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UKELA
UK ENVIRONMENTAL LAW ASSOCIATION

NEWS FROM THE CHAIRMAN

You will shortly be receiving your UKELA membership renewal notice and we'd very much appreciate it if you could renew as promptly as possible. This saves us on extra administration. It would be welcome if you could also consider signing up to pay by Direct Debit – you'll be receiving a form with your mailing – if you have not already done so. We are also mailing everyone again with a Gift Aid form and asking all who are eligible to send this back (even if you have already done so). This really helps UKELA's income to grow.

With your renewal mailing you will receive a complimentary special copy of Environmental Law and Management published by Lawtext Publishing which features the 2007 UKELA conference papers. We're very grateful to Lawtext for helping produce these papers at a minimal cost to UKELA and hope you enjoy reading them. If you are a corporate member but not the main contact you will receive your personal copy directly.

I am particularly looking forward to the 20th anniversary Garner lecture which is being held jointly this year with the Journal of Environmental Law. M.C. Mehta is an inspiring environmental lawyer who has worked tirelessly in India to protect the environment and provide education to enable others to follow in his footsteps.

I do hope to see you on November 21st at University College London. Details of how to book are in the diary section.

UKELA's Council has been planning the work of the organisation for 2008. The highlights include:

- Events on access to environmental justice and regulatory reforms
- The annual conference in Kent with more subsidised places for those on lower incomes and a greener housekeeping approach
- More work on the e-library on environmental law so the ordinary person can find out about their rights and responsibilities

We rely on your support – by continuing as a member, helping organise events and attending them, and participating in the activities of the working parties and regional groups. We hope more of you will do this in 2008, and perhaps consider standing for Council.

If you have any suggestions for the work programme or ideas on how UKELA can improve its service to members please do get in touch.

Best wishes

Daniel Lawrence
UKELA Chairman
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ENVIRONMENTAL IMPACT ASSESSMENT UPDATE[1]
James Maurici, Landmark Chambers

Reasons for negative screening decisions?

1. Are local planning authorities or the Secretary of State required to give reasons for a negative screening opinion or direction (i.e. that development is not EIA development) pursuant to the Town & Country Planning (Environmental Impact etc.) Regulations 1999 ("the 1999 Regulations")?

2. An examination of the 1999 Regulations themselves would suggest not. The 1999 Regulations do not state that reasons need to be given for a negative screening decision. In direct contrast under reg. 4(6) of the 1999 Regulations where a positive screening decision is given i.e. that development is EIA development there is an express duty to give "a written statement giving precisely and clearly the full reasons for that conclusion". This would suggest that the drafter of the 1999 Regulations made a deliberate choice not to require the giving of reasons for negative, as opposed to positive, screening decisions under reg. 4.

3. However, the matter does not end there. The issue was considered by the Court of Appeal (Nourse, Pill, Mummery LJJ) in the context of a renewed application for permission for judicial review in ***R v Secretary of State for the Environment, Transport and Regions, ex parte Marson*** [1998] Env LR 761. In that case, Parcelforce proposed to develop a 17 hectare site near Coventry Airport for the construction of sorting and handling depots. The Secretary of State determined that EIA was not required. This decision was challenged by way of judicial review. It was contended that he had unlawfully failed to give reasons, or to give sufficient reasons for the decision.

4. ***Marson*** in fact concerned the predecessor to the 1999 Regulations (the Town & Country Planning (Assessment of Environmental Effects) Regulations 1988) and the pre-1997 version of the EIA Directive. However, the reasoning of the Court of Appeal is equally applicable in the context of negative screening decisions under the 1999 Regulations. Indeed Pill LJ at p. 679 expressly said so in rejecting a submission that Directive 97/11/EC was material to the decision reached by the Court of Appeal[2].

5. The Court of Appeal refused permission and held that it was not arguable that reasons were required where the competent authority of a member state decides not to require an EIA in relation to a particular project:

> "1) No general duty has been established under Community law or national law to give reasons for all decisions by competent authorities of Member States.
>
> 2) Neither the Directive nor the 1988 Regulations expressly require reasons to be given for a decision not to direct an environmental impact assessment.

[1] This paper was given at the Landmark Chambers seminar "High Court Planning Challenges Seminar" on 5 November 2007. I am grateful to Richard Moules for his work on an earlier draft of this paper.

[2] See para. 5 of the judgment of Burton J. refusing permission in the case of ***Probyn*** (see below) where in relation to ***Marson*** he said:

> "That decision did not relate to the identical Regulation, but it is seemingly common ground, certainly it was before me, that that does not make any difference and that the decision of the Court of Appeal has the same effect on these Regulations as in relation to the specific Regulation it was considering, and that the fundamental principle was very fully set out by the Court of Appeal in that case, namely that there was no obligation on the Secretary of State to give reasons when giving a decision as to whether or not an environmental assessment is necessary."

3) The applicant's right is not a right to an environmental impact assessment but to a decision from the Secretary of State as to whether such an assessment is required.
4) The decision requires an exercise of judgment by the Secretary of State and he is left with a discretion in its exercise. The requirement for a decision is only one part of the procedures provided for planning control and the protection of the environment.
5) Whether or not there is an environmental impact assessment, the local planning authority, in determining applications for planning permission, must have regard to "material considerations" (sections 54A and 70 of the 1990 Act) which will include environmental considerations. The applicant had the opportunity to make representations to the local planning authority and the authority were supplied with information upon environmental considerations, albeit not in the form of an assessment in the form specified in the Directive and Regulations.
6) The right concerned in the circumstances is removed from the relevant substantive decision, that is the decision whether or not to grant planning permission.
7) The right conferred is very far removed from the fundamental right considered by the ECJ in ***Heylens***…"[3]

6. In ***Marson*** (see p. 766) the decision letter said that no EIA was required because the Secretary of State was of the opinion that the proposed development "would not be likely to have significant effect on the environment by virtue of factors such as its nature, size and location". Pill LJ said at 766 that even if there was an obligation to give reasons "…that the statement gives a reason or reasons for the decision because the words of the Regulation, which are recited, set out the basic criteria for the decision". At 770 he said that "reasons for the decision were given, albeit in summary form".

7. ***Marson*** has been cited and relied upon in the following cases: ***R. v St Edmundsbury BC Ex p. Walton*** [1999] Env. L.R. 879 per Hooper J.; ***BAA Plc v Secretary of State for Transport, Local Government and the*** [2002] EWHC 1920; [2003] J.P.L. 610; ***Gillespie v First Secretary of State*** [2003] EWHC 8; [2003] 1 P. & C.R. 30[4].

8. ***Marson*** was recently reconsidered by Burton J in an application for permission to apply for judicial review in ***R (on the application of Probyn) v First Secretary of State*** [2005] EWHC 398 (Admin). A 25m high fume extraction stack had been built pursuant to planning permission at a combined slaughter house and cutting facility for chickens. The permission was subsequently quashed and an application was made for permission for retention of the stack. The claimants requested a screening direction under Regulation 4(8) of the EIA Regulations[5], but the Secretary of State declined. It was contended that he had unlawfully failed to give reasons, or to give sufficient reasons.

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[3] Following what Richards J. said in ***Gillespie*** (see below) para. 5) of the reasoning has been undermined by the House of Lords decision in ***Berkeley v. Secretary of State for the Environment*** [2001] 2 AC 603 but "that does not affect the balance of the reasoning, the broad thrust of which … hold[s] good."

[4] In that case, Richards J. said:

> "Although the judgment of the Court of Appeal in ***Marson*** was on a permission application, it was a detailed judgment and is of strong persuasive authority. I accept that the decision of the House of Lords in ***Berkeley*** has undermined part of the reasoning, namely reliance on the fact that the applicant had the opportunity to make representations on the environmental considerations and the authority was supplied with information on those considerations. But that does not affect the balance of the reasoning, the broad thrust of which seems to me still to hold good."

The Court of Appeal ([2003] EWCA Civ 400; [2003] Env. L.R. 30) upheld Richards J's decision but did not consider ***Marson*** and reasons aspect.

[5] Reg. 4(8) provides "The Secretary of State may direct that particular development of a description mentioned in Column 1 of the table in Schedule 2 is EIA development in spite of the fact that none of the conditions contained in sub-paragraphs (a) and (b) of the definition of "Schedule 2 development" is satisfied in relation to that development." See further: ***Berkeley v Secretary of State for the Environment Transport & Regions & London Borough of Richmond upon Thames*** [2002] Env. L.R. 14.

9. The claimants in ***Probyn*** relied upon two ECJ decisions post-***Marson*** namely, ***Commission v Italy*** C-87/02 and ***Commission v Italy*** C-83/03, to suggest that ***Marson*** was wrongly decided. In C-87/02, Advocate General Ruiz-Jarabo Colomer stated (at [36]) that:

> "36. An administrative decision which concludes that the particular features of a project are not such that it is damaging to the environment must be explained by reasons. (35) According to the general rule, which I have already set out, all projects must be made subject to an assessment of their effects prior to authorisation; therefore, if a particular project is excluded from that requirement because it is not harmful, the reasons on which that finding was based must still be disclosed. Environmental protection currently occupies a prominent position among Community policies. (36) Furthermore, the Member States also have a crucial responsibility in that area. (37) Community citizens are entitled to demand fulfilment of that responsibility (38) under Article 37 of the Charter of Fundamental Rights of the European Union, (39) which guarantees a high level of environmental protection and the improvement of the quality of the environment. Accordingly, the main elements of any measure which strays from the general criteria aimed at protecting the environment must be duly specified, since that is an embodiment of the rational exercise of power, as well as being a tool which, if necessary, enables the measure to be reviewed subsequently[6]."

10. The ECJ's conclusion was more ambiguous ([46]-[49]):

[6] Note also paras. 20 – 22 of the Advocate-General's opinion:

> "20. The Commission maintains that, pursuant to Article 4(2) of the Directive and Article 1(6) of the Presidential Decree of 12 April 1996, the Italian authorities are obliged to check the impact of the Lotto Zero route on the environment. The Commission goes on to state that the decision not to submit the project to an environmental impact assessment, adopted in Regional Decree 25/99, is not explained by reasons.
> 21. The Italian Government responds that the project was checked and that it was possible to adopt the decision by administrative silence, without providing reasons, but that, in any event, the decision contained in the Presidential Decree of 12 April 1996 is explained by reasons because it refers to the report from the Regional Committee for the Assessment of Effects on the Environment.
> 22. The Commission contends that its complaint essentially relates to the fact that the Italian authorities failed to check whether the characteristics of the project required it to be assessed for its impact, a failure which is evidenced by the absence of reasons in Decree 25/99" (emphases added).

And paras. 31 to 35:

> "31. As the Commission rightly points out in the reply, the dispute therefore centres on the issue of whether the Italian competent authorities examined the characteristics of the Lotto Zero project in order to establish whether there would be any damage to the environment and, if so, whether they made their consent conditional on a prior assessment of the impact of the project on the environment.
> 32. That supervision was carried out, in the formal sense, inasmuch as Regional Decree 25/99 of 15 November 1999 states that it is not necessary to assess the effects of the project on the natural surroundings on the grounds that it does not affect a protected zone and the Regional Committee for the Assessment of Effects on the Environment came to a favourable conclusion in the meeting held on 22 October 1999. However, the committee's report is as lacking in detail as the Decree, (32) in that it merely contains a reference to the positive opinion which was issued by the civil engineer on 6 July 1999, under number 8634, and which, like the administrative decision and the conclusion of the committee, is not explained by reasons. (33)
> 33. That document, which the defendant Member State submitted with its reply to the questions formulated by the Court, is not a report on the environmental impact of the public works under discussion. It is clear from simply reading the document that it is an authorisation, 'solely for hydraulic purposes', (34) to cross the Tordino River and to carry out work on the riverbed relating to the construction of a number of viaducts.
> 34. The report attached to the defence is not the opinion of the civil engineer referred to in the decision of the regional committee; instead it is an environmental compatibility study conducted in December 1997 at the request of a company called ERM Italia Srl.
> 35. It is clear from the foregoing considerations that, by failing to check whether the construction of the road in Teramo required an environmental impact assessment, the Italian Republic has committed the breach complained of by the Commission."

> "46. Examination of the documents produced shows that Decree No 25/99, by which the Abruzzo Region gives a favourable opinion as regards the outcome of the screening procedure and decides to exempt the project from the assessment procedure, is based on a cursory statement of reasons and merely refers to the favourable opinion by the Coordinating Committee. The latter opinion, which appears in the handwritten minutes of the Committee's meeting of 22 October 1999, contains a sentence which conveys the favourable opinion and states that in adopting that opinion, the Committee had available to it the civil engineer's opinion No 8634 of 6 July 1999.
>
> 47. As the Advocate General rightly observes in point 33 of his Opinion, that opinion by Teramo's civil engineering department, produced at the Court's request, is not an opinion on the environmental effects of the project, but merely an authorisation 'solely for hydraulic purposes' to cross the Tordino river and carry out certain works. The document attached by the Italian Republic to its defence, the cover page of which gives the necessary details as to the nature of the document and which was produced at the Court's request, does not appear to be required under the Law as part of the screening procedure. Moreover, the Court does not have information which would allow it to conclude that it was used by the competent authority as a basis for its decision.
>
> 48. That information indicates that no screening was carried out to determine whether to subject the project 'Lotto zero' to an impact study and that the failure to fulfil obligations as set out by the Commission in its claims is established.
>
> 49. It should be pointed out, however, that if the civil engineer's opinion had not been produced at the request of the Court, it would have been impossible to determine whether the screening had been carried out or not. It must be observed that a decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337."

11. In ***Probyn***, Burton J accepted that all that the ECJ decided was that it could not be satisfied that screening had actually occurred[7] – the best evidence of the absence of screening being that no reasons had been given. However, he did acknowledge (at [12]) that "it is plain that the drift of the European Courts –or, at any rate, that of those arguing before the European Court –is flowing in the other direction from ***Marson***". Nevertheless, Burton J. refused permission because ([20]):

> " … it would … be quite inappropriate, and in the interests of neither of the parties in this case for me to grant permission to send this through to a full hearing by the Administrative Court, where the overwhelmingly likely result would be that the Administrative Court would consider itself either bound or extremely persuaded by Marson, and would leave the matter to the Court of Appeal to decide whether it was or was not bound by its own previous decision, and whether it should or should not reconsider it in the light of the apparent dicta of the European Court in the Italy cases, or refer the matter to the European Court. Consequently, it is only a mercy, and a saving time and costs, if I prevent that unnecessary course now, but enable the parties to take the matter straight to the Court of Appeal by way of a renewal of this application; or, if that is the way it must be, by way of an application for permission to appeal against my refusal."

[7] "[a]t least in fuller form, a case was put forward by the Commission that there had not been a screening at all, and that the best evidence of the absence of screening was that there had not been any reasons given."

12. Laws LJ subsequently granted permission to appeal in ***Probyn*** saying "…I have an uneasy sense that judicial insistence on full or fuller reasons in these cases will be an instance (in the tired phrase) of the best being the enemy of the good…". The appeal was, however, withdrawn shortly before it was heard by the Court of Appeal.

13. However, the Court of Appeal is due to consider the issue in ***Mellor (R on the application of) v Secretary of State For Communities & Local Government*** [2007] EWHC 1339 (Admin). The case is listed in the new year. The appellant is seeking a reference to the ECJ

14. Furthermore, the Commission has recently announced that it will be taking infraction proceedings against the UK in relation to the failure to give reasons for negative screening decisions. The complaint that has led to these proceedings arises from the ***Marson*** case!

15. Given all this what in EIA Directive supports an obligation to give reasons for negative screening decisions? Not a lot. Article 4 makes no reference to a need to provide reasons in determining whether EIA is required. This is in marked contrast with the wording at Article 9 of the EIA Directive relating to decisions to grant or refuse development consent. The wording here expressly requires the competent authority to make reasons for their decision available to the public. Had it been the purpose and intention of the EIA Directive that competent authorities were required to make available to the public reasons why, in a specific case, EIA was not required, is it not reasonable to assume the wording would have been more explicit, and in line with that used in Article 9? Furthermore, Article 3(7) of the more recent Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive") expressly requires that reasons be given "for not requiring an environmental assessment". The contrast with Article 4 of the EIA Directive could not be clearer.

Demolition

16. The demolition of buildings is largely exempt from planning control by virtue of s.55 of the Town and Country Planning Act 1990. Is it compatible with European law that demolition is not subject to the obtaining of planning permission and thus in turn the possibility of EIA?

17. The Court of Appeal considered this question in ***R (on the application of England) v London Borough of Tower Hamlets*** [2006] EWCA Civ 1742. The case concerned the demolition of a warehouse to make way for proposed housing development. The claimant argued that by exempting demolition from planning control, domestic law was in breach of EU law. Carnwarth LJ described the challenge as being "potentially arguable" and as raising "interesting points", but the Court of Appeal refused permission as the claimant lacked an interest in the matter since the structure he was seeking to protect had in fact already been demolished ([8]-[11]):

> "8. The other ground raises a potentially arguable question of European law. The position under English law is that demolition as such, with certain exceptions specified by the Secretary of State, does not require planning permission. Mr Buxton suggests that that position is itself a breach of European law, in that where EIA is required for a project which includes demolition and remediation work, that must be subject to a consenting process just as the construction work is so subject.
>
> 9. These are no doubt interesting points. However, it is unclear to us what interest Mr England has in litigating them once the structure which he was seeking to protect has gone. There is no evidence before us as to his position on this. Although judicial review proceedings may often serve to clarify issues of wider importance than the particular concerns of the parties, it is important not to forget the interest of the person or group in whose name the case is being brought. The court decides issues between interested parties, not issues in the abstract. In the present circumstances, we think that it would be

wholly disproportionate to throw further doubt over the progress of this development while such a point is litigated through the courts, possibly to the European Court.

10. It is of interest to note that in one of Mr Buxton's successes involving a proposed development in Crystal Palace, the decision of the House of Lords, following a reference to the European Court was finally given on 6th December 2006 (***R v Bromley LBC ex p Barker*** [2006] UKHL 52). The judgment records that the outline planning application was originally made in April 1997; the application for detailed approval (which was the subject of the dispute) was made in January 1999; the original planning permission lapsed in 2001; and the developers had since intimated that they were no longer interested in proceeding with the development. Those protracted proceedings did indeed reveal a discrepancy between English planning law and the requirements of the European directives. There may have been exceptional factors in the case, and there may have been other reasons why the developers withdrew. But the case illustrates the potential risks to other interested parties of setting in motion proceedings in a case of this kind. Such litigation is not the only means to seek redress for concerns about compliance of English law with European requirements. As is apparent from another case decided by the European court at the same time as ***Barker*** (***Commission v UK*** [2006] QB764), a complaint to the Commission may be equally effective.

11. In a last throw, in the form of a letter to the court on 9th December, Mr Buxton warned us of the risks of breaching our duty under Article 234 (as the final court for these purposes) to refer to the European Court any point of significant doubt under European law. He referred us to the judgment in ***Kraaijeveld*** [1996] ECR 5403We do not accept that this is an obstacle to refusal of leave. Our decision does not depend on taking a view on the European issue, but is simply the exercise of a discretion on the facts of this case."

18. Although permission was refused on the facts, Carnwarth LJ comments in relation to arguability offer encouragement and we can expect the point to be taken again in the future.

EIA beyond planning

19. In ***Edwards and Pallikaropoulos v Environment Agency*** [2006] EWCA Civ 877; [2007] Env. L.R. 9 the appellants appealed against the decision (([2005] EWHC 657) not to quash a PPC permit granted by the Environment Agency to Cemex UK Cement Ltd, pursuant to the Pollution Prevention and Control (England and Wales) Regulations 2000 Part I, reg. 10, for the continued operation of its cement plant in Rugby, including, as a new proposal, the burning of waste tyres as a partial substitute for conventional fuel in the kiln at the plant.

20. One of the grounds of challenge in ***Edwards*** was that the permit was unlawful for want of an EIA pursuant to the EIA Directive. It was argued that:
    i. the operation the subject of the permit is a "project" as described in Article 1.2 of the EIA Directive and as prescribed by Article 2.1 by reference to Annex II, requiring "development consent", and, therefore, requiring the Environment Agency to consider calling for an EIA, which it did not do;
    ii. the proposal to burn waste tyres in partial substitution for existing conventional fuels at the plant was not a "material change of use" under domestic law and so did not trigger a need for planning permission or a need for an environmental impact assessment under domestic law; but
    iii. such an obligation arose as a matter of EU law because the United Kingdom, by providing in 1999 Regulations for an EIA to be carried out as part of an application for planning permission, but not also in respect of a discrete process for consideration of applications for PPC permits, has not properly implemented the EIA Directive; and

iv. the Agency was, therefore, in breach of the Directive, which has direct effect, in not considering EIA.

21. All of these arguments were rejected by the Court of Appeal. But the House of Lords has granted leave to appeal and the appeal is to be heard in the new year.

22. Similar issues to those in ***Edwards*** arose in Case C-199/04 ***Commission v UK***, [2007] Env LR D12. The Commission challenged the compatibility with the EIA Directive of the use of the test of "material change in the use of any buildings or land" when applications are made for planning permission. The Commission claimed that this had the effect of excluding certain projects form the application of the EIA Directive. This complaint was rejected as being inadmissible on the ground that it was not coherently and precisely stated and the ECJ could not appreciate the exact scope of the infringement complained of. A second challenge raised in these proceedings was also rejected as inadmissible – the Commission had alleged that when the EIA Directive was transposed into national law, the UK did not coordinate planning and pollution control rules adequately so as to ensure compliance with all the obligations in the EIA Directive.

23. The background to Case C-199/04 was two complaints relating to:
    i. an authorisation, under what would now be a PPC permit, granted to a cement manufacturing plant operated by Castle Cement in Clitheroe, Lancashire, to burn, in partial substitution for its conventional fuel, a mixture of industrial liquid waste, known as Cemfuel. According to the complainants, the authorities did not address the issue whether the project in question had to be subject to an EIA prior to granting such authorization;
    ii. a complaint concerning the cement manufacturing plant operated by the same company in Padeswood, Flintshire. In this instance, although the construction of an additional kiln and the substitution of conventional fuel by Cemfuel, whole tyres and a mixture of waste paper and plastic, known as Profuel, were the subject of an EIA, the National Assembly for Wales granted permission for them, before the Environment Agency had determined the application for an authorisation.

Enforcement, time limits & lawful development certificates

24. In ***R. (on the application of Prokopp) v London Underground Ltd*** [2004] Env. L.R. 8 the Court of Appeal rejected a submission that the refusal of a local planning authority to take enforcement action could constitute a "development consent" for the purposes of the EIA Directive and hence require consideration of EIA. However, ***Prokopp*** is not the end of the matter.

25. In C-98/04 ***Commission v UK***, the ECJ rejected as inadmissible infraction proceedings under Article 226 EC. In that infraction, the Commission alleged that the lawful development certificate regime being applied in UK under s. 191 of the 1990 Act, whereby an application could be made for a certificate concerning a project within the meaning of the EIA Directive but without an EIA, meant that the UK had failed to ensure the correct application of its obligations under Articles 2(1) and 4 of that Directive. The ECJ held:

> "19 During both the pre-litigation stage of the present procedure and the litigation itself, the Commission concentrated its criticisms on the issue of LDCs in so far as it allows by-passing of the procedures governing application for consent and environmental impact assessment required by Directive 85/337 for projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location.
>
> 20 The Commission has not put forward any complaints concerning the actual existence of time limits for the taking of enforcement action against development which does not comply with the applicable rules, although the introduction of LDCs is by its very nature

inseparable from the provisions laying down such rules of limitation. Pursuant to section 191 of the TCPA, an LDC is issued, in particular, when no enforcement action may then be taken against the uses or operations concerned, whether because they did not involve development or require planning permission or because the time for enforcement action has expired.

21 Consequently, the present action for failure to fulfil obligations, since it puts before the Court only one aspect of a legal mechanism composed of two inseparable parts, does not satisfy the requirements of coherence and precision referred to above.

22 That conclusion is all the more necessary because the arguments put forward by the United Kingdom Government to contest the failure to fulfil obligations are based, in essence, on the system of time-limits which the Commission failed to include in the subject-matter of the dispute and which, accordingly, could not form the basis of detailed discussion between the parties.

23 It follows from the foregoing that the action must be dismissed as inadmissible."

26. Advocate-General Ruiz-Jarabo Colomer's opinion had been that UK law was in breach of the EIA Directive for reasons which may be relied on at a later date since they suggest that the UK planning enforcement regime (as opposed to the LDC procedure) may not be compliant with the EIA Directive. He identified a difficulty with the enforcement regime and suggested that UK legislation which granted local authorities a discretion whether to take enforcement action in respect of uses of land contrary to the town planning legislation allows projects included in Annexes I and II to EIA Directive to be carried out without prior consent and, where appropriate, without assessment of their effects on the environment. Although it was argued that LDCs were not a development consent within the Directive (since they merely recognise and declare an existing lawful use), he stated:

> "30. It is of little importance whether the ground of the breach relates to the date on which the local authorities, in the exercise of their discretion, took no action or to the point in time when the LDC was issued, precluding any breach; it is of still less relevance whether the certificate in question is in the nature of a decision or is merely declaratory. The crucial point is that …wide as the discretion of the administration is, it may not give rise to a result contrary to the central objective of the Community legislation set out in Article 2(1) thereof."

27. The ECJ recognised the complexity of the issues raised. The Commission and the Advocate-General seemed oblivious to these difficulties. It is submitted that, broadly speaking, four distinct situations need to be looked at:
    i. a case in which there is a long established use or development, dating from before the coming into effect of the EIA Directive. There can be no question but that projects which, by whatever means, had become lawful in national law before 3 July 1988 (the date of the coming into force of the EIA Directive) are outwith the scope of the EIA Directive[8];

[8] The ECJ's decision in ***Commission v Federal Republic of Germany*** [1995] ECR I- 2189, following and applying the Court's earlier decision in ***Bund Naturschutz in Bayern v Freistaat Bayern*** [1994] ECR I- 3717, is authority for the proposition that the obligations contained in an EC Directive come into effect on the date provided by the Directive concerned for Member States to take the measures necessary to comply with the Directive. In the EIA Directive, Article 12 provided that this was to be "within three years of [the Directive's] notification", and the Directive was notified to the Member States on 3 July 1985. Accordingly, in Commission v Germany it was determined that 3 July 1988 was the date upon which the EIA Directive came into effect. It was also determined in these cases that the EIA Directive applied only to projects, the consent procedure for which was initiated after 3 July 1988, see: Advocate General Gulmann's opinion in ***Bund Naturschutz in Bayern EV v Freistaat Bayern*** and Advocate

ii. a case in which, after the coming into effect of the EIA Directive, a new use or development is adopted, of which the local planning authority has knowledge at all material times, but in relation to which it simply fails to take any enforcement steps without any good reason within the set time limit. In this case a local planning authority would be in breach of its own public law obligations as a matter of domestic law, and aggrieved third parties could – before the time limit expires – seek a mandatory order to compel the local planning authority to exercise its statutory discretion properly. Accordingly, this type of case would not represent a gap in the protection required by the EIA Directive. As to the operation of the time limit, precluding the taking of legal action after a period of time, this is justified on the grounds of the principle of legal certainty. It is impossible for any system of legislation to ensure that EIA always takes place in accordance with the Directive. All that can be done is to ensure that remedies exist in relation to any failure to carry out EIA where that is required by the Directive but is not undertaken. Such remedies exist in the United Kingdom and the procedural rules applicable to those remedies do not infringe the general principles of EU law;

iii. a situation as in scenario (ii) above, but where the local planning authority exercises its discretion not to intervene not in an arbitrary or capricious manner, but on grounds which are relevant, rational and lawful so far as English law is concerned (e.g. because it assesses that the costs of taking enforcement action would be disproportionate to the protection of the public interest which would thereby be achieved). It is in this situation that the possible lacuna arises. Such a view is dependent upon it being accepted that in such a situation the local planning authority had "consented" – de facto (by deciding not to proceed to take enforcement action, and in circumstances where that decision was lawful according to the limitations upon the discretion under domestic law, and so could not be successfully challenged in judicial review proceedings) - to the new use or development. Of course this is the analysis rejected by the Court of Appeal in ***Prokopp***. One difficulty with regarding such a decision as a "development consent" is that it in fact confers no immunity from enforcement until the expiry of the relevant limitation period because it would be open for the relevant authority to revisit its decision not to enforce;

iv. a situation as in scenario (ii) above, but where the new use or development has occurred without the local planning authority being aware of it until after the time limit for exercise of its enforcement powers has expired. No system of law can guarantee that its requirements will actually be complied with by individuals; and on this scenario, the local planning authority will have acted entirely properly and cannot in any sensible way be said to have given its consent for the new use or development. Simply, the provision for a time limit after which enforcement action may not be taken - which is contained in the general law as set out in the statute and which applies without any exercise of discretion or the grant of any consent by any public body – will have come to operate and will be binding.

Consequences of Barker

28. The ECJ in ***Commission v. UK*** Case C-508/03 and ***Barker*** Case C-290/03 [2006] Q.B. 764 and the House of Lords in ***R. v Bromley LBC Ex p. Baker*** [2006] 3 W.L.R. 1209 have introduced the possibility of EIA at stages in the planning decision making after an in-principle decision granting outline planning permission. However, as Case C-201/02 ***R (Delena Wells) v. Secretary of State*** [2004] 1 C.M.L.R. 31 itself shows, the implications are not limited to reserved matters alone but extend to cases where approvals under negative conditions, effectively conditions precedent to development proceeding, are required. See also in this regard the analysis of Lord Hope in ***R. (on the application of Barker) v Bromley LBC*** [2006] UKHL 52; [2007] 1 A.C. 470 and see also ***R (on the application of Anderson) v Bradford MDC*** [2006] EWHC 3344.

General Elmer's opinion in ***Commission v Germany***. This approach was based principally upon reasons of legal certainty and non-retroactivity.

29. Moreover, a similar approach might also apply in the case of subsequent stages in multi-stage decision-making in connection with the requirements of the Habitats Directive and Regulations.

30. The ECJ summarised the issue raised by the Art. 234 reference from the House of Lords at para. 42 of its judgment in ***Barker***:

> "Is EIA required to be carried out if, following the grant of outline planning permission, it appears at the time of approval of the reserved matters that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location?"

31. In ***Barker*** the ECJ held:

> "46. …it is therefore the task of the national court to verify whether the outline planning permission and decision approving reserved matters which are at issue in the main proceedings constitute, as a whole, a "development consent" for the purposes of Directive 85/337 (see, in this connection, the judgment delivered today in Case C508/03 ***Commission v United Kingdom*** [206] ECR I-0000 paragraphs 101 and 102).
>
> 47. Secondly, as the Court of Justice explained in ***Wells*** [2004] ECR I-723, at paragraph 52, where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.
>
> 48. If the national court therefore concludes that the procedure laid down by the rules at issue in the main proceedings is a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, it follows that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved: see, in this regard, ***Commission v United Kingdom***, paragraphs 103-106. That assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.
>
> 49. In the light of all of the foregoing, the answer to the second and third questions must be that articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location."

32. ***Commission v UK*** concerned infraction proceedings in relation to the determination of the White City and Crystal Palace developments. The case raised similar issues to ***Barker*** and was heard at the same time. The ECJ said:

> "101. In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.

102. Therefore, the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) 'development consent' within the meaning of Article 1(2) of Directive 85/337, as amended.

103. In those circumstances, it is clear from Article 2(1) of Directive 85/337, as amended, that projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to their effects before (multi-stage) development consent is given (see, to that effect, Case C-201/02 ***Wells*** [2004] ECR I-723, paragraph 42).

104. In that regard, the Court stated in Wells, at paragraph 52, that where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

105. In the present case, the rules at issue provide that an environmental impact assessment in respect of a project may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage.

106. Those rules are therefore contrary to Articles 2(1) and 4(2) of Directive 85/337, as amended. The United Kingdom has thus failed to fulfil its obligation to transpose those provisions into domestic law." Challenges by the Commission to the decisions not to have EIA on the facts in both the White City2 and Crystal Palace cases were held to be admissible, but failed since the Commission had failed to provide evidence of appropriate failure in the light of detailed evidence from the UK. The ECJ rejected the complaint by the Commission on the facts that there had been "a manifest error of assessment" in determining that EIA was not required (see paras. 82-92).

33. DCLG issued interim guidance pending consideration by the House of Lords and amendments to the regulations: *Applications for Outline Planning Permission, Applications for approval of reserved matters and EIA procedure; The Effect of ECJ judgments in the cases of Ex parte Barker and Crystal Palace/White City.* The advice was to the effect that, pending the determination by the House of Lords in ***Barker*** and pending the subsequent amendment of the 1999 Regulations to comply with the ECJ judgments, local planning authorities should ensure that their administrative procedures are in compliance by carrying out EIA screening of applications for approval of reserved matters.

34. When the case returned to the House of Lords ***R. (on the application of Barker) v Bromley LBC*** [2006] UKHL 52; [2007] 1 A.C. 470, the claimant had abandoned her claim for a quashing order (which would have revived the expired outline permission!) and she sought declaratory relief which was not opposed in principle by the Secretary of State, although Bromley LBC still maintained that the reserved matters determination in that case was not a development consent.

35. Lord Hope (who gave the only substantive speech) held that the Secretary of State had been right not to oppose a declaration that the 1988 Regulations failed properly to implement the EIA Directive:

"21. It is clear that the effect of regulation 4(2) of the 1998 Regulations, read together with the definition of "Schedule 2 application" in regulation 2(1), was that any consideration of the need for an EIA was precluded at the reserved matters stage. The Regulations overlooked the fact that the relevant development consent may, as the Court of Justice said in ***Commission v United Kingdom*****,** para 102, be a multi-stage process. That situation is demonstrated by the terms in which outline planning permission was given in this case. In its notification of grant of outline planning permission the council stated that the grant was subject to conditions, which included the following: "01 (i) Details relating to the siting, design, appearance, access, landscaping shall be submitted to and approved by the local planning authority before any development is commenced." The effect of that condition was that the consent which would have entitled [the developer] to proceed with the project was withheld until the details referred to were approved by the local planning authority. Any grant of planning permission which contains a condition in these terms must be regarded as a multi-stage development consent for the purposes of the Directive".

36. Lord Hope explained when further EIA might be required:

22. It does not follow however, where planning consent for a development takes this form, that consideration must be given to the need for an EIA at each stage in the multi-consent process.

…. An application for outline planning permission should be accompanied by sufficient information to enable that question to be answered and an EIA, if needed, to be obtained and considered before outline planning permission is granted. The need for an EIA at the reserved matters stage will depend on the extent to which the environmental effects have been identified at the earlier stage.

23. If sufficient information is given at the outset it ought to be possible for the authority to determine whether the EIA which is obtained at that stage will take account of all the potential environmental effects that are likely to follow as consideration of the application proceeds through the multi-stage process. Conditions designed to ensure that the project remains strictly within the scope of that assessment will minimise the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters. In cases of that kind it will normally be possible for the competent authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development: ***R v Rochdale Metropolitan Borough Council, Ex p Milne*** (2001) 81 P & CR 365, para 114, per Sullivan J.

24. As the European Court said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988

Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances.
...

28. In my opinion the answer to the question whether the outline planning permission and the decision to approve the reserved matters in this case constituted, as a whole, a "development consent" for the purposes of the Directive is now plain. It is conveniently set out in the court's judgment in ***Commission v United Kingdom***, paras 101 - 102. L & R were told in condition 01 (i) of the outline planning permission that they were not entitled to proceed with any development until details relating to the reserved matters had been submitted to and approved by the local planning authority. That being so, the decisions to grant outline planning permission and to approve the reserved matters must be considered to constitute, as a whole, a multi-stage development consent for the purposes of the Directive.

29. It is no longer possible to challenge the grant of outline planning permission on the ground than an EIA was required at the outline stage, and we lack the information that would be needed for finding as a fact that an EIA was required at the reserved matters stage. These issues have in any event been rendered academic by the lapse of planning permission for the development. But the appellant is entitled to a declaration that the advice that the officials gave to the committee that an EIA could not as a matter of law be required at the stage of approving the reserved matters was wrong. Sullivan J's observation in ***R v Rochdale Metropolitan Borough Council, Ex p Tew*** [1999] 3 PLR 74, 97 that, if significant adverse impacts on the environment are identified at the reserved matters stage and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding must now be regarded as unsound. If it is likely that there will be significant effects on the environment which have not previously been identified, an EIA must be carried out at the reserved matters stage before consent is given for the development."

37. The consequences of ***Barker*** are therefore that:

(1) EIA may be required for subsequent stages in a multi-stage consent process in order to ensure that the objectives of the Directive are properly met. Lord Hope considered that EIA would only be required at subsequent stages if ([24]) "*the need for an EIA was overlooked at the outline stage*" or where "*because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier*".;

(2) The general approach, however, in ***R. v. Rochdale B.C. ex p. Tew*** [2000] Env. L.R. 1 and ***R. v. Rochdale B.C. ex p. Milne*** [2001] Env. L.R. 22 to EIA at the outline stage still holds good subject to the additional possible requirement for EIA in the context of reserved matters. Lord Hope made specific reference to these cases in para. 23 of his speech. ***Barker*** therefore does not justify a more relaxed approach to EIA at the outline permission stage – something developers have been somewhat cheekily suggesting post ***Barker***;

(3) EIA at the reserved matters stage may be required where likely significant effects are identified at the reserved matters stage which -

(a) Were not identifiable at the outline planning permission stage. This is likely to include those effects which were not identified as well; or

(b) Were present but simply not identified at the outline stage, through erroneous screening or failure to consider at all; or

(c) Were identified and assessed but which now require "a fresh assessment". This is likely to apply where there has been some material change of circumstances since the grant of planning permission.

(4) Where a reserved matters EIA is required, then the ECJ held that: "This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment." It is suggested that the "comprehensive" assessment is limited to those aspects of the project which have not yet been assessed or which require assessment. This is supported by Lord Hope's speech at para. 25 where he said " … account will have to be taken of all the aspects of the project that are likely to have significance effects on the environment which have not yet been assessed or which have been identified for the first time as requiring assessment".

38. The Government is currently consulting on the Town and Country Planning (Environmental Impact Assessment) (England) (Amendment) Regulations 2007 to deal with ***Barker***. A consultation paper was published on 19 October 2007. The closing date for responses is 11 January 2008. The amendments are expected to be in force in January 2008. The main features:
    i. as well as enabling EIA to be carried out at reserved matters stage for outline planning applications, the draft regulations enable EIA to be applied to conditions attached to full planning permissions for all types of development, including minerals development, which require the submission of certain detailed matters and their approval by the planning authority before the development may proceed:
        i. it is proposed that reg. 2(1) of the 1999 Regulations will include a definition of "multi stage consent" which refers both to reserved matters approval and to approval required under a condition attached to a full planning permission prior to the development being commenced;
        ii. a new re. 26B is proposed that would apply the 1999 Regulations to multi stage consents, subject to certain exceptions;
    ii. the consultation paper says:

> "3.3 Provided applications for outline planning permission are properly screened for IA and, where it is required, the approach set out in guidance has been followed – i.e. the approach suggested in the Tew and Milne judgments – then it is our view that the likelihood of the need for further EIA at the reserved matters is unlikely and should be necessary only in exceptional circumstances. Nonetheless, we have to make provision for the possibility that EIA may be required at the later stage in a multi stage approval procedure.
>
> 3.4 We consider that the need to undertake EIA at reserved matters stage could arise in the following circumstances:
>
> • where EIA should have been required at outline stage but (for whatever reason) the planning authority failed to issue a screening opinion
>
> • where a screening opinion was issued at outline stage to the effect that EIA was not required, but the planning authority on reconsideration considers that there are likely to be significant environmental effects
>
> • where EIA was required at outline stage and an Environmental Statement was produced, but the planning authority consider the Statement needs revising or updating before it can be regarded as an Environmental Statement for the purposes of the regulations".

Screening, significant environmental effects and the relevance of mitigation measures

39. This matter has been considered by the Court of Appeal on several occasions and remains controversial. When considering whether a project is likely to have significant effects on the environment are proposed mitigation measures to be taken into consideration?

40. In ***Gillespie v First Secretary of State*** [2003] EWCA Civ 400; [2003] Env. L.R. 30 Pill LJ said:

> "36. When making his screening decision, the Secretary of State was not in my judgment obliged to shut his eyes to the remedial measures submitted as a part of the planning proposal. That would apply whatever the scale of the development and whether (as in ***BT***) some harm to the relevant environmental interest is inevitable or whether (as is claimed in the present case) the development will actually produce an improvement in the environment. As stated in ***Bozen***, it is the elements of the specific project which must be considered and all the elements of the project relevant to the EIA. In making his decision, the Secretary of State is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision. If the judges in the cases cited took a contrary view, I respectfully disagree, though it appears to me that both Sullivan J in ***Lebus*** and Richards J in the present case did not require all remedial or mitigating measures to be ignored.
>
> 37. The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration."

41. Laws LJ put the matters this way:

> "Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA. If then the Secretary of State were to decline to conduct an EIA, as it seems to me he would pre-empt the very form of enquiry contemplated by the Directive and Regulations; and to that extent he would frustrate the purpose of the legislation."

42. Arden LJ stated, at para. 49, that the decision turns "not on the complexity or controversiality of the development as such but on the nature of the remedial measures contemplated by such conditions."

43. The Secretary of State's decision in ***Gillespie*** was quashed. The Court of Appeal held that the Secretary of State erred in granting permission in assuming that a planning condition which required comprehensive investigation of the condition of the land (which was severely contaminated) provides "a complete answer to the question whether significant effects on the environment [are] likely." The planning condition "itself demonstrates the contingencies and uncertainties involved in the development proposal" (paragraph 40) and "when making the screening decision, these contingencies must be considered and it cannot be assumed that at

each stage a favourable and satisfactory result will be achieved" (paragraph 41). In the later case of ***Dicken*** (see below) Laws LJ said "the facts in ***Gillespie*** were very stark indeed. The development was certainly going to have environmental effects. Their extent was unknown; what would be required by way of remedial measures was also unknown. The Secretary of State sought to set in train an investigative and curative process, but did so by way of planning condition and not an EIA. It is, with respect, perhaps of little surprise that the decision was struck down".

44. These matters were considered again in ***R (on the application of Catt) v Brighton and Hove City Council*** [2007] EWCA Civ 298, where Pill LJ having reviewed ***Gillespie*** said:

> "31 …. In the present case, it would be ludicrous to ignore conditions imposed as to the frequency of football matches, the days on which they may be played and the music which may accompany them. An activity involving thousands of people which occurs daily has more effect on the environment than one which occurs on a limited number of occasions a year and for no more than a few hours on each occasion.
> 32. Similarly with traffic management measures, in considering the effect of the additional capacity of the stadium, the Council were not required to shut their eyes to the known effect of the existing development, including studies of the movements involved, the monitoring scheme operated by the club, the extent of parking on matchdays as compared with non-matchdays, or studies upon the number of additional cars likely to be approaching the stadium by reason of its increased capacity and the continuing role of the monitoring scheme in the new situation.
> 33. This is a very different development from that proposed in ***Gillespie***. Developments come in all forms and the approach to the screening opinion must have regard to the development proposed. There will be cases, such as Gillespie, where the uncertainties present, whether inherent or sought to be resolved by conditions, are such that their favourable implementation cannot be assumed when the screening opinion is formed.
> 34. On the other hand, there will be cases where the likely effectiveness of conditions or proposed remedial or ameliorative measures can be predicted with confidence. There may also be cases where the nature, size and location of the development are such that the likely effectiveness of such measures is not crucial to forming the opinion. It is not sufficient for a party to point to an uncertainty arising from the implementation of the development, or the need for a planning condition, and conclude that an EIA is necessarily required. An assessment, which almost inevitably involves a degree of prediction, is required as to the effect of the particular proposal on the environment, and a planning judgment made. (See also the judgment of Ouseley J in ***Younger Homes (Northern) Limited v First Secretary of State*** [2003] EWHC 3058 [2004] JPL 950 at paragraphs 59 to 62 citing Dyson LJ in ***R(Jones) v Mansfield District Counci***l [2003] EWCA Civ 1408.)
> 35. I repeat my statements in Gillespie, at paragraph 36, that the decision maker is not "obliged to shut his eyes to the remedial measures submitted as a part of the planning proposal", and that "in making his decision, the Secretary of State [the planning authority] is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision". Laws LJ was considering the facts in Gillespie and I do not consider he was asserting a general principle that, only when remedial measures are "uncontroversial", can they be taken into account when giving a screening opinion.
> 36. Having referred to ***Gillespie***, Dyson LJ, at paragraph 39 in ***Jones***, stated:
>
> > "The uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further

surveys are to be undertaken. Everything depends on the circumstances of the individual case."

37. When forming a screening opinion, the Council were not required to ignore either the conditions proposed to limit the scope of the development or the conditions providing for ameliorative or remedial measures. The consequences of providing the additional seating, and other changes, could not be predicted with certainty but, as Collins J noted, the Council had extensive knowledge and experience, supported by surveys, of the impact of existing football league and cup matches upon the environment. On the basis of that, and the studies into future impact, they were entitled to assess the likely impact of the additional capacity proposed in the context of the continuing ameliorative measures also proposed and to form the screening opinion they did."

45. Finally, the Court of Appeal looked at these issues again in ***Dicken & Ors (R on the application of) v Aylesbury Vale District Council*** [2007] EWCA Civ 851. This case involved the challenge of a grant of planning permission for three buildings for egg production, in effect a chicken farm, incorporating what is called the "oli-free roosting system", whose effect is to prevent the build up of chicken waste and to keep the environment free of odour, flies and vermin. Laws LJ said:

"12. As it seems to me, if a firm judgment can be made on the facts at the screening stage to the effect that there is no likelihood of significant environmental effect, so that in truth there is nothing of substance to argue about, then -- and strictly in such a case only - the local planning authority is entitled to arrive at that judgment, and accordingly conclude that no EIA is required …

14. In the present case the applicants say that the oli-free roosting system was unique, unavailable for public scrutiny and unspecified in any document at the time of the screening; and the farm at New Road, Dinton where it was already operating was only one-eighth the size of the proposed development …

15. The truth is that the oli-free roosting system is, as my Lord, Lord Justice Richards pointed out in the course of argument, this morning part and parcel of the proposed development itself. It is not in reality a separate or free-standing remedial system. Mr Clayton QC accepted as much. It is, as is demonstrated by the report of the Head of Planning prepared before the 15 September 2005 resolution, the very system in which the birds will be housed [see paragraph 35 of that report]. The Head of Planning had before him moreover a detailed report, the Hedwin Owen report, which describes the oli-free system. I accept … that a screening opinion is by its nature a more perfunctory affair than an EIA would be. Nevertheless, on the facts, in my judgment the local planning authority were entitled to conclude that no EIA was required and the judge was right to reject this first ground.

16. It is to be borne in mind that the test for the judicial review court is the irrationality test. Provided the local planning authority asked themselves the right question and arrived at an answer within the bounds of reason and the four corners of the evidence before them, then it seems to me their decision cannot be categorised as unlawful. Mr Clayton has been at pains to emphasise that the context of the issue here is one that engages the law of the European Union; that is of course right. But there are boundaries to the requirement for an EIA, set as surely by the Directive as by the Regulations. Much has been made of the suggested impact of EU law, but in my opinion I think there is a real risk of over-complicating what in essence is a relatively straightforward matter. If on the question whether the proposed development is likely to have significant environmental effects there is anything of substance to argue, then the process of the Directive and the Regulations requires democratic public participation in that argument. This is, of course, a very important legal requirement as Lord Hoffman's opinion in Berkeley demonstrates. But if in truth there is nothing of substance to dispute, having regard, it may be, to plainly effective remedial measures, whether or not part and parcel of the development itself, then as I see it there is no requirement for an EIA. This case,

as the LPA were entitled to find, is in the latter category. In short, they were entitled to conclude that there were no issues that required determination through the EIA process."

Timing of challenges to screening opinions

46. The House of Lords reasoning in ***R (Burkett) v Hammersmith and Fulham LBC*** [2002] 1 WLR 1593. has been held to apply. This means that time does not run from the screening opinion but only from the eventual issue of permission: see ***Catt*** in the Court of Appeal overturning Collins J. decision below (which was in line with Sullivan J.'s approach in ***R (Malster) v Ipswich Borough Council*** [2001] EWHC Admin 711). The Court of Appeal in ***Catt*** held:

"47. … the principle established in ***Burkett*** covers the present situation. Lord Slynn, in ***Burkett***, expressed concern about restricting the right of a citizen to protect his interests. It is the grant of planning permission which affects those interests, even if the grounds relied are broadly the same as those which would have been relied on to challenge the screening opinion. Following a screening opinion, planning permission may be refused or may be granted in a form different from that contemplated when the screening opinion was sought. I have no doubt that on occasions that occurs.

48. Ouseley J in ***Younger Homes (Northern) Limited v First Secretary of State*** [2003] EWCH 3058 [2004] JPL 950 also stated, obiter, at paragraph 84:

> "The real point was that the stage at which the claimant's rights were definitively at issue was the grant of planning permission, even though there were a number of steps in the decision- making process which had to be gone through for that permission to be issued. Some of those did have legal consequences akin to those attributed to the screening opinion here. But there was no certainty that the rights of those aggrieved would be affected until the grant of planning permission by the local authority in Burkett or by the First Secretary of State here."

49. I agree with that approach. To deprive a citizen of the right to challenge a planning permission by way of judicial review would be a major and a retrograde step. The screening opinion certainly has a formality and status in the statutory planning scheme. It may itself be challenged and that may be the appropriate course in some situations. However, the opportunity to challenge does not affect the right to challenge by judicial review a subsequent planning decision. The opinion does not create, or inevitably lead, to a planning permission and the right to challenge a subsequent planning permission relating to the same proposed development is not, in my judgment, defeated by the passage of time between the screening opinion and the planning permission ... "

The meaning of "waste disposal" in the EIA Directive

47. The issue that has arisen is whether the references to "waste disposal installations" in Council Directive 85/337/EEC of 27 June 1985 (as amended by Council Directive 97/11/EC of 3 March 1997) on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive") includes installations solely or primarily used for waste recovery, rather than disposal.

48. In the EIA Directive in Annex I:

i. point 9 refers to "waste disposal installations for the incineration, chemical treatment as defined in Annex IIA to Directive 75/442/EEC under heading D9, or landfill of hazardous waste (i.e. waste to which Directive 91/689/EEC applies)".
ii. point 10 refers to "Waste disposal installations for the incineration or chemical treatment as defined in Annex IIA to Directive 75/442/EEC under heading D9 of non-hazardous waste with a capacity exceeding 100 tonnes per day".

49. Annex II of the Directive cites, in point 11 (b) “installations for disposal of waste (projects not covered in Annex I)”.

50. There are other references to waste in the EIA Directive:
    i. Point 3 of Annexes I and II deal with radioactive waste;
    ii. Point 13 on Annex I and point 11(c) of Annex II deal with waste water treatment plants.

51. And there are some references to recovery operations:
    i. Point 11(h) of Annex II refers to “Installations for the recovery or destruction of explosive substances”;
    ii. Point 4(d) of Annex II refers to “Installations for the smelting, including the alloyage, of non-ferrous metals, excluding precious metals, including recovered products (refining, foundry casting, etc.).

52. Further there are other references that could (see below) incorporate recovery operations:
    i. industrial installations for the production of electricity (Annex II, point 3 (a));
    ii. industrial estate development projects (Annex II, point 10(a));
    iii. urban development project (Annex II, point 10(b)).

53. In ***Edwards*** (see above) at first instance the Judge held that the change in fuel used in the kiln could not in itself be a “project” “for the disposal of waste” under Annex II since, on the evidence before him, the partial change in fuel had no significant adverse effects on the environment. He added that the project, if any, was one for waste recovery rather than waste disposal, a distinction which he thought important although not expressly drawn in the EIA Directive but could be imported from other Community provisions, including the Waste Framework Directive and Community and domestic jurisprudence.

54. The Court of Appeal did not express a concluded view on the distinction between waste recovery and waste disposal under the EIA Directive. However, Auld LJ did comment obiter that a commonsense as well as purposive interpretation supported the view that there was such a distinction under the EIA Directive.

55. However, these views must be read in the light of subsequent ECJ case-law:

56. Case C486/04 ***Commission v Italy*** [2006] ECR I-11025 concerned proceedings brought under Article 226 of the EC Treaty by the Commission which argued that the Italian Republic had failed to fulfil its obligations under the EIA Directive. It alleged that, by authorising the operation of recycling plants without subjecting them to EIA, Italy had committed two infringements: (i) in respect of its national legislation generally, which as it exempted from EIA requirements premises carrying out the recovery (valorización) of waste authorised by a simplified procedure; and (ii) a specific infringement related to a facility, located in Massafra in the province of Taranto, for generating electricity from the incineration of combustible material derived from waste and biomass. The relevant part of the judgment is as follows:

    “39. … the Court must first determine the legal scope of the concept of ‘disposal of waste’ for the purpose of Directive 85/337 in the light of the same expression used in Directive 75/442.

    40 It is common ground that Directive 85/337 does not define the concept of waste disposal, Annexes I and II to that directive merely referring to some waste disposal installations. Furthermore, it is also common ground that Directive 75/442 does not include any general definition of the concepts of waste disposal and recovery, but merely refers to Annexes II A and II B to the directive, in which various operations falling within the scope of those concepts are listed (see Case C-6/00 ASA [2002] ECR I-1961, paragraph 58).

41 The essential characteristic of a waste recovery operation, such as is apparent from Article 3(1)(b) of Directive 75/442 and from the fourth recital to that directive, is that its principal objective is that the waste can serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources (see, inter alia, ASA, paragraph 69; Case C-458/00 Commission v Luxembourg [2003] ECR I 1553, paragraph 36; and Case C 103/02 Commission v Italy [2004] ECR I-9127, paragraph 62).

42 That characteristic is extraneous to the consequences which the waste recovery operations as such can have on the environment. As the Advocate General pointed out in paragraphs 54 to 56 of his Opinion, those operations, like those for waste disposal, are capable of having significant effects on the environment. Moreover, Directive 75/442, in Article 4, obliges Member States to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment.

43 Lastly, it must be noted that where the Community legislature considered it necessary in Directive 85/337 to establish a link with Directive 75/442, it did so expressly. That applies, in particular, where, in points 9 and 10 of Annex I to that directive, it refers to chemical treatment as defined in Annex II A to Directive 75/442, under heading D 9. However, no reference of that nature is made concerning waste disposal itself.

44 Therefore, it must be held that the concept of waste disposal for the purpose of Directive 85/337 is an independent concept which must be given a meaning which fully satisfies the objective pursued by that measure, recalled at paragraph 36 above. Accordingly, that concept, which is not equivalent to that of waste disposal for the purpose of Directive 75/442, must be construed in the wider sense as covering all operations leading either to waste disposal, in the strict sense of the term, or to waste recovery".

57. On 5 July 2007 the ECJ (Second Chamber) gave judgment in Case C-255/05 ***Commission v Italy***. These were proceedings under Article 226 EC brought by the Commission and alleging failures on the part of the Italian Republic to subject a "third line" of an incinerator belonging to ASM Brescia SpA to an EIA under the EIA Directive. The Court applied, and endorsed, its earlier decision in Case C-486/04 ***Commission v Italy*** to the effect that an installation carrying out "waste recovery" operations is to be regarded as involving a "waste disposal" operation for the purposes of the EIA Directive notwithstanding the differing terminology of the Waste Framework Directive. The United Kingdom intervened in this case to support Italy.

58. Similar issues arise in the forthcoming Case C-247/06 ***Commission v Germany***. This concerns the licensing of furnace plant for wood gas in Germany. The original licence application in that case did not include any wood classified as hazardous for the purposes of Council Directive 91/689/EC of 12 December 1991 on hazardous waste. During that licensing process, it was determined that the project did not require an EIA as it was not likely to give rise to any significant licensing effects. Later the application was amended to include hazardous waste. The Commission alleges that no re-assessment was undertaken as to whether EIA was required nor was there any further public participation under the licensing procedure. The issue of whether Case C-486/04 ***Italy v Commission*** was correctly decided again arises. The United Kingdom have intervened to support Germany.

SEA – the next big thing?

59. There are no English cases yet on the SEA Directive.

60. However, the SEA Directive and the Northern Ireland transposing regulations were recently considered in ***R (on the application of Seaport Investments Limited and others)*** [2007] NIQB 62, 7 September 2007.

61. The background to this case was an application for judicial review concerning the transposition of the SEA Directive. Seaport Investments Limited, the first applicant, was a development company based in County Antrim, Northern Ireland. The draft Northern Area Plan 2016 was published on 11 May 2005 covering four administrative areas. It was circulated in April 2004 prior to the coming into operation of the Northern Ireland Regulations transposing the SEA Directive and was prepared under the previous regime. Accompanying the draft Plan and described as "Technical Supplement 11" was a document also described as a "Strategic Environmental Assessment". The second applicants were Magherafelt District Council, and five property development companies operating in Magherafelt district. The draft Magherafelt Area Plan 2015 was published on 24 April 2004 with a 6 week period for consultation. An environmental appraisal was published as a technical supplement to the draft plan on 6 may 2004. The 6 week consultation period ended on 9 June 2004 before the transposing Regulations came into operation. The respondent decided to complete an environmental assessment in accordance with the transposing Regulations. On 10 May 2005 the earlier environmental appraisal was withdrawn and a draft plan revision statement published. On 24 May 2005 an environmental report was published and a consultation period ended on 5 July 2005.

62. Both plans were made by the Department of The Environment in Northern Ireland. There was no designated authority to be consulted on the environmental effects of implementing plans and programmes when those plans and programmes had been drawn up by the Department. The Department pointed to its wide environmental role, and that it had the input of its Environment Heritage Service with the requisite expertise and contended that it is not required to create a new environmental authority for consultation purposes, and that the principle of subsidiarity permits the State to meet its environmental responsibilities within the existing structures.

63. The court rejected this argument. The applicant contended successfully that the Department had not adequately transposed Article 6.3 (transposed by Regulation 4). It was not sufficient for different divisions of the Department to carry out one of the roles. Weatherup J firmly rejected the argument on subsidiarity:

> "The margin of appreciation accord to Member States must be consistent with securing the aim of the measure and observing the requirements of the Treaty. I am satisfied that the aim of the measures relating to the consultation process is directed to achieving an input from a consultation body which has sufficient expertise and which is independent of the body responsible for the preparation of the plan."

64. Secondly, the applicants argued that Article 6.2. had not been adequately transposed by reg. 12, as appropriate time-frames were not set in the Regulation which the SEA Directive required. Weathrup J relied on the guidance issued by the Commission which stated that the "timeframe needs to be laid down in legislation" and on Case C-6/04 ***Commission v UK*** where the ECJ held that the UK legislation implementing the Habitat's Directive was "so general that it does not give effect… with sufficient precision and clarity to satisfy fully the demands of legal certainty". Weathrup J stated that appropriate timeframes had to be set for these reasons and that Regulation 12 had not transposed the SEA Directive correctly.

65. Thirdly, in the circumstances of the case, Weathrup J agreed that there had not been substantial compliance with the requirements of the contents of the environmental report. Weathrup J applied ***Berkeley v Secretary of State for the Environment*** (see above) and did not seek to examine the fine detail of the contents but to seek to establish whether there had been substantial compliance with schedule 2. He sets out in summary detail why the draft Northern Area Plan was not in substantial compliance [paragraphs 27-34] with specific requirements. He repeated the

exercise for the draft Magherafelt Plan [paragraph 35-36]. His analysis focused on which particular paragraphs were not sufficiently addressed and held that the non-technical summary required by paragraph 10 was inadequate in both cases

66. Lastly, Weathrup J agreed that the sequencing of draft plans and the environmental reports were not in accordance with the Scheme of Articles 4 and 6 of the SEA Directive and regulations 11 and 12 of the transposing Regulations. Weathrup J placed weight on the Commission guidance in that the environmental assessments should "influence the way the plans and programmes themselves are drawn up" in holding that the scheme of the SEA Directive and the transposing Regulations "clearly envisages the parallel development of the environmental report and the draft plan with the former impacting on the development of the latter throughout the periods before, during and after the public consultation". This must be at a stage that is sufficient "early" to avoid in effect a settled outcome having been reached and to enable the consultation responses to be capable of influencing the final form, and further it must also be "effective" so that it does in the event influence the final form. Whilst the scheme does not demand simultaneous publication, it contemplates the opportunity for concurrent consultation on both documents.

67. In the case of the Northern area, he held that it was apparent that the development of the draft plan had reached an advanced stage before the environmental report had commenced. The environmental appraisal under the previous legislation does not comply with the requirements for an environmental report under the transposing Regulations. This was not in accordance with the scheme of Articles 4 and 6 of the SEA Directive and the transposing Regulations. In the case of the Magherafelt area, in effect the draft plan issued for consultation in 2004 and the environmental report issued for consultation in 2005 and there was no parallel consultation on the plan and the report. This was not in accordance with the scheme of Articles 4 and 6 of the SEA Directive and the transposing Regulations.

Aarhus and EIA

68. Note that the amendments to the EIA Directive effected by Directive 2003/35/EC included the insertion of Article 10A which transposes Article 9 of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). The EU is a signatory to and has ratified the Aarhus Convention. One of the requirements of Article 9, also now contained in Article 10A of the EIA Directive, is that access to environmental justice should not be "prohibitively expensive". Aarhus is growing in influence in EIA cases in relation to costs issues: see R. ***(on the application of Burkett) v Hammersmith and Fulham LBC (Costs)*** [2004] EWCA Civ 1342; [2005] C.P. Rep. 11; ***R (England) v LB of Tower Hamlets*** [2006] EWCA Civ 1742 and ***River Thames Society v First Secretary of State*** [2007] J.P.L. 782. The Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006 S.I. 3295, which came into force on 15 January 2007 transposed Article 10A of the EIA Directive.

UKELA WORKING PARTY INTRODUCTION – ANDREW RYAN

It is with great pleasure that I take over the role of Convenor for the UKELA Northern Ireland Working Party. I would first like to take this opportunity to thank Dr Brian Jack for his stewardship of the Working Party over the last few years and I hope that the Working Party can continue to take an active role in shaping the future of environmental governance in Northern Ireland.

A few words on myself – I am a solicitor specialising in environmental law at Carson McDowell Solicitors based in Belfast. I am fairly new to the scene in Northern Ireland, having previously practised environment law at CMS Cameron McKenna in London, until moving to Belfast in 2006. Having been familiar with the regulatory culture in England and Wales, it would be fair to say that there is a marked contrast in both the style and quality of environmental regulation in Northern Ireland. Whilst the letter of the law is generally fairly similar to that in England and Wales (with some notable exceptions, including the continued absence of an equivalent to Part IIA of the Environmental Protection Act 1990), environmental governance is a very different creature and in many respects falls short of the standard experienced in Great Britain.

The most notable difference between the regulators, and arguably the root cause of problems in NI regulation, is that the principal regulator – the Environment and Heritage Service (EHS) is not an independent body but remains part of the Department of the Environment (DOE). From both an objective and operational point of view, this has significant implications for environmental governance in Northern Ireland. The shortcomings of the current structure were highlighted in the recently published report – "Foundations for the Future, The Review of Environmental Governance" produced in May 2007. This report represents the culmination of a number of years of preliminary reports and consultations on the way in which environmental regulation should be conducted in Northern Ireland. One of the principal findings of the report was that the current structure is "not fit for purpose" and "is not capable either of resolving the environmental legacies of the past, or of responding to present and emerging environmental pressures".

A primary recommendation of the Review is that the regulatory and enforcement functions of the DOE should be separated into an independent environmental protection agency along similar lines to the Environment Agency and SEPA in Great Britain. It is this recommendation that is the current focus and priority for the work of the Northern Ireland Working Party. The Working Party recently published its views and comments on the Review (a copy of which is available on the UKELA website) and the Working Party thoroughly supports and endorses this recommendation of the Review.

In order for the regulatory environment to improve in Northern Ireland, it is absolutely critical that an independent regulator is created. This is necessary to provide the independence and transparency that is a fundamental principal of good environmental regulation. A credible regulator needs a degree of transparency that cannot be afforded within a ministerial department, where policy-making processes are, by necessity, confidential. Furthermore, the accountability of Departmental civil servants to the Minister arguably stifles regulatory decision making, since controversial decisions can have political consequences.

No one would claim that the Environment Agency or the Scottish Environmental Protection Agency were perfect examples of independent environmental regulators. However, I doubt that anyone would argue that their functions should be moved to central government. Of course, the creation of an independent EPA in Northern Ireland would not resolve some of the current problems overnight. However, with the re-introduction of devolved government to Northern Ireland and the timely publication of the Review, a significant opportunity has now arisen to progress this issue and start working towards the creation of an independent EPA in Northern Ireland. If this current opportunity is lost, then it is highly unlikely that any

real and beneficial change will occur in environmental governance in the near future. It is for this reason that the Northern Ireland Working Party has made the issue of improving environmental governance its top priority for the year ahead.

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RIGHTS OF WAY - POWER GIVEN TO NATIONAL PARKS TO MAKE TRAFFIC REGULATION ORDERS

From the 1st October 2007 a new power has been given to National Park Authorities to make traffic regulation orders on certain classes of roads (rights of way and unsurfaced roads) within a National Park.

The last few years has seen a growing debate about the appropriateness and sustainability of the use of byways by motor vehicles for recreation. Some National Parks have attracted considerable numbers of recreational off-road motor vehicles. The government considers that in many cases a level of recreational use that may be acceptable in some areas is inappropriate in National Parks, which are designed to conserve and enhance natural beauty, wildlife and cultural heritage as well as enabling people to enjoy their special qualities.

Government research indicated that while the existing byway network can in general support current levels and types of motor vehicle use, there can be difficulties on particular byways.

Most people who responded to public consultation supported the new powers.

The powers are set out in Section 72 of the Natural Environment and Rural Communities Act 2006 and are part of a package of measures introduced to control excessive or inappropriate use of vehicles away from the ordinary road network.

The government has issued Guidance for National Park Authorities making Traffic Regulation Orders under section 22BB Road Traffic Regulation Act 1984

The Regulations and Commencement order can be found at www.opsi.gov.uk/si/si2007/20072542.htm

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UKELA MEMBER PROFILE – PHIL CUMMING

Phil Cumming is the Sustainability Manager for the London Organising Committee of the Olympic Games and Paralympic Games (LOCOG), having previously spent a little over 9 years in the environmental consultancy sector providing the complete delivery of a range of environmental projects across a wide range of industrial sectors for major private and public sector organisations, at home and overseas. He has been an active member of UKELA since 1999 and is currently Secretary to the Waste Working Party. Out of work hours he is either kayaking or trying his best to escape to the hills.

The e-law 60 second interview

The questions:

What is your current role?

As Sustainability Manager for LOCOG my role is to develop and manage specific elements of the London 2012 Sustainability Programme – that is to operate sustainable and environmentally responsible Games.

How did you get into environmental law?

I realised that environmental compliance was going to have a significant role to play in my career at a very early stage and was lucky enough to have some very good lecturers for both my first degree and Masters. Having been given a really good grounding in environmental law I found myself being pushed forward as an expert almost from the outset – particularly in respect to practical interpretation of very messy pieces of legislation – anyone remember the Special Waste Regulations?

What are the main challenges in your work?

Where do I start? London 2012 is a continuously evolving project presenting significant challenges and opportunities, which will require the use of all my skills and more. Sustainability itself is a rapidly evolving discipline and as we move from preparing the Games, to staging them, I will need to be able to respond to new situations and take advantages of new practices.

What environmental issue keeps you awake at night?

Again not an easy one to answer given my role – I guess if I had to choose one from a societal point of view it would have to be waste. We live in a very wasteful society and much more can be done to avoid unnecessary waste which would reduce demand for raw materials and ultimately reduce carbon emissions. The law does not always help and I find myself wondering whether the principal aim of environmental law – to protect human health and the environment – has become a little lost in recent years.

What's the biggest single thing that would make a difference to environmental protection and well-being?

We all need to reduce our need for materials and live more sustainable lifestyles – waste prevention is the most important aspect of waste management in terms of reducing carbon emissions and where more efforts should focus.

What's your UKELA working party of choice and why?

I have been involved with a number of Working Parties during my time with UKELA, but given that waste management has and continues to be a significant part of my job I have been most active in the Waste Working Party and have been its Secretary since late 2005.

What's the biggest benefit to you of UKELA membership?

The chance to network and keep up to date with emerging issues in environmental law – or indeed whether we are any nearer to resolving the definition of waste issue which I am sure will continue to run and run for many years to come. I also hope, being a non-lawyer, that I offer a lot given my practical experiences of acting as both consultant and in-house manager.

UKELA WILD LAW WORKSHOP 21-23 SEPTEMBER 2007

WILD LAW: A RESPONSE TO CLIMATE CHANGE

Summary note by Simon Boyle of Argyll Environmental and UKELA's Council.

The focus of this year's workshop was climate change and the way in which Wild Law could help in tackling this complex problem. The purpose of this article is to give UKELA members some insight into proceedings and encourage members to consider enrolling for Wild Law 2008, scheduled for next autumn.

Background

UKELA held the first Wild Law conference in November 2005 and the second, in conjunction with the Environmental Law Foundation (ELF) and the Gaia Foundation, in November 2006. Both were traditional conferences at which about 200 people listened to leading figures such as Michael Meacher and Satish Kumar.

The papers from both conferences have been published by Environmental Law & Management (ELM) (Volume 18 Issue 1 and Volume 19 Issue 2) and the 2007 papers will be published by ELM early in 2008. UKELA is immensely grateful to Rachel Caldin for ELM's continued support.

The 2006 conference was followed by a weekend workshop for about 20 people to take their ideas further, based at Arundel Youth Hostel. It was arranged at the instigation of Cormac Cullinan, the South African instigator of Wild Law who set out the concept in his book "*Wild Law – A Manifesto for Earth Justice*" [9]. Much of the time was spent outside to allow participants direct communication with nature.

The workshop proved highly effective, particularly in allowing close links to be forged between those who attended. Consequently when the Wild Law planning group (with representatives from UKELA, ELF and Gaia) met early this year it was decided to hold a similar weekend event on a slightly larger scale.

It was considered that 40-50 would be the optimum size – any larger and the intimacy of the group is lost. It was also crucial to find the right venue which could provide good facilities as reasonable cost with access to good countryside suitable for outdoor activities.

We had some difficulty in finding the right place, but our Member Support Officer, Alison Boyd, had the excellent suggestion of Lea Green Development Centre near Cromford in the Peak District. This was checked by UKELA's Executive Director, Vicki Elcoate and the event facilitator, Liz Rivers, and found to be ideal for our purposes; an old stately home with superb grounds owned by Derbyshire County Council used primarily for educational purposes.

The group's next tasks included the selection and invitation of speakers, the preparation of the course programme, and publicity. To help pay for our speakers' expenses (with two from overseas) we sought charitable sponsorship. UKELA member Deborah Smith worked hard on this and successfully secured £2,000 sponsorship from the Body Shop Foundation. We are extremely grateful for their support.

The Weekend Workshop

Forty four people attended from eleven countries including Kenya, South Africa, the USA, Italy, Sweden and Australia; and a variety of backgrounds: environmental lawyer; student; government policy maker;

[9] Published by Green Books 2003

regulator; environmental NGO; community group; academic; philosopher; scientist; and journalist. All stayed in the residential accommodation except a hardy few (including the author) who camped in the extensive and beautiful grounds.

Friday evening lecture: Cormac Cullinan – Getting Real About Climate Change

Cormac is the author of *Wild Law* (see above), chief executive officer of *En*Act International, an environmental governance consultancy headquartered in Cape Town, South Africa, and a director of Winstanley and Cullinan Inc, South Africa's leading specialist environmental law firm.

In this lecture he postulated the Universe as inherently creative and self regulating. What was crucial was not the individual parts of the universe but the relationships between them, both between living beings and those with its other components. These relationships were constantly changing but maintained a balance which could be compared with the movement in a dance.

All entities within the Universe can be considered to have their own identities (holons) while at the same time being part of a greater whole (the holarchy). For example, a cell in one's liver can be considered individually and can regulate its own chemistry, but is also part of a greater whole, the liver. If any one cell starts to behave in a dominant way, say by reproducing itself, this could lead to a cancer which might be fatal for the liver as a whole. If the liver is to remain healthy its response must therefore be either to destroy the 'rebel' cell or bring it back into correct order.

Many scientists now regard the Earth itself as a holarchy, a living super organism that regulates both its own chemistry and climate to remain benign for the life forms that populate it. This is of course the Gaia theory first proposed by James Lovelock.

Thus we can see that our species, and all others, needs to play its proper role to enable the Earth (the holarchy) to stay in a healthy state.

Through rapid population growth and industrialisation, humanity is now destroying many of these relationships so causing the overall health of the Earth to deteriorate. We have to realise that if man tries to dominate the Earth and sees other species and the natural environment merely as 'resources' for human exploitation our species will be the equivalent to a cancer in the body.

It is an illusion to see human beings as somehow aloof and separate from the natural world. Our ancestors certainly had a close affinity with nature and lived their lives with a deep understanding of it. It

is essential that we rediscover this connection and relearn that all things are connected and that our survival as a species is inextricably dependent upon a healthy Earth.

Lawyers need to realise that each holon needs certain rights if it is to survive. But at present only humans have legal rights. We need to extend rights to all members of the Earth Community which, to quote Thomas Berry,[10] is made up of "a communion of subjects rather than a collection of objects".

On climate change the first task is to diagnose the cause of the problem. Only when you have identified the cause can you begin to work out the cure. The root causes of climate change are the myth of superiority and the belief that we can play to our own rules (principally economic) without regard to the laws of the Universe. We have come to believe that more is better and that we can consume indefinitely. This results in many symptoms of malaise - one of these being climate change. The current thinking is that technology will provide the cure but again this is part of the illusionist thinking. Only when we realise that we need a paradigm shift to one where the Earth and the human members of the Earth Community are properly respected, can we really start to get to grips with climate change.

To achieve this requires stronger local democracies with a closer affinity with their local environment. We need to shorten the distance between cause and effect, and move away from decision making by central government or large corporations which have no empathy with the environment that is affected by their decisions.

This will not be easy to achieve and big ideas will be needed. But the prize of success will be our species' continued membership of the Earth Community.

Speakers left to right: Brian Goodwin of Schumacher College; Elizabeth Rivers, environmental mediator; Cormac Cullinan, South African environmental lawyer and author of Wild Law; Andrew Kimbrell, US environmental lawyer; Peter Roderick of the UK Climate Justice programme

Saturday Morning Lectures

Andy Kimbrell – Halting the Global Meltdown: Can Environmental Law play a Role?

Andy is a public interest attorney, activist and author. He has been involved in public interest legal activity in numerous areas including technology, human health and the environment. After working for eight

[10] Thomas Berry is a Catholic monk, philosopher, cultural historian and author. He lives in the USA and is the author of several books including *The Great Work*. One of his central arguments is: "we need legal structures and political establishments that will know our way into the future is not through relentless industrial development but through the living forces that brought us into being and are the only forces that can sustain us in the coming centuries" (Foreword to 'Wild Law' by Cormac Cullinan)

years as the Policy Director at the US Foundation for Economic Trends he established the International Centre for Technology Assessment in 1994 and the Center for Food Safety in 1997. He is also a founder member of the Greenhouse Crisis Foundation**.** In 1999, with Joseph Mendelson, he started the action which led to the Supreme Court decision of *Massachusetts v Environmental Protection Agency*. This has been described as the most important litigation related to climate change to date.

In his lecture Andy largely departed from his written paper (to be published in *Environmental Law and Management*). The following is based upon the lecture given.

There is a Chinese Proverb which says that unless you change direction [then] you are likely to end up where you are heading. This fairly accurately describes the position we are now in. We know that we are destroying the natural systems of the Earth, with Intergovernmental Panel on Climate Change (IPCC) scientists telling us we need to act urgently if we are to escape the worst ravages of climate change. But most politicians and society at large seem incapable of putting into effect the necessary actions.

Some explanation for this incapacity for action can be seen if we consider the condition of our society and indeed our age.

There are in effect three milieu that humans have evolved through:

The first was that of **nature** when our ancestors were hunter gatherers and had a deep affinity with the natural environment. We are fortunate that a few indigenous peoples remain still able to teach us how we can connect with the natural world.

As civilisation began so mankind advanced into the second milieu, that of **society**. Classicism and the great works of art and music are amongst its products.

As we moved into the industrial age we entered the third milieu which can be termed the **technological** milieu.

This milieu is a dangerous one because we have failed to learn how to master the technology we have created and are allowing it to destroy society. If you look for it you will quickly see the evidence everywhere. Go for a walk round your local streets and you will see the dim blue lights coming from the homes where people are glued to their computer screens. We hear how children rarely play in the local woods or fields as they did just a generation ago. Now they are all at home playing computer games.

Almost every one of us has become entirely dependent upon these technological crutches. How many of us panic when we realise we have left home without our mobiles or Blackberrys? How would we cope at work without our computer or at home without our TV or phone?

Enslaved as we are by technology we now foolishly believe that it can save us from the ecological meltdown that has already begun. We have turned to the god of technology and there we seek salvation.

But technology has been the main cause of environmental destruction. It is a power that we have been given but we have not been wise enough to use constructively. Instead of having a technology that fits with nature and society we have been trying to change nature and society to fit the technology.

For example we are using biotechnology, genetic engineering and nanotechnology to ‘improve’ on nature so that it better fits with our requirements and helps towards our endless quest for greater efficiency.

We have also taken the language and rules from the boardroom and applied those to nature. The language of the boardroom is that of exploitation, competition and profit. But that is not how nature works.

The workings on nature are based principally on cooperation rather than competition (on this Darwin made his main mistake). We need to look more closely at nature and take heed of the lessons she teaches – to learn to apply our technology in accordance with the laws of nature. As lawyers, we need to examine the principles we already have that might be used to curb environmental degradation.

The doctrine of Public Trust prohibits the total exploitation of natural resources. The concept of Guardian ad Litem could be expanded so that the interests of other species who cannot speak for themselves can be legally represented in court by the guardian.

An inevitable consequence of a failure to change direction will be the gradual exhaustion of natural resources. Natural resources that were once plentiful will become increasingly scarce and this will lead to competition. Both World Wars and the Gulf Wars were wars of competition, and more will follow.

So we need to step back and take a long hard look at our technology and where it is taking us. If that is not a place we want to go then we must look to take those first steps necessary to alter our direction.

Prof Brian Goodwin – The Great Work of Transformation

Brian Goodwin teaches Holistic Science at Schumacher College in Devon. His books include "*How the Leopard Changed Its Spots: the Evolution of Complexity*" and "*Signs of Life: How Complexity Pervades Biology*". His most recent book is "*Nature's Due: Healing Our Fragmented Culture*"[11].

In early times man had an intimate relationship with nature. Many early peoples saw the Earth as the 'mother earth' which was at all times to be loved and revered. There were also close bonds with the animals which were hunted and a reverence for the food that was to be eaten.

As man formed large societies he became far more exposed to disease, with episodes such as the Black Death. Thinkers such as Francis Bacon then saw nature as something fearful which man had to dominate and control. There are many examples of this in history and is perhaps epitomised by the 'taming' of the North American wilderness by the European settlers in the eighteenth and nineteenth centuries.

Our current mindset is still based on fear of nature which, through our urban and technologically base lifestyles, has become alien to us.

Through an understanding (for example through the Gaia theory) and love (from many of our poets and artists) we need to move from this fear-induced mindset to a love of nature, in which we seek to participate rather than control.

Moving from the one mindset (centred on fear and control of nature) to the other (based on participation with nature) is a dialectical process – where an individual will move between states. If you think back you will find times when your mind was fully in this 'participation circle' perhaps especially during your childhood. Through practice and an appreciation of the dynamics involved it will be possible to 'move' primarily or even permanently from the circle of control to the circle of participation. As in all things it requires time for quiet reflection in nature, and a willingness to follow inner feelings.

[11] published by Floris Books in June 2007.

Peter Roderick, Co-Director, Climate Justice Programme – Climate Change in the Courts. Summary of Cases

Peter Roderick is the co-Director of the international and collaborative Climate Justice Programme which supports and encourages enforcement of the law to combat climate change, and is hosted by Friends of the Earth International (www.climatelaw.org).

There have now been at least seven important judgements in cases about climate change. The best known is *Commonwealth of Massachusetts et al v EPA* in which, by a five to four majority the US Supreme Court held that carbon dioxide was capable of being an air pollutant under s 202(a)(1) of the Clean Air Act. The case was a major blow to the Bush Administration's position on climate change (essentially that climate change would be resolved through the market and technological innovation).

There are also a number of on-going cases including the well publicised case in which the State of California sued six of the biggest US vehicle manufacturers including General Motors for damages. The Complaint issued in Sept 2006 states that "Global warming has already injured California, its environment, its economy, and the health and well-being of its citizens." It also cites the reduction of the Sierra snowpack which provides 35% of California's water supplies. The case was dismissed in September 2007 and an appeal is expected.

The IPCC Third Assessment Report (2001) stated that they were 66-90% confident that most of the warming during the second half of the 20th century was due to human activities. This was sufficient to enable the building of a climate change case based on temperature-proximate impacts. The Fourth Assessment Report (Feb 2007) said this level of confidence had increased to at least 90%, and so it should be relatively straightforward for a plaintiff to prove that mean global temperature increases are mostly due to human activities, notably CO_2 emissions.

The main hurdle for any plaintiff is of course to show that the CO_2 emissions from the defendant were of a sufficient contribution to the global total.

Once you move away from direct temperature increases and look at other effects of climate change such as flooding, storms and hurricanes then the science is less developed. For example, it could be very difficult to prove (even on the balance of probabilities) that a particular storm which damaged a property directly resulted from man made carbon dioxide emissions and not due to some unrelated local condition or natural variability.

However, here, climate change scientists are making good progress on the science of attributing the consequences of human greenhouse gases in the environment; scientists refer to this branch of climate change science as 'detection and attribution'.

Often it is a case of realising the limitations of what scientists can predict and to ask the right questions. For example, not to ask 'was the hurricane caused by global warming?', but rather 'to what extent did global warming contribute to the risk of the hurricane?'

Saturday Afternoon

The afternoon consisted of two sessions. The early part was spent walking in the surrounding Peak District to allow participants to 'tune in' to the natural world and reflect on the ideas behind Wild Law and how it could be used in practice. The scenic itinerary included mature woodland with watercourses.

In the late afternoon delegates had a number of options including: working on the mock trial (see below) and assisting counsel in building their cases, and a general Open Space session in which to talk through any ideas they had.

Sunday Morning

Wild Law Mock Trial

The purpose of this exercise was to test Wild Law principles in a simulation of traditional adversarial court proceedings using a case linked to climate change.

The preparation for all the materials for the mock trial was carried out by Melanie Strickland during her summer holidays following her Law Society Finals. Melanie is now a Trainee Solicitor at Wragge & Co.

The case centred on the topical issue of the threat to endangered orang-utans posed by palm oil plantations in the state of Sabah in Malaysia. Palm oil is increasingly being grown as a biofuel. The plaintiff (an NGO acting on behalf of a population of orang-utans) sought an injunction on the basis that the proposed plantation would destroy a habitat vital to their survival.

The defendant's case was that palm oil production was a vital part in the global strategy to tackle climate change, the EU and many states, having set biofuel targets as part of their renewable energy targets. (In the case of the EU, the Commission has proposed a binding target of 20% of energy from renewables by 2020 of which at least half must come from biofuels.)

A hypothetical constitution for the state of Sabah had been drafted by Cormac Cullinan based on key Wild Law principles:

- The human species is part of the community of life on Earth - 'the Earth Community' (and by implication is not ruler or even steward of the Earth).
- Every form of life is unique and is entitled to rights irrespective of its perceived 'worth' by humans.
- All species have the right to exist and a place (habitat) where they can exist.
- The rights of each member of the Earth Community are limited by the rights of other members and to maintain the health, integrity and well-being of the Earth Community as a whole.
- Human affairs must be conducted in such a manner as to enable humans to live in a harmonious relationship with both humans and non-human species.
- The current human population has a responsibility to future generations of both humans and other species.
- The human species has a responsibility to protect the environment as a whole and to maintain and protect biological diversity
- Natural resources must be used in a prudent manner which ensures the preservation of ecosystems and other species

Using these principles the plaintiff argued that the interests of the orang-utans were paramount and outweighed the human interests concerning the production of bio-fuels which were intended to preserve the unsustainable lifestyles of the industrialised nations.

The defendant's argument was primarily based on the low cost of producing biofuel from palm oil and that such fuels were currently the only renewable option for the transport sector. The plaintiff countered that the production of bio fuel merely provided additional fuel for a world economy that had an unquenchable thirst for liquid fuel. The availability of bio fuel would not therefore have the slightest impact on demand for fossil fuels, the production of which would only cease when the oil wells ran dry.

The judge found in favour of the plaintiff and granted an injunction to prevent the defendant logging the forest to produce palm oil. He held that the defendant's proposed action would be in breach of a number of the constitutional provisions- especially the right to habitat.


The mock trial case study team.

The case study helped show the fallacy of setting bio fuel targets which many countries have adopted. As the world economy reaches peak fossil fuel output all biofuels will do is provide additional fuel supplies to meet burgeoning demand. All biofuels will do is increase food prices (as existing farmland is switched from food production to bio fuel production - corn prices in Mexico recently increased by 80%) and critically accelerate the destruction of the remaining rainforests, especially in Indonesia, China and Brazil.

Conclusion

Feedback from the delegates was very positive and overwhelmingly rated the event excellent or good. Here are some of the comments:

- "All incredibly useful. The walk was essential in giving us the opportunity to connect with the beautiful surroundings."
- "just wonderful and very enriching"
- "I found the talks by [the speakers] very interesting and inspirational"
- "Well done. Great learning, make the ideas into law and make it work to save the planet."
- "my expectations have been exceeded"

Future Wild Law work

As a result of the success of the three Wild Law events to date, the pertinence of the issues, and the urgency of the need to find enduring and effective answers UKELA is keen to support further work to stimulate discussion on Wild Law and is planning further activities for 2008.
There are three main tasks:

1. Simon Boyle will prepare the papers from the 2007 workshop for a Wild Law themed edition of Environmental Law and Management.

2. We plan to gather examples of Wild Law in practice from across the globe and produce a paper which includes cases and other legal examples. This paper will be finished by next September so that we can present the findings at the next Wild Law event organised by UKELA. A volunteer is needed to help with this task. You would be working with internationally renowned lawyers including Cormac Cullinan (author of Wild Law) and Andrew Kimbrell (of the Massachusetts case). If you are able to help with this please contact UKELA's Executive Director Vicki.elcoate@ntlworld.com.

3. We are also planning a 2008 workshop, which will be held in the autumn. We would welcome any offers of help to organise this. The tasks are: joining in the planning group for the event; researching venues; helping find and brief speakers; organising the papers for the event and sorting out the written materials. If you can help please contact Vicki as above.

SPECIAL OFFERS FOR UKELA MEMBERS

Is Brownfield Land the Gateway's Greatest Asset or Its Millstone?
28 November 2007
ExCeL Exhibition & Conference Centre

THREE essential seminars for understanding the policy and practice of successful Brownfield redevelopment and land remediation

- **Land remediation: is Brownfield land the Gateway's greatest asset or its millstone?**
- **Risks and Rewards: The Keys to Successful Brownfield Development**
- **Policy and Practice: Delivering Successful Land Remediation Projects Venue**

About the Day

Assessing and cleaning up contamination is part of the 'critical path' for redeveloping Brownfield sites – in the Thames Gateway and across the country. However, land assessment and remediation is governed by complicated and rapidly changing legislation and there are numerous technical issues to tackle, which create risk and uncertainty.

The EIC/Thames Gateway Forum Brownfield Day is an essential business event, featuring leading experts from Government and industry who will provide definitive current status reports, clear guidance and hard won practical lessons on the policy and practice of successful Brownfield redevelopment and land remediation.

Speakers include:

Neil McDonald, Director of Planning, Department for Communities and Local Government

Cormac MacCrann, Executive Director of Construction, Canary Wharf Contractors

Clare McCallan, Waste Policy Manager, Environment Agency

For full programme details go to:
http://www.thamesgatewayforum.co.uk/page.cfm/Link=85/t=m/trackLogID=256369_BDB7162224

How to Book Your Place

The cost of the day is £215 + VAT (or £170 + VAT for UKELA Members).

This will give you:
• Entrance to both days of the Thames Gateway Forum
• A place on all three seminars for the 2007 Brownfield Seminar Day

You can book your place by going to:

http://www.thamesgatewayforum.co.uk/page.cfm/Link=85/t=m/trackLogID=256369_BDB7162224

and following the instructions for EIC members

ENVIRONMENTAL INDUSTRIES COMMISSION CONFERENCE

UKELA members are being offered £50 discount on the non-member fee for the EIC conference: "Clean, Clever & Competitive? Ensuring UK companies win in the new Green Economy" - at the Royal College of Surgeons, London on 8 November. Speakers include:

- Rt Hon Hilary Benn MP, Secretary of State for the Environment
- Peter Ainsworth MP, Shadow Secretary of State for Environment
- Barbara Young, Chief Executive of the Environment Agency
- James Smith, Chairman of Shell UK

EIC's Conference brings together the top policymakers, regulators and CEOs to examine how business can respond to the developing environmental agenda as an opportunity for new markets, competitive advantage and profits.

For bookings visit www.eic-uk.co.uk/nationalconference/Leaflet.pdf Please state UKELA member when returning the form.

CORPORATE SOCIAL RESPONSIBILITY FOR PROFESSIONAL SERVICE FIRMS

One-day conference – special offer for UKELA members
Wednesday, 5 December 2007, London

Although a large proportion of professional service firms have traditionally devoted funds to charity and undertaken 'pro bono' community involvement, increasingly firms are having to adopt a more integrated approach to CSR with client and employee demand for such initiatives rising. But with any firm's CSR programme, there are a whole host of challenges that need to be addressed to ensure its success within the needs of the business, such as:

- What do clients look for in a firm's CSR policy and how is this information used?
- How can you engage staff and avoid alienating them in your wider CSR initiatives?
- How can firms market their CSR activities to a sophisticated audience of potential employees and clients?
- To what extent should law firms be imposing CSR requirements on suppliers?
- Should firms be applying moral or ethical criteria when selecting clients?
- Should multi-office firms adopt a common CSR policy or take local considerations into account?
- How can firms reduce their carbon emissions and secure the buy-in of suppliers, staff, in particular partners, and clients?

Managing Partner magazine's ***Corporate social responsibility for professional service firms*** one-day conference will address these challenges and more through sharing best practice and promoting lateral thinking through encouraged discussion and debate. To allow delegates to hear a variety of different perspectives from a number of influential professional service firms, this event features a number of roundtable discussions in addition to presentations and debates.

Special discounted UK Environmental Law Association members price: £630 + VAT (normal price £745 + VAT). To claim this discount please quote code "UKELA" when booking

For more information or to book call **+44(0)20 8785 5910** or email: **pconnelly@ark-group.com**

ENDS Legal Compliance Manager

We wanted to make you aware, that as a UKELA member, your organisation is entitled to a 10% discount on a subscription to the ENDS *Legal Compliance* MANAGER. ENDS *Legal Compliance* MANAGER is an on-line subscription service that provides the information and tools to help you understand, manage and keep up-to-date with environmental law in one easily accessible place.

" If you are looking for a product that keeps you updated on a daily basis with environmental law and policy developments, as well as providing a really helpful legal research tool - then this has no equal."
Ian Salter – Partner, *Burges Salmon*

Updated daily, it contains access to over 10,000 original legislation and policy documents from over 300 sources and categorised by sectors and subjects to help you avoid information overload. It will provide you with:

- **Policy Briefings:** Consolidated overview of International, EU and national legislation and policy - and implications for business
- **Consolidated Legal Summaries:** Plain English statements of the current legal situation (England & Wales only).
- **Original legislation:** Access to original law and the sectors it applies to.
- **Calendar:** Allows horizon scanning with early compliance warnings of future policy change and key dates.
- **Management Guides:** Introductory guides in getting started in compliance and environmental management
- **Legal Register tool:** To allow users to collate applicable legislation documents in one place and add your own compliance notes.
- **Email Alerts:** Daily updates to allow you to systematically keep up to date with new changes or developments as they occur.

We want you to experience the ENDS ***Legal Compliance*** MANAGER, by offering you a 3-day free trial. To register for the trial and to qualify for a 10% discounts as a UKELA member, simply go to http://www.endscompliance.com/ENDSApp/Login.aspx?DCMP=EMC-ukela

JOB ADS

For those who have an environmental law job to advertise, e-law is a cost effective way of reaching over 1,000 people with relevant skills and interest. Advertising your job in e-law costs £200, with £50 for NGOs, academic institutions and statutory bodies including local authorities.

You will need to be mindful of e-law's publication dates when planning to place an advert, although we can also include them in the members' mailings which we circulate in between editions of e-law. My email is catherine.davey@stevens-bolton.co.uk and I'm happy to discuss your requirements.

JOB OPPORTUNITIES

Richard Buxton – Environmental and Public Law, Cambridge

We need help with an ever increasing tide of unlawful decision making and nuisance from public authorities and bad neighbours.

We work for a wide variety of clients, including private individuals, residents' groups, companies, local authorities, NGOs, and even developers. Our website has more details: www.richardbuxton.co.uk. Much of the work involves planning judicial reviews, noise (including particularly aircraft noise), nature conservation and EIA. We have done several leading environmental and public law cases.

We are looking for someone ideally with 2-3 years PQE. Essential qualifications are solid experience of High Court litigation, including judicial review; a first class academic record; the ability to write lucidly, think creatively and argue articulately; being prepared to deal with the rigours of legal aid; to have a mindset that favours the environment; and content to explore new legal territory fearlessly and without giving up. Knowledge of ordinary planning law would be helpful and experience of work relating to waste and contaminated land would be attractive.

You will need to fit into a busy, informal office, be self-motivated and, to a large extent, self-sufficient. Overall you will be prepared to take a risk on a career shift that is potentially truly satisfying, but is unlike any other solicitor's practice.

We will pay a proper salary for Cambridge depending on qualifications and experience, and seek someone who we would see as becoming a partner in due course. Do not, however, apply if your first aim is to make a fortune.

To apply

Send a CV with a full covering letter to Richard Buxton at 19B Victoria Street, Cambridge CB1 1JP, by post, or by email attachment to home@richardbuxton.co.uk. Please in any event provide an email address that you are happy to be used. We will of course treat applications in strict confidence. Telephone: 01223 328933.

Greenpeace International: Amsterdam - The Netherlands

How many lawyers does it take to change the world? Just one, if you are the right one. Are you a highly creative lawyer with a track record in promoting environmental or human rights? Are you able to operate within a political environment with a clear understanding of how modern NGOs function? Greenpeace International, based in Amsterdam, is seeking a Legal Counsel to provide integrated campaign related legal advice and support.

Closing Date: 16 November 2007

Purpose of the job:

To provide integrated campaign & actions related legal advice and support to Greenpeace International.

Main responsibilities:

1. Legal Advice and Support
Conduct and review legal risk assessments and co-ordinate the legal network, within Greenpeace legal policies and in cooperation with the Senior Legal Counsel. Provide pre-publication advice on reports, international press releases and web-publications.

2. Legal Network and Liaison
Develop and maintain relationships with the Greenpeace internal and external legal network in order to spread the use of standard legal tactics and practices and share information between all Greenpeace offices. Liaise between the organisation and external lawyers in the event of (threatened) legal proceedings.

3. Legal Policies and Strategies
In cooperation with the Senior Legal Counsel, develop and maintain Greenpeace legal policies and provide training in order to spread knowledge and use thereof worldwide. Integrate the Greenpeace legal policies within the campaign planning process and, in cooperation with the Senior Legal Counsel, develop legal strategies for Greenpeace global campaigns.

4. International law
Develop and maintain knowledge of international environmental and human rights law in order to provide pro-active guidance and advice to Greenpeace global campaigns.

Skills required/qualifications:

Required:
- Minimum 2 years work experience as a professional lawyer, preferably in an international context.
- Demonstrable knowledge of and experience in criminal and human rights law.
- Experience in civil, administrative and/ or criminal litigation.
- Fluent in English, both written and spoken. Preferably multilingual (e.g. French, Spanish).
- Affinity with activism

Contact information:
Please send resume along with a covering letter to the following email address:
int.recruitment@int.greenpeace.org

Please write the position in the subject of your message when sending your CV and do not forget to state where you have seen the job posting at.

OPPORTUNITIES FOR STUDENTS

UKELA's student membership is growing rapidly and we have some great offers and opportunities for students this academic year.

Please could you help by distributing the information in this mailing to any students with a potential interest in environmental law. They may be studying subjects other than law so please do share the materials as widely as possible.

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ANDREW LEES ARTICLE COMPETITION

The United Kingdom Environmental Law Association is pleased to announce its annual article competition - "the Andrew Lees Prize". This competition is open to any student, trainee solicitor, pupil or solicitor / barrister with not more than 2 years' post qualification experience.

Andrew Lees was the Campaigns Director for Friends of the Earth and a leading environmental campaigner on a range of issues from water pollution to illegal waste dumping. He died suddenly in 1994 while on a working holiday in Madagascar campaigning against a large opencast mine.

If you would like to enter, a short article of no more than 1,000 words (not including footnotes) should be submitted by close of business on **25th January 2008**.

There will be two prizes – a winner and a runner up:

The winner and runner up each receive a free place (including travel expenses) at the 2008 UKELA conference at Kent University with a prestigious dinner at Canterbury Cathedral. The winner of the first prize will have their article published in UKELA's journal e-law.

Entries invited for this 1,000 word article on the theme of:

Theodore Roosevelt said:

The nation behaves well if it treats the natural resources as assets which it must turn over to the next generation increased and not impaired in value. Conservation means development as much as it does protection.

Was he right?

You should complete and attach the enclosed form with your essay (enclosed at the end of this journal). All essays should be typed in 12pt script and submitted electronically as well as on paper. Your name should appear on the top right hand corner of each page and the number of words should appear at the end of the essay.

The judges have been appointed by UKELA Council and their decision on all matters relating to the competition is final.

MOOTING COMPETITIONS

There are two mooting competitions:

The Lord Slynn of Hadley Mooting Trophy Competition is open to all those who as of 31st October 2007 are in pupillage, a trainee solicitor, on the bar vocational course or legal practice course, or who are taking the CPE. In essence this competition is for those on vocational courses.

The UKELA Student Prize Moot is open to those who as of 31st October 2007 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). In essence this competition is for those who are students not yet on vocational courses.

Teams consist of two members. An institution may enter more than one team. Subject to obtaining the permission of the Master of the Moot, teams may comprise of competitors from different institutions.

Each team should submit two skeleton arguments, one on behalf of the Appellant and one on behalf of the Respondent. No more than five authorities may be cited in each skeleton (in addition to any referred to in the Moot problem below). Each skeleton argument should be no more than six pages of A4 paper. The font should be Times New Roman, size 12, with 1.5 line spacing. Paragraphs and pages should be numbered. The skeleton arguments should be accompanied by a contact name, address and day and evening telephone number. A copy of the skeleton argument should be forwarded electronically by email to **rk@no5.com**. If an electronic copy is submitted this should be accompanied by a paper submission ("hard copy").

Electronic and hard copies of the skeleton arguments should be submitted to **Richard Kimblin, No5 Chambers, 76 Shoe Lane, London, EC4A 3JB (DX 449 Chancery Lane) no later than 4pm on Monday 21st January 2008.**

The finalists will be selected on the basis of the written skeleton arguments. All competitors will be notified of the outcome. The finals will be held at a venue and at a date to be announced in March 2008.

The winners of both competitions will receive a cash prize from No5 Chambers. The winners of the Senior competition will receive the Lord Slynn of Hadley Mooting Trophy and the Junior competition winners will receive the Junior Trophy. The four winners will also receive a year's subscription to Environmental Law and Management, kindly donated by Lawtext Publishing Limited (www.lawtext.com). All finalists will receive "Environmental Law" by Stuart Bell and Donald McGillivray, kindly donated by Oxford University Press.

The Master of the Moot reserves the right to change the rules of the competition without notice as he thinks fit.

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:

BUILDIT QUICK

Claimant

And

NEWT PROTECTION AGENCY

Defendant

JUDGMENT MR JUSTICE BRAIN

In this case Buildit seek to challenge, by way of judicial review, the decision of the Newt Protection Agency (NPE) to designate Buildit's land as a site of special scientific interest (SSSI) by reason of a population of great crested newts.

Buildit own the land which is the subject of this appeal. It is former industrial land, which, from the evidence I have seen, is in desperate need of cleaning up because of its industrial past and which would, absent the newts, provide housing for which there is a great shortage in south east England. The NPE are a statutory body with duties of environmental protection in the sphere of protection of newts and their habitats.

Co-incident with Buildit's application for planning permission, NPE determined that the land was a SSSI by reason of the exceptional number of newts on the site and the suitability of this derelict site as a habitat for newts. Buildit's application for a licence to remove the newts was refused on the basis that there were alternative sites on which houses could be built.

I have been referred by the NPE to *Aggregate Industries (UK) Ltd v English Nature and the Secretary of State for Environment Food and Rural Affairs* [2003] 3 Env LR which, they submit, is a complete answer to Buildit's first complaint. Buildit have submitted that *Aggregate Industries* should now be seen in the light of the decision in *Tsfayo*[1].

I note the strong policy arguments in favour of experts deciding these matters. I also accept that a high level of protection is to be given to species which are rare on a European scale. I can well see that the local planning authority may not wish to grant planning permission for a development that would impact on a SSSI. However, I prefer Buildit's arguments because it seems to me that Buildit has not had an opportunity to be heard by a fact finding tribunal which is clearly independent of the body which made the decision complained about. Moreover, I also accept Buildit's second submission that, in the circumstances of this case, it is a disproportionate interference with the use of Buildit's rights in land to render it effectively of no value. I bear in mind the need to balance the needs of people and the needs of wildlife.

I grant permission to appeal to the Court of Appeal on both points because they give rise to issues of wider importance, namely (i) does *Tsfayo* alter the position stated in *Aggregate Industries,* and; (ii) was it open to me to find the designation of the land was a SSSI was a disproportionate interference?

[1]Tsfayo v United Kingdom – European Court of Human Rights - Application no 60860/00

DIARY: WORKING PARTY MEETINGS / COURSES / CONFERENCES / LECTURES / SEMINARS

SCOTTISH ANNUAL CONFERENCE

UKELA's Scottish Group has organised a one day conference on "Environmental Issues in the Urban Environment" at the Roxburghe Hotel in Edinburgh on Tuesday November 13th.

The conference is chaired by Professor Kenneth Ross and the programme includes Environmental Case Law update by Sir Crispin Agnew and sessions on SEA and EIA, Public Health and Nuisance, The Whiteness Project; Enforcement of Environmental Law and Environmental Liability; Environmental Due Diligence in the Scottish Conveyancing Market and Sustainable Development.

Places for members are £145, non-members £175 and a limited number of free places for students. The booking form is attached below or alternatively can be found on the diary section of www.ukela.org. For booking enquiries contact info@originevents.co.uk.

20TH ANNIVERSARY GARNER / JOURNAL OF ENVIRONMENTAL LAW LECTURE

This year's lecture will be on Wednesday November 21st at 6pm at University College London. The event is being held in partnership with the Journal of Environmental Law and University College London. The speaker is M.C. Mehta, the leading Indian environmental lawyer, attorney in the Supreme Court of India, one of the founders of the Indian Council for Enviro-Legal Action (ICELA), and director of the M.C. Mehta Environmental Foundation in New Delhi. M.C.'s landmark environmental cases in the Supreme Court of India have resulted in the protection of India's natural and cultural treasures – including the Ganges River and the Taj Mahal – from the adverse effects of pollution. In addition, M.C. played a key role in persuading India's Supreme Court to rule that Article 21 of the Indian Constitution, which guarantees each citizen the "right to life," necessarily includes the "right to a healthy environment."

In 2000, M.C. Mehta achieved a long-held dream to build an international facility for teaching public interest environmental advocacy. The foundation is a non-profit, non-governmental organization (NGO) working throughout India for the protection of the environment and citizens' rights. http://www.mcmef.org.

Places are free but need to be booked. Please confirm your attendance by replying to Alison Boyd, alisonboyd.ukela@ntlbusiness.com with your name, organisation and relevant phone number if needed on the day of the lecture. Visit www.ukela.org for details.

Drinks reception afterwards kindly supported by Brick Court Chambers.

CONFERENCE ON EU ENVIRONMENTAL LIABILITY DIRECTIVE

27 November 2007 at The Royal Society London

The conference is organised to provide a platform for the discussion of some of the key issues surrounding the implementation of the EU **Environmental Liability Directive** (ELD). The ELD makes 'operators' legally and financially responsible for cleaning up environmental damage to water, land and protected wildlife in accordance with the Polluter Pays Principle. This conference will showcase the Toolkit produced by the REMEDE project for the European Commission on how to implement **resource equivalency methods** for assessing damage and determining remediation under Annex 2 of the ELD.

The Toolkit is also relevant for selecting compensation measures under the **Habitats and Wild Birds Directives** and the **Environmental Impact Assessment Directives**.

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STUDENT SOCIAL EVENT

Students considering a career in environment law are warmly invited to come along to our social and careers advice evening on December 6th. The evening starts at 6pm at Freshfields Bruckhaus Deringer, 65 Fleet Street, EC4. The format is informal with advice from UKELA members working as lawyers, barristers, environmental consultants, regulators, government lawyers, in NGOs etc. There will be a short presentation on UKELA and careers in environmental law at 7pm. All students are welcome, places are free but must be booked and numbers are limited. Refreshments will be provided.

To book your place email alisonboyd.ukela@ntlbusiness.com.

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REGIONAL GROUPS

North West

On 6th December UKELA North West is organising a festive event at Hammonds' offices on John Dalton St in central Manchester. The subject is "the Water Framework Directive - an introduction and insight into the practical impacts".
The event is open to members of UKELA, IEMA and CIWM and will commence at 5pm.
Attendees will be provided with mulled wine and mince pies, and just around the corner on Albert Square is the vibrant Christmas Market which is well worth a visit afterwards, not to mention late night shopping.....
Full booking details will be circulated soon.

South West

Meeting on ELD and regional group AGM Monday 19th November 2007, 6-8.30pm
Venue: TLT Solicitors One Redcliff Street, Bristol, BS1 6TP - The Environmental Liability Directive- Update on Implementation and its Legal Impact and AGM. With leading speakers Caroline Blatch, Senior Legal Adviser Environment Agency Update on the ELD and the Agency's role and Peter Blair QC Guildhall Chambers on Impending impacts for business and the environment beyond existing legal regimes.

All meetings can be booked via the website www.ukela.org or by contacting alisonboyd.ukela@ntlbusiness.com.


UKELA
UK ENVIRONMENTAL LAW ASSOCIATION
Help shape the future of our planet..
Interested in a career in the environment?
Student social and careers information evening
Thursday December 6th
6pm – 8.30pm, Freshfields Bruckhaus Deringer, London EC4
Drop in to meet the professionals and hear a talk on careers at 7pm.
Refreshments provided
Places are FREE but must be booked. No admissions on the door.
Email: alisonboyd.ukela@ntlbusiness.com
Professions represented: solicitor; barrister; environmental consultant; regulator; government lawyer; environmental insurance; academic; NGO
With thanks to Freshfields Bruckhaus Deringer which is kindly hosting this event
See you there!

UKELA "ANDREW LEES PRIZE" ESSAY COMPETITION

NAME: _____

NAME OF ACADEMIC INSTITUTION / CHAMBERS OR LAW FIRM:
_____

CONTACT ADDRESS:
_____
_____

DAYTIME TEL: _____

EMAIL: _____

The qualification for entering the competition is that you must be either a student, trainee solicitor, pupil barrister or be a solicitor or barrister with less than 2 years post qualification experience.
I confirm that I have read and understood the rules and I meet the criteria set out above.

……
(Signed)

……
(Date)

Your essay and completed form should be sent to **Richard Kimblin, No5 Chambers, 76 Shoe Lane, London, EC4A 3JB (DX 449 Chancery Lane)** and/or to **rk@no5.com**. In other words, you may send a hard copy, and electronic copy, or both, as you wish, but only electronic copies will receive an acknowledgment. They are to reach him by 4pm on **25th January 2008, which is an absolute deadline**.

REGISTRATION FORM

'ENVIRONMENTAL ISSUES IN THE URBAN ENVIRONMENT'
ROXBURGHE HOTEL, EDINBURGH
TUESDAY 13TH NOVEMBER 2007

Delegate Details:
To register please complete this form in block letters (one form for each delegate)

Mr ☐ Mrs ☐ Ms ☐ Miss ☐ Prof ☐ (please tick)

Last Name: First Name:

Organisation: Department:

Postal Address:

Postcode: Country:

Telephone: Email:

Conference Programme		***Speakers***
09.30 - 10.00	*Registration & Coffee*	
10.00 - 10.15	*Introduction by Chairman*	*Prof Kenneth Ross, Brodies LLP*
10.15 – 10.45	*Environmental Case Law update*	*Sir Crispin Agnew QC*
10.45 – 11.15	*SEA and EIA – current issues for development approval*	*Beverley Walker, Royal Haskoning*
11.15 – 11.30	*Morning Coffee*	
11.30 – 12.15	*Public Health & Nuisance*	*Alastair Brown, Group Manager (Enforcement) Land & Environmental Services Glasgow City Council*
12.15 – 12.45	*"Sustainable Re-Development – The Whiteness Project"*	*James Whittle, R&R Urquhart*
12.45 – 2.00	*Lunch*	
2.00 - 2.45	*Pollution issues in the Urban Environment*	*Dave Gorman, SEPA*
2.45 – 3.15	*Enforcement of Environmental Law & Environmental Liability*	*Prof Colin Reid*
3.15 – 3.30	*Afternoon Tea*	
3.30 – 4.00	*Environmental Due Diligence in the Scottish Conveyancing Market*	*Groundsure*
4.00 – 4.30	*Sustainable Development: Illusion or Reality, Please?*	*Richard Hawkins, MA Barrister, International Environmental Writer & Lecturer*
4.30 – 4.45	*Questions & Answers*	

Registration Fees: **(please tick appropriate box)**

UKELA Member: £145 per person ☐ Non-member: £175 per person ☐

Please note there are limited free places available for students

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

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E - LAW

The editorial team wants articles, news and views from you for the next edition due to go out in December 2007.
All contributions should be dispatched to Catherine Davey as soon as possible by email at: catherine.davey@stevens-bolton.co.uk by 31 November 2007
Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.

Letters to the editor will be published, space permitting