the DoE or the developers in the earlier proceedings, and was only disclosed very shortly before the Privy Council hearing.

The majority saw the question as being whether the DoE acted lawfully in approving the project when there was substantial doubt as to whether the EIA was correct in saying the floor was granite. The majority concluded that the classification as sandstone or granite would not have made any significant difference as to the safety of the dam – all the engineers involved had been agreed that what mattered was the permeability and load-bearing capacity of the rock, not its geological classification. It was argued that a dam built on sandstone would be different to one envisaged by the EIA as being built on granite, but there was no evidence as to how it would be different. Lords Walker and Steyn took a much less forgiving view of the conduct of the DoE and developers. The onus on not only the Government but also the developers was to conduct the judicial review litigation with all the cards on the table. Lord Walker, having meticulously analysed the history of the EIA process and the litigation, concluded that effectively they had filed affidavits which had misled the lower courts into believing that the EIA provided complete and accurate geological data when the NEAC met and voted for environmental clearance. The majority made light of the fact that a dam built on sandstone might

[97] Para. 70.

have different features to one predicated on granite foundations. The minority looked at it differently: the method of rolled concrete construction referred to in the EIA might or might not be appropriate for a dam built on sandstone. There was no evidence on the matter, which was not one for the Privy Council in any event. But it was "a matter highly relevant to the competence and adequacy of the EIA". Lord Walker concluded as follows:[98]

"117. In this most unsatisfactory state of affairs a few essential points are clear. The geology in the EIA was seriously wrong… The predominantly sandstone bedrock is probably capable of providing a satisfactory foundation for a dam but only if the new geological information is taken into account in the design. Under the EPA and the Regulations the design of such an important public works project was required to be included in the EIA, and should have been the subject of public consultation and public debate before approval, and before work started on the project. Instead there are to be changes in the design … but the nature of the changes has been withheld from the public. The appellant's case is … stronger than that of the successful appellant in Berkeley v Secretary of State for the Environment [2001] 2 AC 603. In that case all the relevant information was (one way or another) in the public domain, but only if the public embarked on a "paper chase" (see at page 617). Here not even the most protracted and determined paper chase could have got at the true facts.

"118. I would therefore have allowed the appeal and quashed the DoE's decision … to grant environmental clearance for the project. I would have done so on the ground that the EIA was so flawed by important errors about the geology of the site as to be incapable of satisfying the requirements of the EPA and the Regulations. I would in the absence of a satisfactory undertaking grant an injunction restraining BECOL from continuing work on the project unless and until a corrected EIA is prepared for public consultation, and secures recommendation by NEAC and approval by the DoE.

"120. …Belize has enacted comprehensive legislation for environmental protection and direct foreign investment, if it has serious environmental implications, must comply with that legislation. The rule of law must not be sacrificed to foreign investment, however desirable (indeed, recent history shows that in many parts of the world respect for the rule of law is an incentive, and disrespect for the rule of law can be a severe deterrent, to foreign investment). It is no answer to the erroneous geology in the EIA to say that the dam design would not necessarily have been different. The people of Belize are entitled to be properly informed about any proposals for alterations in the dam design before the project is approved and before work continues with its construction."

With respect to the majority of the Board, the approach of the minority seems correct. If it had been proven that the granite vs. sandstone issue could not have affected the form of construction of the dam, then the majority's view would have been correct. But there was no evidence to that effect. In the absence of such evidence, the approach of the minority is surely correct: it should be assumed that there might have to be changes, in which case the whole of the EIA begins to unravel. It seems possible that indeed the rule of law has been sacrificed to the desirability of foreign investment and a more secure electricity supply for Belize.

- **Remedies and discretion.** As BACONGO and other cases already mentioned show, remedies are an important part of environmental JR proceedings. A purely legal victory for the claimant could be pyrrhic in nature, even if declaratory relief is granted. The opponents of project generally want the project stopped, or at least delayed for reconsideration. The Court of Appeal has emphasised that in general, the motive of the claimant in bringing the challenge, whether as a local resident or

[98] Paras. 117-120.

commercial competitor, will not affect the question of relief, unless abuse of process is involved.[99] Nor will the fact that the authority has attempted to cure any defect by ratifying the decision under challenge necessarily prevent relief; the courts are mindful of the temptations to ex post facto rationalisation, or to internal mutual support, in such situations.[100] In the environmental context, the courts have indicated a high level of caution in recent cases about exercising discretion not to quash decisions which are unlawful, particularly if EC requirements are involved, or if the directly enforceable rights of citizens have been infringed.[101] However, there may be cases where serious prejudice to a third party, perhaps involving delay, will persuade a court not to grant relief.[102] Also, there has been something of a reaction to the strict approach of Berkeley in the EIA context, particularly where what is involved is essentially a procedural defect on post-decision publicity.[103]

UKELA MOOTING COMPETITIONS 2006

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Each year, UKELA organises two moot competitions for university students, trainee barristers, trainee solicitors, and for students on the bar vocational course or legal practice course, or those who are on taking the CPE.

The Lord Slynn of Hadley Mooting Trophy Competition is open to all those who are in pupillage, are a trainee solicitor, are on the bar vocational course or legal practice course, or who are taking the CPE. The 'UKELA Student Prize Moot' is open to those who do not qualify for the Lord Slynn Trophy Competition but who are studying for a degree (including graduate degrees, e.g. LLM's or non law degrees).

The 2006 moot finals took place on 20th February in the Inner Temple. No 5 Chambers and the legal publishers, Sweet & Maxwell/Thomson, sponsored the moots. The moot problem was kindly written by Gordon Wignall of No5 Chambers and was based on a claim in nuisance for damages arising out of a fire which occurred in 1996 at the former tin mine in Pothcullock, Cornwall. A copy of the moot problem and grounds of appeal are available on the students' page on the UKELA website: www.ukela.org

The finalists for each competition were as follows:

Lord Slynn Mooting Competition:
Team 1 - Lindsay Connal and Jon Gale (trainees at Ashurst)
Team 2 - Sophie Weller (pupil at 2-3 Gray's Inn Square) and Rupert Wilson (trainee at Berwin Leighton Paisner)

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[99] R (Mount Cook Land Limited) v. Westminster City Council [2003] EWCA Civ 1346; [2004] 1 PLR 26, paras. 45-46, Auld LJ.

[100] See e.g. R (Carlton-Conway) v. London Borough of Harrow [2002] EWCA Civ 927; [2002] 3 PLR 77.

[101] Berkeley v. Secretary of State for the Environment [2001] 2 AC 603 at paras. 608C-D (Lord Bingham of Cornhill) 615G, 616F (Lord Hoffmann); R (Mount Cook Land Limited) v. Westminster City Council [2003] EWCA Civ 1346; [2004] 1 PLR 26, para. 46, Auld LJ.

[102] For example, R (Gavin) v. Haringey London Borough Council [2003] EWHC 2951 (Admin); [2004] 1 PLR 61; R (Edwards) v. Environment Agency [2005] EWHC 657 (Admin).

[103] See R (Richardson) v. North Yorkshire County Council [2003] EWHC 764 (Admin) [2004] Env LR 237 at first instance (Richards J); R (Bown) v. Secretary of State for Transport [2003] EWCA Civ 1170; [2004] Env LR 509, para. 47 per Carnwath LJ; R (Jones) v. Mansfield District Council [2003] EWCA Civ 1408; [2004] Env LR 391, para. 59 per Carnwath LJ. Note however that in R (Richardson) v. North Yorkshire County Council [2003] EWCA Civ 1860; [2004] 1 WLR 1920 Simon Brown LJ at para. 42 left open whether Carnwath LJ's suggestion as to the narrow reach of Berkeley was correct.

UKELA Student Mooting Competition:
Team 1 - Katherine Dunseath and David Loveday (University College London)
Team 2 - Simon Newman and David Rushmere (Sheffield University)

The judge, the Rt. Hon. Lord Slynn of Hadley (UKELA's President) allowed the appeal on the first ground of appeal (namely that the Honourable Mr Justice Pitchfork was wrong not to hold that the Appellant was under a 'measured duty of care' during the reclamation of the site so as to ensure that the Claimant would not be at risk from damage caused by fire). Lord Slynn commented that the written skeletons presented by all finalists this year were "splendid" and that they all argued "in a clear and persuasive way".

The final is judged on each Counsel's advocacy skills (ability to persuade; presentation skills; knowledge, interpretation and argument; lateral and quick thinking; confidence and professionalism). A short feed-back on the finalists' performance was given at the end of the moots. Lord Slynn stated that an important factor was how questions were answered, as it was vital to see if a question had been really answered and how ready each Counsel was to turn to the authorities and use them. The winners of the Lord Slynn Mooting Competition were the Appellants, namely Lindsay Connal and Jon Gale (trainees at Ashurst) and the winners of the UKELA Student Mooting Competition were the Respondents, namely Simon Newman and David Rushmere (students at the University of Sheffield).

A prize ceremony followed, whereby the winners and runners-up were awarded cash prizes by No5 Chambers, books by Sweet & Maxwell/Thomson and free annual UKELA membership from UKELA Council. There was an opportunity for photos as well as the presentation of the Lord Slynn Trophy and, for the first time this year, the new Student Shield. Drinks and canapés followed.

These moots have been an excellent way of promoting environmental law and UKELA to young people. Both moots attracted the biggest number of entrants these competitions have ever had, and they seem to be going from strength to strength each year. UKELA is grateful for the support it receives from the sponsors for promoting environmental law.

Afterwards Simon Newman, student winner from Sheffield University, commented:

"Taking part in the UKELA mooting competition enables students to gain a better understanding the advocacy and the litigation process. The process also provides a greater insight into how the law is to be applied practically as opposed to the more theoretical level at which it is studied.

"We entered the competition for a number of reasons. The experience should help enhance our career prospects and help with CV building for the ever more cut-throat legal world. In addition it was a good opportunity to develop our interests in environmental law further and provided a great stage for practising advocacy and public speaking.

"Both David and myself intend to enter practice. I am currently looking at going to the bar subsequent to taking a year out whilst David intends to pursue a career as a solicitor and enter the litigation world.

"The highlight of the competition was the opportunity to moot in front of Lord Slynn and meet him afterwards. It was also of course great to see our hard work pay off by winning the competition, it really made all the effort which we put in, during a busy time of the academic year, worthwhile".

Lindsay Connal of Ashurst, part of senior winning team, said

“Taking part in the UKELA Moot was a fantastic experience, and one which I would encourage anyone with an interest in advocacy and the law to take the opportunity to do. The initial stage of the moot requires each team to prepare written skeleton arguments for both the Appellant and the Respondent. Working on these arguments enables you to develop and hone your research and drafting skills, both of which are of great value in a career in the law. As you have to examine the issues, applicable legislation and relevant cases from both opposing sides, by the time you submit the written arguments you have a much greater insight into the particular area(s) of environmental law which the moot focuses on. This year, the moot raised several fascinating issues, including the scope/application of the measured duty of care, the assimilation of the principles of negligence and nuisance, and the consideration of the factor of public benefit with regard to the defence of reasonable user. Strong team-work was essential not only in identifying the main issues and arguments for each side, but also in choosing which of these to use, bearing in mind the limit on the number of cases which can be cited and the number of arguments which can be developed in the short time allowed at the final.

“Being given the opportunity to speak in front of Lord Slynn was a wonderful opportunity.. One of the most challenging aspects of speaking at the final was being able to 'think on your feet' and respond not only to questions that were asked, but also to the way in which the arguments developed -not always the way that you might have predicted/chosen! The whole experience was both enjoyable and very rewarding, and it has certainly increased my own enthusiasm for pursuing litigation and advocacy as a career."

UKELA SEMINAR - ENVIRONMENTAL INSURANCE

On February 8th 2005 UKELA organised a successful evening seminar in London, attended by 35 members, on the subject of 'Environmental Insurance' and its relevance to lawyers. The event was kindly hosted by Herbert Smith Solicitors, and was arranged by Simon Boyle of Argyll Environmental, with presentations from Valerie Fogleman of Lovells and Stephen Sykes, Global Head of the Environmental Liability Solutions team at WSP Environmental.

Environmental insurance is a UK success story. Over the past decade it has developed from relative obscurity to an industry that generates more than £50,000,000 per annum in premium and one which employs more than 50 people full time as underwriters (who insure the risks) and brokers (who approach underwriters to find and then place the best policy for the client). Many lawyers have had first hand experience of environmental insurance and understand how it can be used, together with some of its limitations.

Valerie spoke about the wide range of policies available from the London Market. One of the most popular policies is the property transfer policy, designed to facilitate land transactions by providing cover for liabilities arising out of contamination that exists on an insured site at the inception of the policy. Another popular policy provides cover for liability for remedial works (off-site and on-site), property damage, bodily injury and other liabilities arising from pollution incidents that occur during the policy period. Other policies for liabilities arising from sites include the stop loss policy (also known as a cost cap policy) that provides cover for remediation costs that exceed an amount which is agreed between an insured and the insurer, the lender liability policy which provides cover for a borrower's principal loan balance or remedial costs if the borrower defaults on a loan the secured collateral for which is land and a policy that covers homeowners against Part IIA liability. Valerie also described policies that provide cover to environmental consultants, contractors and laboratories for their acts or omissions.

Valerie explained that notwithstanding recent legislation regulating the 'mediation of insurance contracts' (the Financial Services and Markets Act 2000, FSMA) lawyers continue to have an important role,

working alongside the insurance broker, to assess the applicability of environmental insurance and then to negotiate the terms and conditions of any policies that may be sought by clients.

Stephen presented a personal view that, notwithstanding the growth that has been achieved, the market has lost momentum in recent years. Underwriters have geared up for growth so there is little difficulty with supply, albeit that an increase in risk appetite and greater flexibility with policy wording would help. He pinpointed the problem on the demand side, in particular the failure on the part of many insurance brokers to develop successful specialist environmental broking teams.

In addition, Stephen argued that due to various factors (including the tendency of brokers to monopolise the client relationship, the relative lack of innovation in the insurance market, underwriters inability / unwillingness to talk about claims and lawyers concerns about FSMA), lawyers have tended, over recent years, to have a reduced interest in environmental insurance. In order to achieve further growth these restraints could be managed as follows;

- Encouraging lawyers to re-engage with environmental insurance by insurers and brokers being more innovative and taking time to address lawyers' concerns;

- For brokers not to see lawyers as obstacles to securing insurance, but rather to work in tandem with lawyers throughout the entire process of accessing environmental insurance;

- To agree and communicate the correct, defined role for lawyers and the correct, defined role for brokers; and

- To develop and support a professional association to promote awareness about environmental insurance.

Simon Boyle,
Legal Director,
Argyll Environmental

CLIMATE CHANGE WORKING PARTY

New convenors, Tom Bainbridge and Michael Woods, were appointed at the recent meeting of the Climate Change Working Party as the climate change debate reaches another pivotal point.

2006 sees the European Commission and numerous Government departments separately engaged in new policy development and existing policy review, with the aim of making real progress on climate change as a central objective of each process. Under the recently launched Energy Review, Government is re-appraising the efficacy of its energy policy in delivering on its climate change and energy security objectives and has invited comments on what more needs to be done and what changes need to be made. Shortly, the UK's draft second National Allocation Plan for allowances under the EU emissions trading scheme, will be published for consultation. Members of the Climate Change Working Party will be responding to both consultations.

This year will also see numerous other developments, including publication of the IPCC's fourth report. Climate change science has evolved since the IPCC's last report and predictions of most likely future scenarios now look more worrying than previously thought, including a higher likelihood of more significant impacts over shorter time-frames. The Working Party has invited a leading climate change

prediction scientist to give an update on the work of the IPCC, climate change scenarios and potential business applications of prediction science. This will kick off a series of talks by invited speakers over the course of the year.

The Working Party also plans to (1) monitor ongoing EU and US climate change litigation (2) engage in dialogue with policy makers and regulators (3) examine the efficacy of existing and new legal instruments and (4) review the impact of regulatory change on the carbon and renewables markets.

New members are always welcome to join and participate in the activities of the Working Party. Details of the next meeting and planned activity can be found on the relevant page of the UKELA website: http://www.ukela.org/groups_working_climate.shtml

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UKELA
REPORT ON WORKING PARTIES

WORKING PARTY ACTIVITY

1. **Biotechnology Working Party – Convenor, Daniel Lawrence daniel.lawrence@freshfields.com**

   No meetings have taken place recently. The convenor is considering arranging a speaker meeting on nano-technology and expects renewed interest in biotechnology following a World Trade Organisation ruling on genetically modified crops expected in Spring 2006.

2. **Contaminated Land Working Party – Convenor, Matthew Townsend - Matthew.Townsend@allenovery.com**

   No meetings have taken place recently.

3. **Climate Change Working Party – Joint Convenors, Michael Woods michael.woods@shlegal.com; Tom Bainbridge Tom.bainbridge@hammonds.com.**

   The working party's next meeting is on April 6th at 6pm with a speaker (to be confirmed) on the Science of Climate Change Prediction. All welcome. Meeting at Hammonds, 7 Devonshire Square, Cutlers Gardens, London, EC2M 4YH. Book your place with Tom Bainbridge and copy to his PA Julie.Forster@hammonds.com, Places are limited and available on a first come first served basis.

   The working party is currently preparing UKELA's response to the Government's Energy Review focusing on nuclear, carbon abatement and low carbon technologies and energy efficiency measures.

4. **Environmental Litigation Working Party – Joint Convenors, James Kennedy – james.kennedy@freshfields.com; Justine Thornton – Justine.Thornton@AllenOvery.com**

   The working party has been very active recently in preparing UKELA's response to the Better Regulation Executive's consultation on "Regulatory Justice – Sanctioning in a post-Hampton world". The working party is also involved in DEFRA's Review of Enforcement in Environmental Regulation which is due to provide a progress report shortly.

5. Insurance and Liability Working Party – Convenor, Valerie Fogleman – vfogleman@blg.co.uk

The next meeting is scheduled to take place once the Environmental Liability Directive consultation paper is available.

6. IPPC Working Party

This working party has now disbanded – its work has been subsumed by the Climate Change and Waste working parties. Please enquire to those convenors.

7. Nature Conservation Working Party – Convenor, Andrew Baker – a.baker@BSG-ECOLOGY.COM

The working party last met on 4th March in Nottingham to discuss the Natural Environment and Rural Communities Bill, the review of TAN 5 and to provide an update on casework.

8. Planning Law and Sustainable Development Working Party – Convenor, Anne Harrison – aharrison@clarkslegal.com - Deputy Convenor – William Upton – wupton@compuserve.com

A speaker session was held on 25 January 2006 on the draft PPS25 currently out for consultation. The speakers were Rachael Hill from the Environment Agency Flood Risk Management Policy and Ben Mitchell from Peter Brett Associates.

It is hoped this session has helped formulate what UKELA's response should be to the consultation document.

9. Scottish Law Working Party – Convenor, Gordon McCreath – Gordon.McCreath@dundas-wilson.com

No meetings have taken place recently.

10. Waste Working Party – Convenor, Andrew Bryce – bryce@ehslaw.co.uk Secretary, Anju Sanehi - asanehi@aep.com

A meeting took place on 23 November 2005. No further meeting has been scheduled.

11. Water Working Party – Convenor: James Montgomery, james.montgomery@mottmac.com

A meeting took place on 20 January 2006. The meeting covered progress in membership rationalisation, new consultations, case law update and consideration of future speaker sessions that could be pursued. The next meeting has been scheduled for 28 April 2006.

MARK BRUMWELL
Dundas & Wilson LLP
Working Party Co-ordinator
25 January 2006
Mark.Brumwell@dundas-wilson.com

UK ENVIRONMENTAL LAW ASSOCIATION:
NORTH EAST REGIONAL GROUP MEETING

CONTAMINATED LAND AND FUTURE DIRECTION OF THE GROUP

The UKELA North East Regional Group is pleased to announce a special meeting on Contaminated Land and the Future Direction of the North East Group to be held on Wednesday, April 5th 2006.

Our speaker will be Andrew Wiseman, Chairman of UKELA who will speak on Contaminated Land and Paul Bratt of Hammonds, Leeds who will lead a Q&A session afterwards. Members will also be invited to contribute ideas on the future direction of the North East Regional Group.

There will be an opportunity for discussion and networking with light refreshments.

Date: Wednesday April 5th 2006

Time: 4.30pm – 6.30pm (speakers at 5pm)

Venue: Hammonds, 2 Park Lane, Leeds, LS3 1ES

Cost (to cover refreshments): UKELA members £5. Non-members £10. Students free of charge although places are limited. All places must be booked.

Booking:

Please book your place by sending the attached form and cheque payable to UK Environmental Law Association to Alison Boyd, UKELA, Members Support Officer, 45 Claygate Road, Dorking, Surrey RH4 2PS.

UKELA NORTH EAST REGIONAL GROUP MEETING ON CONTAMINATED LAND AND FUTURE DIRECTION OF THE NE GROUP

April 5th 2006

All places must be booked

I enclose a cheque for £ _____ payable to the UK Environmental Law Association

Fees:

UKELA members	£5
Others	£10
Students	free of charge

Name

Address

Firm/Organisation/Academic Institution

Email address

Phone number/mobile

UKELA member ☐

Student ☐

Other ☐

Please return this form with your payment (cheques payable to UK Environmental Law Association) to:

Alison Boyd
UKELA
Members Support Officer
45 Claygate Rd
Dorking
Surrey RH4 2PS

UK ENVIRONMENTAL LAW ASSOCIATION:

EAST ANGLIAN REGIONAL GROUP MEETING
ENVIRONMENTAL LAW AND PLANNING APPLICATIONS

The UKELA East Anglian Regional Group is pleased to announce a special meeting on Environmental Law and Planning Applications to be held on Wednesday, May 10th 2006.

Our speakers will be Bruce Monnington, Counsel of Fenners Chambers, Cambridge who will speak on Environmental Law and Planning Applications and a speaker (to be confirmed) from AERC Consultant Environmental Scientists of Colchester who will speak on Environmental Impact Assessments.

There will be an opportunity for questions and discussion and a networking opportunity with light refreshments afterwards.

Date: Wednesday May 10th 2006

Time: 4.30pm – 6.30pm (speakers at 5pm)

Venue: Taylor Vintners Solicitors, Merlin Place, Milton Road, Cambridge, CB4 0DP

Cost (to cover refreshments): UKELA members £5. Non-members £10. Students free of charge although places are limited. All places must be booked.

Booking:

Please book your place by sending the attached form and cheque payable to UK Environmental Law Association to Helen Korfanty, Bates Wells and Braithwaite, 27 Friars Street, Sudbury, Suffolk CO10 2AD.

UKELA EAST ANGLIAN GROUP MEETING ON ENVIRONMENTAL LAW AND PLANNING APPLICATIONS - BOOKING FORM

May 10th 2006

All places must be booked

I enclose a cheque for £ _____ payable to the UK Environmental Law Association

Fees:

UKELA members	£5
Others	£10
Students	free of charge

Name

_____

Address

_____

_____

_____

Firm/Organisation/Academic Institution

_____

Email address

_____

Phone number/mobile

_____

UKELA member ☐

Student ☐

Other ☐

Please return this form with your payment (cheques payable to UK Environmental Law Association) to:

Helen Korfanty
Bates Wells and Braithwaite
27 Friars Street
Sudbury, Suffolk CO10 2AD

UK ENVIRONMENTAL LAW ASSOCIATION:
NORTH WEST REGIONAL GROUP ENVIRONMENTAL INSURANCE SPECIAL

The UKELA North West Regional Group is holding a special meeting to discuss Environmental Insurance on Wednesday, May 3rd 2005. Solicitor Valerie Fogleman, of Lovells, and consultant David Brierley of Bridge Insurance, will address the question:

Do you and your clients have adequate environmental insurance?

There will be an opportunity for questions and discussion and a networking opportunity with drinks afterwards.

Date: Wednesday May 3rd 2006

Time: 4.30pm – 7pm (speakers at 5pm)

Venue: Addleshaws, 100 Barbirolli Square, Manchester, M2 3AB.

CPD points accredited: 1

Coffee/tea available from 4.30pm. Please stay for drinks and nibbles afterwards.

Cost (to cover refreshments): UKELA members £5. Non-members £10. Students free of charge although places are limited. All places must be booked.

Booking:

Please book your place by sending the attached form and cheque payable to UK Environmental Law Association to Alison Boyd, UKELA Members' Support Officer, 45 Claygate Road, Dorking, Surrey RH4 2PS

UKELA NORTH WEST GROUP ENVIRONMENTAL INSURANCE SPECIAL - BOOKING FORM

May 3rd 2005

All places must be booked

I enclose a cheque for £ _____ payable to the UK Environmental Law Association

Fees:

UKELA members	£5
Others	£10
Students	free of charge

Name

Address

Firm/Organisation/Academic Institution

Email address

Phone number/mobile

UKELA member ☐

Student ☐

Other ☐

Please return this form with your payment (cheques payable to UK Environmental Law Association) to:

Alison Boyd,
UKELA Members' Support Officer,
45 Claygate Road,
Dorking, Surrey
RH4 2PS

UK ENVIRONMENTAL LAW ASSOCIATION SEMINAR
ENVIRONMENTAL LAW UPDATE: CARDIFF JUNE 13TH 2006

UKELA is holding an Environmental Law Update seminar in Cardiff on June 13th 2006 – members and non members welcome. There will be an opportunity for questions and discussion and a networking opportunity with drinks afterwards.

We have three speakers:

- Professor Robert Lee of BRASS at Cardiff University: Update on Environmental Law
- Victoria Jenkins of Swansea University: Environmental Law – developing a distinctive approach
- Andrew Wiseman, of Trowers and Hamlins: Contaminated Land – how is it going?

The seminar will be chaired by Andrew Wiseman, who is the chair of UKELA.
Our thanks to Julian Boswall, of Eversheds in Cardiff, for hosting the meeting.
Places are limited and early booking is recommended.

Date: Tuesday June 13th 2006

Time: 4.pm – 7pm (speakers at 4.30pm)

Venue: Eversheds, 1 Callaghan Square, Cardiff, CF10 5BT

CPD points accredited: 2

Coffee/tea available from 4.pm. Please stay for drinks and nibbles afterwards.

Cost (to cover refreshments): UKELA members £10. Non-members £20. Students free of charge although places are limited. All places must be booked.

Booking:

Please book your place by sending the attached form and cheque payable to UK Environmental Law Association to Alison Boyd, UKELA Members' Support Officer, 45 Claygate Road, Dorking, Surrey RH4 2PS

UKELA CARDIFF SEMINAR: UPDATE ON ENVIRONMENTAL LAW - BOOKING FORM

June 13th 2006

All places must be booked

I enclose a cheque for £ _____ payable to the UK Environmental Law Association

Fees:

UKELA members	£10
Others	£20
Students	free of charge

Name

Address

Firm/Organisation/Academic Institution

Email address

Phone number/mobile

UKELA member ☐

Student ☐

Other ☐

Please return this form with your payment (cheques payable to UK Environmental Law Association) to:

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UKELA Members' Support Officer,
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VACANCIES

SOLICITOR (5 YRS +) WORKING IN THE BIRMINGHAM AND/OR NOTTINGHAM OFFICE WITHIN THE LITIGATION AND DISPUTE MANAGEMENT TEAM. EXCELLENT SALARY AND BENEFITS.

Closing date: 28 April 2006. For further information please contact David Gordon 0121 232 1473.

Eversheds LLP are looking for a solicitor to join our litigation team in Nottingham and/or Birmingham. The development of a strong non-contentious environmental practice in the East Midlands to supplement our strong civil environmental team and exploit the opportunities available through our large corporate/property client base.

The candidate will contribute proactively and enthusiastically to the growth of the team via structured Business Development activity with the internal and external markets. The candidate will also have key management responsibilities in working closely with the civil environmental team based in Nottingham and the environmental and regulatory team based in our Birmingham and Cardiff offices. The successful applicant would also be expected to develop strong/close working relationships with the planning team based in our Real Estate department.

A strong background in providing environmental support on large property and corporate transactions together with niche expertise in relation to environmental and regulatory matters including IPPC, Waste, Climate Change and Contaminated Land is desired. Experience in respect of contentious environmental matters (both criminal and civil) would be an advantage.

The highly motivated candidate would be expected to have strong inter-personal skills with a background of successful business development activities and the enthusiasm to develop his/her own team in conjunction with others within this growing product area.

Excellent organisational, analytical and communication skills are essential. The candidate will relish the challenges of difficult situations, will possess a "solutions" mentality and be committed to delivering client-centred service on time and on budget.

To apply, please visit www.eversheds.com and apply online using reference number 20318

BOOK REVIEW

A Practical Guide to Environmental Issues in Commercial Property Transactions

Authors: Helen Loose and Nick Stalbow
Publisher: Legalease Publishing
Price: £49.95
ISBN No: 1-903927-60-9

I have to admit that my heart sank when this book arrived. My first thought was “not another book on environmental issues for commercial property lawyers”, an area which is already well covered.

However, my opinion changed rapidly as I started reading the book. It is arguably the most practical book on environmental liabilities in commercial property transactions that you will read.

The book is laid out in a logical and easy to read manner and deals with the process of addressing actual/potential environmental liabilities in the chronology of a transaction. Unusually the authors also provide advice on how to manage some of the most common post-completion issues.

Sadly for practitioners in Scotland the book only covers the law in England and Wales. The law is up to date as at June 2005.

The book starts by explaining (simply) environmental liabilities. Tables summarise the situations which parties to a transaction and their solicitors may be confronted with. The tables cross reference to relevant paragraphs later in the book.

The authors go on to consider environmental due diligence and offer some useful pointers on enquiries of sellers and landlords and on the pitfalls and limitations of CPSE's. Practical advice is also offered in relation to enquiries of Sellers in the context of business and share sales and in particular in relation to environmental representations contained in Certificates of Title. The authors remind us that as part of environmental due diligence useful information can be obtained by investigating Health & Safety policies, risk assessments files and notifications and reports of workplace accidents/injuries and deceases.

An entire chapter is devoted to the contaminated land regime and considers drafting issues from various perspectives.

Environmental insurance and the alternative risk management solutions which have evolved over the past few years, are also covered.

The chapters on drafting sale agreements and leases and drafting business and share purchase agreements will be invaluable for practitioners. They offer a wealth of seriously practical advice.

The book covers the liability of lenders and insolvency practitioners and includes a short but useful chapter on post-completion issues which deals with everything from procedures for exempting documents from the public right to inspect (R137 LRR 2003), requests for information under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 and the conduct of post-completion audits by buyers, tenants or corporate purchasers.

It also touches on the management of warranty and indemnity cover and (for example) making sure that the Buyer monitors time limits and trigger dates for claims under warranties and indemnities.

Chapter 10 provides an overview of main environmental liabilities and development incentives. It is essentially a quick guide to environmental law with a particular focus on the impact of each potential liability on the parties to a transaction, rather than on the underlying policy. The chapter is broken down into environmental liabilities:-

- associated with the state and condition of the property;

- which may arise out of business activities being carried out at the property (which would be continued by the Buyer/Tenant) in the context of a share sale; and

- main liabilities and incentives associated with property development.

As I said at the beginning of this review this book is very practical. At the very least it will make your commercial property colleagues think. I suggest it ought to be required reading for all commercial property lawyers.

REVIEWED BY: **Catherine Davey, Partner, Stevens & Bolton LLP**

LEGAL UPDATES

Elen Stokes

WTO Dispute Panel issues preliminary ruling on Biotech Products

A WTO Dispute Panel on 7 February issued a preliminary ruling indicating that several aspects of the EU's approval process for genetically modified organisms contravened the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Its findings are largely favourable to the complaint submitted in 2003 by the US, Argentina, and Canada against what they alleged was an EU moratorium on the approval of new biotech products.

The Panel is assessing three aspects of EU regulation for their compliance with WTO rules: (i) the alleged general EU moratorium on biotech approvals; (ii) the EU's failure to approve a number of specific biotech products (referred to as 'product-specific measures'); and, (iii) national-level bans in several EU Member States on the marketing and import of specific biotech products after the products had been approved at the EU level.

The Panel's interim ruling, which was confidential and only released to the parties to the dispute, found that between June 1999 and August 2003 the EU *had* applied a general 'de facto' moratorium on approvals of biotech products. It held that this did not constitute an SPS measure in and of itself, but had "resulted in a failure to complete individual procedures without undue delay", thus violating Article 8 and Annex C of the SPS Agreement.

This finding was reflected in the Panel's conclusions relating to the 'product-specific measures' argument, which held that the completion of the approval process had been unduly delayed for 24 of the 27 biotech products.

In relation to the 'safeguard measures' in the form of national bans in France, Germany, Austria, Italy, Luxembourg, and Greece, the Panel found that, contrary to the EU's claim that the bans were precautionary measures adopted on the basis of Article 5.7 SPS Agreement, Member States had not undertaken risk assessments in line with the Agreement that would "reasonably support the prohibition."

The interim ruling requests the EU to take steps to ensure conformity with obligations under the SPS Agreement. A final ruling is expected to be released in April.

Interim conclusions and recommendations can be found at:
http://www.tradeobservatory.org/library.cfm?refid=78475

Landmark lead paint liability

Three former lead paint makers in the US have been found liable for poisoning thousands of children in Rhode Island in a landmark lawsuit that could trigger a wave of litigation against the industry.

On 22 February, the Rhode Island Superior Court jury sided with prosecutors who accused paint manufacturers of covering up the risk of lead paint, especially to children, in their lawsuit filed in 1999 – the first by a state to hold the paint industry responsible.

The state of Rhode Island brought the case against the three ex-lead paint manufacturers, arguing that the product created a public nuisance by poisoning thousands of children and contaminating hundreds of thousands of homes. Though lead paint was banned in the U.S. in 1978, it still exists in many Rhode Island homes.

The companies, Sherwin-Williams Co., NL Industries Inc. and Millennium Holdings LLC, are liable for clean-up costs, which could amount to billions of dollars, although the Superior Court held the state failed to meet the high standard required to pursue a claim for punitive damages.

Animal Welfare Bill gets third reading

The Animal Welfare Bill brings together and modernises welfare legislation relating to farmed and non-farmed animals. It imposes a duty on owners and keepers of vertebrate animals to ensure the welfare of animals in their care. Under the Bill, those responsible for the enforcement of animal welfare laws can take action if an owner fails to take reasonable steps to ensure the welfare of their animal, regardless of whether or not the animal is suffering.

On 14 March, it had its third reading in the House of Commons. The Bill will now go to the House of Lords for consideration there. As a result of the latest amendments docking of dogs' tails will be prohibited, unless a vet certifies that the dog is likely to work*;* supplying, publishing, showing or possessing with intent to supply recordings of animal fights which took place in Great Britain will be prohibited; causing an animal mental suffering will be an offence; and, inspectors who act in relation to an animal in distress must tell the animal's owner about what they have done

Beef export ban lifted

On 8 March, EU veterinary experts voted to end the ten year ban on beef and cattle exports from the UK. The ban was first introduced by the European Commission on 27 March 1996, prohibiting export following the announcement by the UK Government of the possible link between BSE and vCJD in humans.

The EU standing Committee for the Food Chain and Animal Health unanimously approved a proposal to resume exports of cattle born after 1 August 1996, and beef from cattle slaughtered after 15 June 2005.

Secretary of State for Environment, Food and Rural Affairs Margaret Beckett said:

“This is excellent news for the British beef industry. This EU decision is a vindication of our controls on BSE and our efforts to eradicate this disease.

“Britain's farmers produce high quality beef which will be in demand across Europe once the ban is lifted. We know that our beef is, at the very least, as safe as beef produced anywhere else in the EU.”

Exports of beef and cattle should resume in late April, or early May. When they do resume, they will be subject to certain conditions.

For more information, see:
http://www.defra.gov.uk/animalh/bse/index.html

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The editorial team want articles, news and views from you for the next edition due to go out at end January 2006. All contributions should be dispatched to Catherine Davey as soon as possible by email at: Catherine.Davey@stevens- bolton.co.uk by 17 May 2006 .
Please use Arial font 11pt. Single space.

Letters to the editor will be published, space permitting