UKELA
UK ENVIRONMENTAL LAW ASSOCIATION

e-law

UKELA Making the law work for a better environment

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EDITORIAL

In this edition of e-law you can learn more about access to justice in Northern Ireland, this year's Wild Law weekend, implementation of the Habitats Directive, what an Ombudsman for Future Generations does and how UKELA's Law and Your Environment website is benefiting local communities. There's also all the latest on events, jobs and volunteering.

2009 has been tough for us all and we are only too well aware that cuts in staffing by law firms has affected environmental lawyers as well as those in other disciplines.

As ever a huge - and heartfelt - thank you from me to everyone who has so generously taken time to write articles for e-law. We really could not provide you with the quality of papers that we do if it was not for the unstinting support of so many members. Remember – UKELA is your organisation and e-law is your journal. Do not feel shy about sending papers in for review with a view to publication!

Once again Vicki and Alison have given great service to members and Council. Many thanks to both of them for all their hard work this year.

The UKELA membership year is nearing an end and you'll soon be receiving a reminder to join up again for 2010. We do hope you will want to stay with us and will renew promptly. We really value our members and believe that UKELA provides excellent value for money.

We have much already planned for 2010. Join us to hear the Hungarian Ombudsman for Future Generations talk about his unique role in February and look out for an upcoming London meeting on the latest hot topic – nuclear energy. The student competitions finals day at the end of March is for anyone who wants to support the finalists or learn more about presenting and mooting. You can get away from it all with Wild Law in Scotland in April or at the annual workshop on the outskirts of London in Lee Valley Country Park in September. Bookings for the annual conference in Exeter with dinner at Powderham Castle open soon. And all that is without counting the activities of the working parties and regional groups!! We urge you to make 2010 the year you get more involved with them.

Credit: Clare Elcoate

On behalf of myself and all my colleagues on Council I would like to wish you all a very happy Christmas and let us look forward with optimism to 2011.

catherine.davey@stevens-bolton.co.uk

In this issue

CALLING ALL BARRISTERS

CONFERENCE 2010 NEEDS YOU

Volunteers are sought to provide the end of year review of the hottest environmental cases in 2009/10 at next year's UKELA Conference which will be held in Exeter between 25-27 June 2010. Three papers of approximately 25 minutes duration will be required on Sunday 27 June(between 11.30 and 13.00).

Contact Catherine Davey at catherine.davey@stevens-bolton.co.uk (01483 734234) if you are interested in participating next year.

She is waiting for your emails and calls!!

Conference 2010

Bookings for the annual conference in Exeter 2010 will open with the renewals mailing. The theme is "Climate Change and the Changing Face of Regulation" and we already have plans for some excellent sessions and a highly topical opening presentation. The programme details will be circulated with the renewals mailing. If you want to secure your place book as soon as possible.

MEMBERSHIP RENEWALS- Look out for your renewal notice coming soon!

This year we are sending out renewals by email as part of UKELA's bid to become as paperless as possible and to help save on administrative and postage costs. Your renewal will arrive at the beginning of December. Remember that for 2010 our membership subscriptions remain frozen at 2009 levels helping to ensure that UKELA continues to offer great value for money to our members.

Will your membership category change for 2010? For example, are you currently registered as a student but are now in employment? Will you fall into one of our new categories? We now offer a new rate of £30 per year for pupil barristers/trainee solicitors and graduate consultants (for the first 2 years of full-time employment). We also now offer a corporate category specifically for Local Authorities which is £75 for up to 3 members. Let us know when your return your renewal details.

Have you moved jobs so need to tell us about a change of details? We are currently checking the emails we hold for our members in readiness for the renewals mailing so if yours has changed recently please send details of this change to alisonboyd.ukela@ntlbusiness.com

UKELA's Work Plan and Priorities 2010

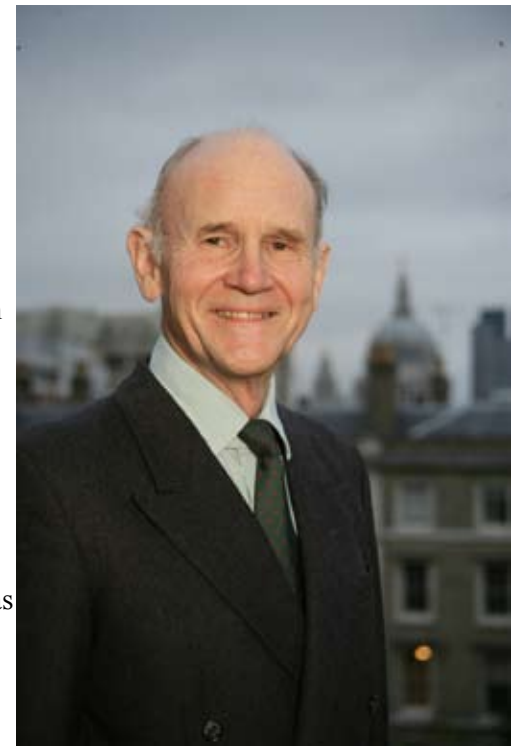
UKELA's Council met recently to firm up the work plan for 2010. Its top priority is to make UKELA as influential as possible, within its resources, in the formulation of environmental law and to really make the law work for a better environment. This means providing the working parties with a higher level of professional support. Rosie Oliver has been supporting the climate change, environmental litigation and water working parties during 2009 and you can see the level of their input on critical issues by visiting their pages on www.ukela.org. Council has pledged to continue Rosie's role at the same level and to work hard to raise money to find more time for Rosie to help the other working parties.

Other priorities for 2010:

- Holding events on key topics
- Starting the major project to review whether environmental law is working effectively to deliver a better environment (this means securing an academic partner and some funding)
- Streamlining our administration as much as possible
- Developing the membership
- Raising core funds and supporting sponsored events for the Lord Nathan Memorial Fund for the Environment

UKELA – like many other charities operating during the recession – has a tight budget in 2010 and we do hope you understand that we need to cover all our costs, which include staff time. This means our events will cost a bit more to attend but will remain excellent value.

LORD KINGSLAND
A PERSONAL APPRECIATION



With thanks for the photo to Francis Taylor Building

Christopher Kingsland, then Sir Christopher Prout, joined our chambers, then at 2 Paper Buildings, in the late 1980's at the invitation of Lord (Geoffrey) Rippon and moved with us to Bream's Buildings. I did not previously know him, nor did I then know much of his already hugely distinguished career in European politics and indeed at the Bar. He joined us in order to practise in the field he knew best, European environmental law. It was our significant loss when, in 2002, he moved to Francis Taylor Building.

Whilst with us, he practised—I thought somewhat unhappily—in planning inquiries, where in common with Geoffrey Rippon before him, he exercised the discursive style of advocacy inherited from and perhaps more suited to the political chamber. His success lay decidedly more in the environmental field. Here he was engaged in such high profile cases as the veal export case against Coventry Airport, and advised with much wisdom and experience on a host of environmental issues. When he died, he was (I am told) heavily and successfully engaged in a major Thames Water prosecution. He was a vice-president of Justice, the legal and human rights organisation which will be well-known to those in UKELA, and he also contributed to Halsbury's Laws of England. The Legal 500 rated him as "One of the most frequently recommended silks".

But it is as the man and the friend that I knew him. The Times described him as "a neat man of quiet unassuming demeanour". This is just about perfect. I do not think that I have known another man of such natural charm and warm humour. In conversation on topics of which he invariably was a master, he would engage utterly as an equal. One's views were as valuable as the great and good. His self-deprecation, to my mind a precious quality much in decline, was completely genuine. He had a hugely retentive memory, and drew from it an unending supply of witty memories and anecdotes.

As a long term bachelor, I suspect that he may have assumed that he would not be special in a woman's eyes. He somewhat bashfully introduced me early on in his relationship to Carolyn. Two greater charmers it would be difficult to find, and despite the ravages of cancer all round, they enjoyed happy years together, based at her farm in Shropshire.

Christopher gave me lunch in the Lords three days before he died. He appeared to have conquered the cancer, and was bursting with energy and enthusiasm for all that life involved for him. He is greatly missed by all who knew him.

Christopher Lockhart-Mummery QC

ADVERTISING WITH UKELA

UKELA is introducing a new advertising rate for its website and publications from January 1st 2010. As a small charity, UKELA needs to make sure that it covers all its costs so that it can deliver its charitable objectives more effectively. The costs below cover staff time to gather information and disseminate it to our 1200 members. As the leading environmental law association in the UK we directly reach most of the environmental law professionals with regular events mailings, our bi-monthly journal e-law and a website visited by members and the public. We've also introduced an advertising discount for UKELA members, so if you're holding an event or have a job to advertise and want to reach your target audience cost effectively, do consider advertising with UKELA.

If you advertise regularly in e-law or on the website please talk to us to negotiate an annual rate.

Advertising rates for commercial organisations for events and publications:

£100 to advertise in the next member mailing (which may be e-law or an events update) and the next UKELA mailing after that if your event has yet to happen. You will also need to be able to offer a discount to members (minimum 10%) as these offers are advertised as being a member benefit. The bigger the discount the higher the take up is likely to be.

£300 to advertise as above plus on our website www.ukela.org. Events will appear on our events listing page within a week of information being received with a link to your website. Publications will appear in our publications section – special offers.

We can also pass on information to our specialist working parties on request.

If you can offer us a significant reciprocal opportunity – eg for an advert in your publication or leaflets at your event – we are happy to discuss terms. But there will be no free reciprocals for offering a discount to members only.

Costs are per event and per publication. Discount for multiple entries: 20% on all entries that are agreed together.

Advertising rates for NGOs/charities:

Events advertising is free of charge to NGOs and charities provided you are able to offer us a reciprocal opportunity to advertise our event to your members.

Rates for academic institutions/other non commercial organisations:

£50 per event or publication in our next member mailing; £50 to add to www.ukela.org

UKELA members (companies advertising must be UKELA corporate members): 30% off these rates

Jobs:

e-law or intermediate mailing and UKELA website: £250 per advert

Your online recruitment advertisement will appear within a week on www.ukela.org for up to 3 months (or until the closing date or when you advise us that the post has been filled), and will be included in the next issue of e-law or an intermediate mailing, subject to publishing dates.

UKELA website only: £175 per advert

Your online recruitment advertisement appears within a week on this website for up to 3 months (or until the closing date or when you advise us that the post has been filled).

e-law or intermediate newsletter mailing only: £100 per advert

Your recruitment advert will be included in the next issue of e-law, subject to publishing dates.

Costs for NGOs, academic institutions and statutory bodies including local authorities

- e-law newsletter & UKELA web site: £90 per advert
- UKELA website only: £50 per advert
- e-law newsletter only: £50 per advert

UKELA members: (companies advertising must be UKELA corporate members) 30% off these rates

SUPPORTING LAW AND YOUR ENVIRONMENT

Recently you will have received an appeal to support the Lord Nathan Memorial Fund for the Environment. This will make sure the Law and Your Environment website will be looked after in future. We know raising money for a website is hard – that's why we're asking UKELA members to help. The website provides information on environmental law and it's already being used by members of the public, local authorities and other regulators.

UKELA's trustees are aiming to raise £285,000 so that the income will take care of the website without having to keep raising funds for it.

If you are able to pledge a monthly amount, however small, that would make a big difference in the long run.

You can make a donation or set up a monthly payment by clicking here

http://guest.cvent.com/i.aspx?5S%2cM3%2ccf215791-2e3f-4ca9-b585-0374cfa9eaf1

Please look out for our mailing about the sponsored half marathon with UKELA trustees taking part to raise money for the endowment.

SPONSORSHIP OPPORTUNITIES FOR LAW AND YOUR ENVIRONMENT

UKELA's corporate members are being invited to consider having a profile on the Law and Your Environment website. Would you like your logo on the home page? Would you like a link through from a supporters' page to your home page?

- All income from corporate sponsorship will go into the Memorial Fund

BENEFITS TO SPONSOR

- Association with a website that has been widely welcomed by Government, regulators, NGOs and community groups
- Association with the leading environmental law association
- Visibility to a growing audience (over 1000 unique visits a month with the average visitor viewing over 4 pages)
- Good visibility on search engines
- Additional traffic to your own website from those already interested
- Opportunity to benefit your CSR objectives by supporting the objectives of Law & Your Environment in relation to environmental quality and disadvantaged communities

UKELA'S ETHICAL POLICY

UKELA is keen to work with like-minded organisations, which support our objectives. A disclaimer on the website will make it clear that the corporate sponsorship has not influenced any content on the website. Sponsors will be organisations which support UKELA's objectives to make the law work for a better environment and to help people themselves to a better environment. Promoting responsible citizenship and raising awareness about our environmental rights and responsibilities is very important to UKELA and its sponsors. UKELA's Council reserves the right to make final decisions about which sponsors are partners we are happy to work with.

SPONSORSHIP TIERS

Two kinds of sponsorship are available, both on an annual basis.

LAW & YOUR ENVIRONMENT CHAMPIONS

Up to three sponsors will be offered the opportunity to appear on the home page. Logos incorporating links will be visible.

The cost is £750 p.a. in the first, pilot, year as the site is new and traffic to the site has yet to develop.

SPONSORED LINKS

The site will incorporate a page of sponsored links with logos and a short explanation about the sponsoring organisation.

Cost: £100 p.a. for our first pilot year.

If you're interested please contact the Executive Director, Vicki.elcoate@ntlworld.com.

Students

FUNDRAISING HELP NEEDED

As you can see, UKELA is working hard to raise money for its endowment fund to maintain the Law and Your Environment website. We need someone to help secure sponsors for the website (see above) – we can provide a list and then it means following up with companies who might welcome the opportunity for a profile on the website. This is your chance to talk to UKELA's corporate members and help UKELA's charitable work. The role would suit someone with flexible hours during the day who is keen to develop their profile in the sector.

EVENTS AND COMPETITIONS

Our very popular annual student careers and networking evening on November 25th (kindly hosted by Landmark Chambers) is fully booked. We have a great team of advisors from a range of professions on hand and a talk from the Chair, Peter Kellett. Sorry to all of you who missed the opportunity (spaces are limited for all our events).

The student competitions are now open (as you can read elsewhere in e-law) and the Competitions Finals Day is being held on March 30th 2010. The day is open to students and supporters and it's a great opportunity to learn a bit more about some key environmental law issues and meet the professionals who will be acting as judges and mentors to the entrants. It's also very helpful if you're considering mooting or are planning to enter the UKELA competitions in future. If you would be interested in attending the Finals day you can register an interest by emailing alisonboyd.ukela@ntlbusiness.com. The programme includes the Moot semi-finals, the Andrew Lees finals and the Moot final before Lord Justice Carnwath. It's all going on in UCL's mooting chamber from about 11am until 6.30pm. We'll send a final programme to all those interested nearer the time and you can confirm your booking then.

Contributions - James Maurici

COSTS AND THE IMPACT OF AARHUS ON ENVIRONMENTAL LAW IN NORTHERN IRELAND

JAMES MAURICI, LANDMARK CHAMBERS

James helped organise the recent UKELA seminar in Belfast on Environmental Regulation and Access to Justice with Andrew Ryan, of Carson McDowell, the Northern Ireland Working Party convenor. James has recently been called to the Northern Ireland Bar.

Introduction

1. During the summer at the twenty fourth meeting of the Compliance Committee in respect of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention")[1] there was consideration given to a complaint brought by the Cultra Residents' Association, County Down.

2. The Association was one of five who were applicants in judicial review proceedings brought in the High Court in Northern Ireland. The judicial review proceedings related to the expansion of City Airport in Belfast. The proceedings were dismissed as being premature (***Kinnegar Residents' Action Group & Ors, Re Judicial Review*** [2007] NIQB 90 (7 November 2007)). The Department's costs were awarded against the applicants in the sum of £39,454. The Association alleged that the award of costs violated its rights under Article 9 of the Aarhus Convention.

3. Article 9(4) of the Aarhus Convention provides that the procedures for rights of access to justice in environmental matters shall "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely, and not prohibitively expensive" (emphasis added)[2].

4. The agenda for the twenty fifth meeting which took place in September 2009 recorded that the "Committee is expected to continue its deliberations on communications ACCC/C/2008/23 (United Kingdom) ... ACCC/C/2008/27

1 Held between 30 June and 3 July 2009.

2 News of the forthcoming hearing was broken by the Belfast Telegraph on 1 May 2009 under the headline "Now the UN joins city airport row" (http://www.belfasttelegraph.co.uk/news/local-national/now-the-un-joins-city-airport-row-14288252.html#ixzz0RCs0eUBW).

(United Kingdom) in closed sessions with a view to completing its preparation of draft findings and, if appropriate, recommendations." The latter communication being the Cultra Residents' Association complaint[3]. In fact I understand that at the September meeting there was no further consideration of the Cultra Residents' Association communication. Defra have in fact raised a concern about the participation in the consideration of the UK communications by a member of the Committee who did not disclose that she had received submissions from her husband and close professional colleague. A decision on the UK communications is now not expected until March 2010.

5. This is truly an example of Northern Ireland being at the cutting edge of international environmental law. It also illustrates the growing importance of Aarhus to those practicing in environmental law throughout the UK.

(i) the Aarhus Convention

6. The Aarhus Convention entered into force in October 2001. It was ratified by the UK in February 2005, and by the EU in the same month.

7. As of 8 September 2009, there were 43 Parties to the Convention.

8. The Convention contains three broad themes or 'pillars':

   I. Access to environmental information;

   II. Public participation in environmental decision-making; and

   III. Access to justice in environmental matters.

9. The focus in this paper in on the third pillar access to justice in environmental matters. This is sometime said to be the "weakest" of all the pillars. Article 9 – part of the third pillar - requires that members of the public[4] have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of environmental decision-making.

10. Moreover, as we have seen Article 9(4) requires that the procedures for rights of access to justice in environmental matters shall "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely, and not prohibitively expensive".

11. The Aarhus Convention is an international convention, and the parties to the convention have established a Compliance Committee that can investigate alleged instances of non-compliance. It was this Committee that recently heard the Cultra Residents' Association complaint. The status of the Convention in the domestic law of the UK was recently considered by the Court of Appeal of England & Wales in ***Morgan v Hinton Organics (Wessex) Ltd*** [2009] EWCA Civ 107 - see further below. Carnwath LJ explained (see para. 22) that "[f]or the purposes of domestic law, the convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect (see Halsbury's Laws Vol 44(1) Statutes para.1439))".

(ii) the EU dimension

3 The former arises out of the ***Morgan v Hinton Organics*** case considered below. A summary of that case records the complaint as being that the communicants "rights under article 9, paragraph 4, of the Convention were violated when they were ordered to pay costs amounting to approximately £25,000, which, in the opinion of the communicants, is prohibitively expensive. The costs order was issued following a discharge of an interim injunction obtained by them earlier in private nuisance proceedings for an injunction to prohibit offensive odours arising from Hinton Organics (Wessex) Ltd operating a waste composting site. The communicants allege that the issuing of the costs order by the Court, in circumstances where one month before it had agreed and made an order that there was a serious issue to be tried and that the Claimants should enjoy interim injunctive relief, amounts to non-compliance with article 9, paragraph 4, of the Convention". A third communication concerning the UK has been brought Mr. James Thornton, the CEO of ClientEarth was adjourned. The complaint there is that the "law and jurisprudence of the [UK] fail to comply with the requirements of article 9, paragraphs 2 to 5, in particular in connection with restriction on review of substantive legality in the course of judicial review, limitations on possibility for individuals and NGOs to challenge act or omissions of private persons which contradict environmental law, prohibitive nature of costs related to access to justice and uncertain and overly restrictive nature of rules related to time limits within which an action for judicial review can be brought".

4 Art. 2 defines 'The public' as meaning "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups" and 'The public concerned' as meaning "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

12. The EU itself has ratified the Aarhus Convention. As a result its institutions can take enforcement action against Member States for non-compliance[5].

13. Indeed the provisions of Article 9 of the Aarhus Convention concerning access to justice have been inserted into two key EC environmental directives. Article 10A of the 1985 EC Directive on Environmental Impact Assessment ("EIA") provides that Member States must ensure that members of the public have access to a review procedure before a court of law or other independent body to challenge the substantive or procedural decisions, acts or omissions subject to the public participation provisions of the Directive, and that "any such procedure shall be fair, equitable, timely, and not prohibitively expensive". Directive 96/61/EC on Integrated Pollution Prevention and Control ("IPPC"), which provides for a consent system for a wide range of industrial activities, is similarly amended with a new Article 15a, which also provides that procedures for legal challenges must be fair, equitable, timely, and not prohibitively expensive.

14. A proposal for a more general European Directive on access to justice in environmental matters (COM(2003) 624 has not progressed beyond the draft stage. It would have been applicable to administrative and judicial review proceedings.

15. The ECJ has recently had cause to consider the meaning of the phrase "not prohibitively expensive" provision. This arose in the context of infraction proceedings against the Republic of Ireland (Case C-427/07 ***Commission v Ireland*** 17 July 2009). In the proceedings it was alleged, inter alia, that Ireland had failed to transpose requirements in Article 10a of the EIA Directive and Article 15a of the IPPC Directive by ensuring that procedures for access to justice in respect of decisions made under those Directives were not prohibitively expensive. The Commission complained that "there is no applicable ceiling as regards the amount that an unsuccessful applicant will have to pay, as there is no legal provision which refers to the fact that the procedure will not be prohibitively expensive".

16. The ECJ concluded that:

"92. As regards the fourth argument concerning the costs of proceedings, it is clear … that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement.

93 Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.

94 That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, … cannot be regarded as valid implementation of the obligations arising from [the EIA and IPPC Directives].[6]"

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5 As Carnwath LJ explained in ***Morgan v Hinton*** (at para. 22) that "[r]atification by the European Community itself gives the European Commission the right to ensure that Member States comply with the Aarhus obligations in areas within Community competence (see ***Commission v France*** (C-239/03) [2004] E.C.R. I-9325 at [25]–[31])."

6 The Advocate-General had rejected the argument that the rule was not concerned with orders against an unsuccessful party to pay the other side's costs. In her view, the ban on prohibitively expensive procedures "extends to all legal costs incurred by the parties involved". She continued:

"95. The Commission founds its objection that there is insufficient protection against prohibitive costs in particular on the basis that the costs of successful parties can be very high in Ireland, stating that costs of hundreds of thousands of euro are possible.
96. In this regard, Ireland's submissions that rules providing for legal aid—the Attorney General's Scheme —exist and that, furthermore, potential applicants can make use of the Ombudsman procedure which is free of charge are hardly compelling. The Attorney General's Scheme is, according to its wording, inapplicable to the procedures covered by the directive. It cannot therefore be acknowledged to be an implementing measure. The Ombudsman may offer an unbureaucratic alternative to court proceedings but, according to Ireland's own submissions, he can only make recommendations and cannot make binding decisions.
97. As the Commission acknowledges and Ireland emphasises, Irish courts can though, in the exercise of their discretion, refrain from awarding costs against the unsuccessful party and even order the successful party to pay his costs. Therefore, a possibility of limiting the risk of prohibitive costs exists.
98. This possibility of limiting the risk of costs is, in my view, sufficient to prove that implementing measures exist. The Commission's action is therefore unfounded in relation to this point too.
99. I wish to make the supplementary observation that the Commission's wider objection that Irish law does not oblige Irish courts to comply with the requirements of the directive when exercising their discretion as to costs is correct. In accordance with settled case-law, a discretion which may be exercised in accordance with a directive is not sufficient to implement provisions of a directive since such a practice can be changed at any time. However, this objection already concerns the quality of the implementing measure and is therefore inadmissible."

17. What this means is open to question. The UK's submission to the Aarhus Compliance Committee in respect of the Cultra Residents' Association communication and the two other UK communications said:

"That case is not on any view authority for the sweeping proposition that a discretionary system, or procedures, cannot satisfy the 'not prohibitively expensive' criterion. Such a proposition would require the State and its courts to ignore all the factors mentioned earlier which need to be weighed, and can legitimately be weighed, in deciding the appropriate, fair and equitable costs outcome in the particular circumstances of the particular case. The ECJ did not state the proposition in these sweeping terms for good reason. The case turned on its facts. The discretion in question was solely the discretion of the court to decide costs issues at the end of the litigation. That in itself, and without more, was not enough. We do not contend that, without more, it would be. It is of particular importance to note that PCOs were not part of the system being considered. Given the vital part they play in securing that the procedures in the UK are not prohibitively expensive, that in itself distinguishes Commission v Ireland. One other point is to be made on that case. It would be wholly inappropriate, and beyond the jurisdiction of this Committee, to seek to decide or to give an opinion on questions of EU law – including specifically, the question whether as a matter of EU law the Convention has become directly effective in UK law. In any event, even to the extent that the Convention has become part of EU law, EU law cannot affect the approach that Committee should take in its consideration of compliance of an international treaty (many of whose signatories are of course not even members of the EU)."

18. It is well known that in 2006 CAJE (Capacity Global, Friends of the Earth, the Royal Society for the Protection of Birds and WWF) complained to the EC Commission about UK non-compliance with Aarhus in particular as regards the "not prohibitively expensive" obligation. A Letter of Formal Notice was sent to the UK in December 2007. It is understood that the Commission is currently considering whether to issue the UK with a Reasoned Opinion. It is said in ***Morgan v Hinton Organics*** that the Commission decision was awaiting the Sullivan Report (www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf, see below) and the UK's response to it. This is because the UK Government had indicated in would respond to the Sullivan Report. It then did not do so. The first public response to the Sullivan Report came in the form of the submissions of the UK to the Aarhus Compliance Committee in the Cultra Residents' Association communication and related communications. Some of the correspondence between the Commission and the UK is recorded in the judgment in ***Morgan*** (see below) as is correspondence between the Aarhus compliance authorities and the UK[7].

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7 Carnwath LJ explained:

"24 In December 2005, WWF-UK (later to become one of the constituent bodies of CAJE) lodged a formal complaint with the European Commission regarding the UK's failure to comply with the convention so far as applied by the Directives. This led in October 2007 to a notice by the Commission to the UK Government relating to alleged failure to comply with its obligations under art.3(7) and 4(4) of Directive 2003/35 . In April 2008, in a letter to CAJE the Commission expressed their particular concern at,

> "the failure by the United Kingdom to provide details showing that review procedures provided for under Articles 3(7) and 4(4) of the Directive are 'fair, equitable, timely and not prohibitively expensive '". (their emphasis added)

They had also asked for clarification on the availability of injunctive relief in environmental cases. Following a meeting with Ministry of Justice officials it had been agreed to await the publication of the then imminent Sullivan report, and the comments on it of the United Kingdom authorities, before deciding what further steps needed to be taken.

25 Parallel with these exchanges there had been correspondence with the Aarhus Secretariat at UNECE in Geneva. In April 2008 the government had published a "UK Aarhus Convention Implementation Report". On the issue of costs, the report (pp.27–9) explained the discretion available to the judge in UK court proceedings, and also referred to the different routes available in the UK system to seek redress in environmental matters. In the same month, in response to earlier representations by the claimants' solicitors and comments by CAJE, UNECE put a number of questions to the Department (DEFRA). The following reply in October 2008 helpfully indicates DEFRA's position on the relevance of the convention to a case such as the present:

> To which procedures and remedies in this kind of case do the provisions of article 9, paragraphs 3 and 4, of the Convention apply?
>
> The rights and obligations created by international treaties have no effect in UK domestic law unless legislation is in force to give effect to them, i.e. they have been 'incorporated'. The provisions of the Aarhus Convention cannot therefore be said to apply directly in English law to any particular procedure or remedy. There is, however, in English law a presumption that legislation is to be construed so as to avoid a conflict with international law, which operates where legislation which is intended to bring the treaty into effect is ambiguous. The presumption must be that Parliament would not have intended to act in breach of international obligations.
>
> In the kind of case in question, i.e. a claim by one private party against another in nuisance, the rules which govern civil court procedure in England and Wales (the CPR 1998 or 'CPR'), as laid down in secondary legislation under powers in the Civil Procedure Act 1997 , are therefore, insofar as they are ambiguous/discretionary rather than clearly prescriptive, to be construed so as to be consistent with article 9(3) and (4) of the Convention.
>
> The procedure to challenge acts or omissions by public authorities for contravention of provisions of national law relating to the environment is also prescribed in the CPR and the same therefore applies."

(iii) the source of the compliance problems – the rule that costs follow the event

19. In Northern Ireland, as in England & Wales[8], although costs are at the discretion of the Court[9] they will usually follow the event: see the Judicature Act (Northern Ireland) Act 1978 s. 59 and RCS Ord 62 and see also ***Re Eshokai's Application*** [2007] NIQB, para. 19.

20. In respect of the Cultra Residents' Association complaint CAJE put in an amicus brief before the Compliance Committee which said:

"11. The most significant obstacle to access to justice in environmental matters arises from the principle that the loser must pay the winner's legal costs. This rule evolved from simple civil cases between private parties and was then applied (almost by default) to public law cases. This means that, unless public funding is available, an unsuccessful applicant will have to cover their own legal fees plus the legal costs of the defendant. The rule that the losing party must pay the legal costs of the winning party is known as 'costs follow the event'. Additionally, there is always the threat that the applicant may have to cover the costs of an interested third party for example an airport or factory operator whose permit was being challenged in the legal proceedings.

12. CAJE believes that the current costs rules (in which the presumption is that 'costs follow the event' even in environmental public law cases) and the Courts' application of the costs rules renders legal action prohibitively expensive for the vast majority of individuals, community groups and environmental NGOs in England and Wales. This assertion is based both upon our own organisations' long experience as well as the findings of a number of reports and commentaries published between 2003 and 2008 ... some of which are considered further in this submission. The overwhelming evidence arising from these reports is that many individuals and NGOs are deterred from either commencing or progressing legal action in England and Wales because of the "chilling effect" of the potential, and unknown, costs of the other side should they lose the case.

13. The 'chilling effect' is well illustrated in Complaint 33 in which the Marine Conservation Society decided not to issue judicial review proceedings as a result of the fear of liability for legal costs.

14. The 'chilling effect' has also been expressly recognised by the courts in this country. In 2004 the Court of Appeal in ***R (Burkett) v LB Hammersmith & Fulham*** ..."[10]

(iv) consideration of Aarhus by the Courts in England and Wales

(a) introduction

21. I could find no reference to the Aarhus Convention in cases in Northern Ireland.

22. However, there have been numerous cases in England & Wales that have made reference to the Aarhus Convention in the costs context[11].

8 The ordinary rule in judicial review in England & Wales, as in other civil proceedings, is that the loser pays, but the Court retains a discretion: see CPR r. 44.3 and cases such as ***R (Smeaton) v Secretary of State for*** Health [2002] 2 FLR 146 per Mumby J. speaking in the context of the general rule that the loser pays, "the starting point is the same in judicial review proceedings as in other types of cases"; ***R v Lord Chancellor, ex p Child Poverty Action Group*** [1999] 1 WLR 347, 355F per Dyson J ("The starting point must be the basic rule encapsulated in RSC Ord 62 r.3(3) [the predecessor to CPR r. 44.3] that costs follow the event. It is true that the role of the court in all public law cases is to ensure that public bodies do not exceed or abuse their powers, but the parties to such proceedings are nevertheless adverse as is the litigation") and ***R v Intervention Board for Agricultural Produce, ex p Fish Producers' Organisation Ltd*** [1993] 1 CMLR 707, 710 (Per Ralph Gibson LJ: "It is in my experience common that the court's discretion is not applied differently or in any special way in circumstances where the costs arise in judicial review proceedings …"). Although CPR 44.3 preserves the general rule that the loser pays since the coming into force of the CPR there has been a move towards split, partial or issue-based awards of costs see the examples at para. 18.1.4 of Fordham, Judicial Review Handbook, 5th ed.

9 Judges in a number of judicial review and related public law cases have at the conclusion of proceedings declined to order costs against claimants whose challenges failed, especially where they raised important public interest issues: see most famously ***New Zealand Maori Council v Attorney-General of New Zealand*** [1994] 1 AC 466. However, there are many other examples: see para. 18.4.2 of Fordham, Judicial Review Handbook, 5th ed.

10 The UK Government have relied on a number of features of the UK's costs regime as providing compliance with Aarhus, namely: (i) the availability of legal aid (public funding); (ii) the existence of judicial discretion as to whether to award costs (and at what level); and (iii) recent legal developments in relation to PCOs. The CAJE amicus brief made submissions to undermine each of these. However, CAJE in its amicus brief invited the Compliance Committee "to find that the UK's current approach to costs – in particular its general approach to 'costs shifting' and the application of the general rule that 'costs follow the event' – is incompatible with Art. 9(4) of the Convention and to recommend that therefore the UK create binding normative rules that would provide for non-prohibitively expensive access to justice in environmental cases".

11 There have also been various mentions of the Aarhus Convention in a non-costs context: see e.g. ***R. (Bard Campaign) v Secretary of State for Communities and Local Government*** [2009] EWHC 624 (Admin) and ***R (Greenpeace Ltd) v Secretary of State for Trade and Industry*** [2007] Env. L.R. 29.

23. The most common context in which this consideration has arisen is in respect of applications for a protective costs order or PCO – about which much more below.

24. Furthermore a Westlaw search reveals many instances of the Aarhus Convention being cited in post-judgment argument. This is usually in a case where the claimant has failed in their claim and seeks to resist paying some or all of the costs of the other parties: see e.g. ***R. (Guiney) v Greenwich LBC*** [2009] J.P.L. 211 and ***R. (Takeley Parish Council) v Stansted Airport Ltd*** [2007] J.P.L. 126.

25. However, the first time that Aarhus was mentioned by the Courts of England & Wales was in ***R. (Burkett) v Hammersmith and Fulham LBC (Costs)*** [2004] EWCA [2005] C.P. Rep. 11. In ***Burkett*** the Claimant sought to challenge the grant of permission for a substantial mixed use development near to Wandsworth Bridge in London. The proposed development comprised a 32-acre development site at Imperial Wharf, Fulham, formerly used for operational purposes by British Gas, and proposed for mixed use development including over 1,800 residential units, a hotel, retail, office, leisure and community uses. The Claimant's application for permission to apply for judicial review went all the way to the House of Lords (2002] 1 W.L.R. 1593). It is, of course, the leading case on delay in planning judicial review. The Claimant having obtained permission from the House of Lords (!) the substantive application for judicial review was then heard and dismissed ([2004] Env. L.R. 3) by the High Court. Following which the issue of costs in the case ended up before the Court of Appeal. The Court of Appeal in an addendum to their judgment having referred to the requirement in the Aarhus Convention that judicial procedures in environmental law "not be prohibitively expensive" said:

"75. A recent study of the environmental justice system ("Environmental Justice: a report by the Environmental Justice Project", sponsored by the Environmental Law Foundation and others) recorded the concern of many respondents that the current costs regime "precludes compliance with the Aarhus Convention". It also reported, in the context of public civil law, the view of practitioners that the very limited profit yielded by environmental cases has led to little interest in the subject by lawyers "save for a few concerned and interested individuals". It made a number of recommendations, including changes to the costs rules, and the formation of a new environmental court or tribunal.

76. …. if the figures revealed by this case were in any sense typical of the costs reasonably incurred in litigating such cases up to the highest level, very serious questions would be raised as to the possibility of ever living up to the Aarhus ideals within our present legal system. …

77. Equally disturbing, perhaps, is the fact that this large expenditure on Mrs Burkett's behalf has not, as far as we know, yielded any practical benefit to her or her neighbours.

…

80. We would strongly welcome a broader study of this difficult issue, with the support of the relevant government departments, the professions and the Legal Services Commission. However, it is important that such a study should be conducted in the real world, and should look at the issue not only from the point of view of the lawyers involved, but also taking account of the likely practical benefits to their clients and the public. It may be thought desirable to include in such a study certain issues that relate to a quite different contemporary concern (which did not arise on the present appeal), namely that an unprotected claimant in such a case, if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and that this may be a potent factor in deterring litigation directed towards protecting the environment from harm."[12]

26. In fact a number of studies and reports[13] have concluded that the UK is not compliant with the requirement in the Aarhus Convention that access to environmental justice not be "prohibitively expensive". Most significantly a recently published comparative study of EC Member States and access to environmental justice concluded in respect of the UK that:

"…the main obstacle to access to justice for members of the public or NGOs is the issue of costs in judicial review cases. The problem is one of exposure and of uncertainty. At the beginning of a case it is impossible for the member of the public or the NGO to know how much money they will have to find if they lose. The possibility of having to pay a large (and uncertain) bill means that people are unwilling to risk bringing legal proceedings to hold a public body to account

12 Aarhus was discussed extensively in Brooke LJ's David Hall Memorial Lecture "Environmental Justice: The Cost Barrier" on 17 May 2006.

13 Using the Law: Barriers and Opportunities for Environmental Justice (Capacity Global) (2003); Environmental Justice (the Environmental Justice Project, comprising the Environmental Law Foundation, Leigh, Day & Co Solicitors and WWF-UK) (2004); Civil Law Aspects of Environmental Justice (Environmental Law Foundation) (2003); Modernising Environmental Justice – Regulation and the Role of an Environmental Tribunal (Macrory and Woods) (2003); Access to Justice: Making it Affordable (CAJE) (2004); UKELA Position Statement on Costs (2004); Access to Justice in Environmental Matters (Professor Nicolas de Sadeleer, CEDRE); Litigating the Public Interest – Report of the Working Group on Facilitating Public Interest Litigation (Liberty and the Civil Liberties Trust); and Measures on Access to Justice in Environmental Matters (Article 9(3)) (European Commission) (2007) (pages 14-16 of the UK report).

for breaking the law. Studies have indicated that a substantial number of potential applicants for judicial review in environmental matters have not proceeded because of the risk of costs involved …

In conclusion, it can be said that the potential costs of bringing an application for judicial review to challenge the acts or omissions of public authorities is a significant obstacle to access to justice in the United Kingdom."

27. The report concluded that when linked to problems of obtaining interim relief, the UK was one of only five countries considered to be unsatisfactory overall (along with Hungary, Austria, Germany and Malta) in terms of Aarhus compliance.

(b) Protective Costs Orders ("PCOs")

(1) what are they?

28. What is a PCO? A PCO is an order of the court which specifies or constrains at an early stage of proceedings what the costs outcome of the case will be[14]: see further The Justice Report chaired by Maurice Kay LJ, *Litigating in the Public Interest* ("the Kay Report") at pp. 30 – 31 and see the *Civil Litigation Costs Review - Preliminary Report* by Jackson LJ ("the Jackson Report") part 7, chapter 35 para. 75.

29. As we will see the developing jurisprudence on PCOs in England & Wales has raised the profile of the Aarhus Convention in that jurisdiction. The Convention is increasingly influential in the development of that jurisprudence.

(2) *Corner House*

30. The recent history of PCOs in the public law context begins with ***R (Corner House Research) v. Secretary of State for Trade and Industry*** [2005] EWCA Civ 192; [2005] 1 WLR 2600[15].

31. In ***Corner House*** the Court of Appeal indicated that a PCO should be granted only in "exceptional circumstances" (see para. 72) but that a PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit if the Court is satisfied that (see para. 74):

I. The issues raised are of general public importance;

II. The public interest requires that those issues should be resolved;

III. The applicant has no private interest in the outcome of the case;

IV. Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and

V. If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

32. The Court of Appeal also indicated: (i) if those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO (para. 74); (ii) that there was a *quid pro quo* to obtaining a PCO and that was that it was likely that a cost capping order for the applicants' costs will be required (para. 76) -"[t]he beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly"[16].

33. The Court of Appeal also gave extensive guidance on the procedures for applying for a PCO. This topic goes beyond the scope of this paper. Save to say that the Court of Appeal sought to limit the overall exposure to costs in respect of the making of a PCO application to no more than a few thousand pounds and sought to discourage satellite litigation on PCOs.

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14 A PCO can take a number of different forms, for example: (i) Type 1 PCO: where the party benefiting from the PCO will not be liable for their opponent's costs if they lose but will be entitled to recover their costs if successful ("one way fee shifting"); (ii) Type 2 PCO: neither side liable for the other's costs; and (iii) Type 3 PCO: the party benefiting from the PCO has its liability to pay their opponent's costs capped in advance

15 Although PCOs did exist before ***Corner House***. In ***R v Lord Chancellor, ex parte CPAG*** [1999] 1 WLR 347 Dyson J formulated the principles upon which the court would make a PCO. Such orders were subsequently made on a number of occasions. In ***R (Campaign for Nuclear Disarmament) v Prime Minister*** [2002] EWHC 2712 (Admin) the divisional court made a PCO limiting the claimants' potential costs liability to £25,000. In ***R (Refugee Legal Centre) v SSHD*** [2004] EWCA Civ 1296 the Court of Appeal made a PCO by consent, whereby there would be no order for costs in favour of either party whatever the outcome of the litigation.

16 For the principles to be derived from Corner House see further [2005] JR 206-215 and [2006] JR 171-175.

(3) "no private interest" – the early days

34. Immediately following the decision in ***Corner House*** the most controversial and problematic criterion proved to be the apparent requirement for "no private interest" in the outcome of the proceedings[17].

35. In ***R (Goodson) v Bedfordshire & Luton Coroner*** [2006] C.P. Rep. 6 the Court of Appeal took a very narrow approach to the "no private interest" criterion refusing a PCO for a bereaved daughter to judicially review a coroner's decision as she had a "private interest" in the outcome. The Court of Appeal said in this regard that "she clearly does have a private interest in the outcome of the case in the form of her claim to obtain by this route a fresh enquiry into the circumstances of her father's death. It is her relationship to her father that gives her both the interest in seeking relief by way of judicial review and sufficient standing in law to pursue her claim". The Court of Appeal in ***Goodson*** remarked (para. 27) that in ***Corner House*** "the requirement that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms, although the court could easily have formulated this part of the guidelines in more qualified terms …".

36. This approach, if it had prevailed, would have made PCOs pretty much the exclusive province of NGOs like Corner House. The ***Goodson*** approach means that if an individual has standing then they will almost by definition have a "private interest" and so not be able to obtain a PCO unless their action is truly representative and they have no personal interest[18]. This will be a rare situation.

37. In other contexts a more flexible approach was taken, see e.g. ***Wilkinson v Kitzinger*** [2006] EWHC 835 (Fam); [2006] 2 F.L.R. 397. This was a Family Division case, albeit in public law type context. Potter P expressed doubts as to the appropriateness or workability of the "no private interest" criterion. He regarded the nature and extent of the "private interest" and its weight and importance to be a flexible element in the court's consideration of what fairness and justice required.

(4) The Kay Report

38. The Kay Report published in July 2006 expressed the view that lack of a private interest should not be a condition for grant of PCO. Instead it was proposed that the nature and extent of the applicant's interest would be a relevant factor in considering PCO. In other words the Potter P view in ***Wilkinson*** was the preferred one.

39. The Kay Report also considered that:

    I. The inability to proceed without PCO should not be determinative;

    II. On balance the costs cap *quid pro quo* was reasonable;

    III. Whether applicant's lawyers were acting *pro bono* should not be given too much emphasis;

    IV. The current exposure to the costs of making an unsuccessful PCO (albeit limited in ***Corner House***) was unduly harsh and that there should be no costs liability for making an unsuccessful PCO application.

40. The recommendations of Kay Report have thus far not acted upon by the Civil Procedure Rules Committee. However, the case-law has moved on (see below).

(5) The case of England – the influence of Aarhus

41. In ***R (England) v LB of Tower Hamlets*** [2006] EWCA Civ 1742, which was a planning case, the Court of Appeal in a permission judgment endorsed obiter the Kay Report and remarks of Potter P in ***Wilkinson*** on the no private interest test not being decisive. Carnwath LJ also said that in any event different considerations may in any event apply to a case where "interest" is not a private law interest but simply one he shares with the other members of his group in the protection of the environment and referred to Aarhus Convention – see below. Carnwath LJ expressed the hope that the Civil Procedure Rules Committee would soon review the position.

(6) the Sullivan Report

17 The origins of the no private interest requirement lies in the particular identities of the early applicants for PCOs in judicial review: see ***R v Lord Chancellor's Department ex p CPAG*** [1999] 1 WLR 347. The lack of a private interest on the part of CPAG was thus put forward in that case as a factor in favour of grant of a PCO. This was transformed by the time of the decision in Goodson from a factor that may be relevant to support the grant of a PCO to a strict requirement limiting the availability of PCOs.

18 Indeed it has been said that the no private interest test automatically excludes anyone who qualifies as "victim" under the Human Rights Act 1998.

42. In May 2008 the report of the Working Group on Access to Environmental Justice *Ensuring access to environmental justice in England and Wales* chaired by Sullivan J. (as he then was) reported. The Working Group[19] has no official status.

43. Sullivan J. as the Report's lead author summed up the UK position in his foreword: "For the ordinary citizen, neither wealthy nor impecunious, there can be no doubt that the Court's procedures are prohibitively expensive. If the problems identified in this report are not addressed it will not be long before the UK is taken to task for failing to live up to its obligations under the Aarhus Convention".

44. The Aarhus featured prominently in the Report. The Executive Summary said this:

"1. The third pillar of the Aarhus Convention is concerned with access to environmental justice. It gives rights to members of the public, including environmental organisations, to challenge the legality of decisions by public authorities to grant consent for a wide range of activities as well as any other acts or omissions that are contrary to the provisions of national laws relating to the environment. Article 9(4) of the Convention requires that procedures for rights to access must "provide adequate and effective remedies, including injunctive relief as appropriate and be fair, equitable, timely, and not prohibitively expensive".

2. The UK government has ratified the Aarhus Convention and is largely relying on existing judicial review procedures to fulfil these access to environmental justice requirements. The liberal approach generally taken by the courts in England and Wales to questions of standing for judicial review in environmental cases reflects the Aarhus obligations in this respect.

3. We consider that the requirement under Aarhus that procedures must not be prohibitively expensive is not limited to the court fees involved in making a judicial review application, but is related to the total costs of making an application including the exposure to the risk of costs should the application fail. These cost requirements equally apply to the obtaining of interim injunctive relief, which can be of critical environmental importance where irreparable or significant damage may be caused before the full case is heard."

45. The Sullivan Report concluded that "[t]he availability of a Protective Costs Order (PCO) at an early stage in proceedings can provide an important mechanism in meeting the requirements on access to justice".

46. The Report suggested that not only should the "no private interest" test be inapplicable (as being particularly ill-suited to environmental cases) but also in cases falling within the scope of Aarhus the requirement to show that the issues raised are of "general public importance" should be disapplied. Rather it is to be assumed that upholding environmental law is always of "general public importance".

47. The Sullivan Report suggested the only criteria for a PCO in an environmental judicial review were: (a) the case is one that falls within Aarhus; (b) permission is granted; and (c) the costs and risk of exposure to costs would be prohibitively expensive to the claimant. In other words if the individual Aarhus claimant, acting reasonably in the circumstances, would be prohibited by the level of costs or cost risks from bringing the case, then the court must make some form of PCO.

48. Is it right to remove the test of general/public interest? I think not. Not all matters falling within the scope of Aarhus automatically engage the general or public interest. A challenge to a planning permission in the context of a neighbour dispute over an extension is a good example. The costs burden for such proceedings should not be effectively shifted to public authorities, almost as a general rule. The retention of a public/general interest test is important, not the least in terms of not having a disproportionate effect on public finances.

49. The Sullivan Report suggests that the increase in judicial review claims in the environmental field as a result of the implementation of its proposals would not be significant. I find this difficult to accept. There can be no question but that if the greatest inhibitor of environmental litigation at present is costs (something all the reports and studies referred to in the Sullivan Report conclude). Given that the effect of implementing the recommendations would surely be a sharp increase in the number of environmental cases.

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19 The Working Group consisted of: Mr Justice Sullivan (chair); Carol Hatton, Solicitor, WWF-UK; James Kennedy, Solicitor, Freshfields Bruckhaus Deringer; Richard Macrory QC, Barrister and Professor of Environmental Law, University College, London; Ric Navarro, Director of Legal Services, Environment Agency England and Wales; Richard Stein, Solicitor, Leigh Day & Co; Colin Stutt, Barrister, Head of Funding Policy, Legal Services Commission and David Wolfe, Barrister, Matrix Chambers.

50. In the recent decision of the Court of Appeal in ***Davey v Aylesbury Vale DC*** [2008] 1 WLR 878 Sedley LJ said "[i]n contrast to a judicial review claim brought wholly or mainly for commercial or proprietary reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs". However, the Master of the Rolls in agreeing with the judgment of Sedley LJ added a "note of caution" namely that "costs should ordinarily follow the event and that it is for the claimant who has lost to show that some different approach should be adopted on the facts of a particular case" (see para. 29) and the basic rule that costs follow the event applies in public law cases "where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of money diverted from the funds available to fulfil its primary public functions" (para. 29)[20].

51. The Sullivan Report did recognise that "[p]rovided that the overall level of costs including the risk and uncertainties of exposure does not make litigation prohibitively expensive, some exposure to costs can provide an important incentive to ensure commitment by the claimant and avoid frivolous claims".

(7) 3 more recent cases: Compton, Buglife and Morgan

(i) Compton

52. In ***R (Compton) v Wiltshire Primary Care Trust*** [2008] EWCA Civ 749; [2008] CP Rep 36 (July 2008) judicial review was sought of decisions in relation to services at a hospital, and in particular the allegation that they amounted to in effect closure. The case was brought by an individual on behalf of a local campaign to save the hospital. The Court of Appeal was invited to revisit the principles in ***Corner House.***

53. Giving the leading judgment of the majority (Buxton LJ dissented) Waller LJ said that the issues of general public importance and public interest in the issues being resolved are difficult to separate. The Defendant argued that hospital closure cases were of local interest only and did not meet the criteria. The claimant suggested that the tests in ***Corner House*** were being applied too restrictively and this resulted in PCOs being granted in too few cases: Waller LJ said (at para. 23, and see also Smith LJ at para. 77) that:

"Where someone in the position of Mrs Compton is bringing an action to obtain resolution of issues as to the closure of parts of a hospital which affects a wide community, and where that community has a real interest in the issues that arise being resolved, my view is that it is certainly open to a judge to hold that there is a public interest in resolution of the issues and that the issues are ones of general public importance. The paragraphs ***in Corner House*** are not, in my view, to be read as statutory provisions, nor to be read in an over-restrictive way".

54. It is of importance that:

I. In the same paragraph of his judgment, Waller LJ also approves the first instance judge's citation of the remarks of ***Wilkinson v Kitzinger***, where Sir Mark Potter P indicated that the "no private interest" condition might be dispensed with if the other conditions were met (see further above);

II. In the following paragraph, he indicated that "exceptionality" was not an additional criterion to be met over and above the criteria in para. 74 of ***Corner House***, but a prediction about the likely effect of the application of those criteria; and

III. It was also held "general" public importance did not mean it must be of interest to the public nationally, but a local group might be so small that issues in which they alone were interested might not be issues of general public importance.

55. On Aarhus Waller LJ sais:

"19 We were also shown a report, Access to Justice in Environmental Cases , from a working group on access to environmental justice (chaired by Sullivan J) published as recently as 9 May 2008. The main concern of that report was with the question whether the current approach of the courts in relation to costs was compliant with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (25 June 1998), concerned with access to justice in environmental matters, and its conclusion is that they are not. In appendix 3 of the report what is termed the "exceptionality test" is addressed in these terms, at para 2:

> "In [the ***Corner House*** case], the Court of Appeal accepted that PCOs should only be granted in 'exceptional' cases. But it now seems this 'exceptionality' test is being applied so as to set too high a threshold for deciding (for example) 'general public importance', thus overly restricting the availability of PCOs in environmental cases. For example, in a recent case [Bullmore's case], the implicit approach taken in the High Court and confirmed in the Court of Appeal was that there really should only be a handful of PCO cases in total every year. Such an approach if generally adopted would ensure that the PCO jurisdiction made no significant contribution to remedying the access to justice deficit it was intended to deal with, including in the environmental field. Unless the exceptionality criterion is eased,

20 See the discussion of Aarhus at para. 17 of Sedley LJ's judgment.

PCOs cannot be used in any significant way to assist compliance with [the Aarhus Convention]."

20 Mr Havers stresses that this report is concerned with environmental issues and that is obviously right, but the thrust of appendix 3 is to suggest the courts should generally consider their approach to PCOs so that there will be compliance with the Aarhus Convention obligation, and it would seem less than satisfactory to carve out different rules where environmental issues are involved as compared with other serious issues."

56. The Court of Appeal also revisited some of the issues of procedure dealt with in ***Corner House***.

(ii) Buglife

57. In ***R (Buglife) v Thurrock Thames Gateway Development Corporation*** [2008] EWCA Civ 1209 (4 November 2008) Buglife applied for a PCO capping its liability in costs in a dispute with the respondent local planning authority. Buglife had applied for judicial review of the decision of the local authority to grant planning permission for the development of a site which contained endangered invertebrate species. Sullivan J. ordered that there be an upper limit of £10,000 on the total amount of costs recoverable from *and by* Buglife in the proceedings. The judge gave reasons for limiting the amount payable by Buglife but did not give reasons for limiting the amount payable to Buglife if it won. Buglife were subsequently refused permission at a rolled up hearing. Buglife then renewed its application for permission which was granted by the Court of Appeal on the basis of public interest. Buglife sought two orders, the first of which would extend the costs protection granted to the proceedings in the Court of Appeal, so that the total amount of costs payable by Buglife if the appeal failed would be £10,000. Buglife also sought an order varying the PCO so as to remove the reciprocal costs cap of £10,000 on any costs recoverable by Buglife if the appeal succeeded.

58. The Court of Appeal again reviewed the relevant principles and the procedures governing applying for PCOs at first instance and on appeal.

59. The Court of Appeal held that following ***Corner House*** and ***Compton*** that the beneficiary of a PCO should generally have the recoverability of its costs limited to a reasonably modest amount and should also expect the costs to be capped. The Court rejected the notion that generally the defendant's liability for costs should be capped in the same amount as the claimant. It would depend on the circumstances. The Court of Appeal also affirmed that the fact that a claimant's lawyers were acting on a CFA with the possibility of a success fee was relevant to the setting of any caps on liability and that the uplift would thus have to be disclosed. The Court indicated that not all the uplift might be allowed to be recovered if a PCO were sought.

60. In ***Buglife*** the Court of Appeal extended the PCO to the appeal and ordered that there again be an upper limit of £10,000 on the total amount of costs recoverable by and from Buglife on the appeal.

61. The PCO in ***Buglife*** was granted despite the parties not acting on a pro bono basis. Indeed this factor emphasised in ***Corner House*** seems to have lost importance. There are other examples of PCOs being granted where the claimant's lawyers were not acting pro bono. Indeed in ***Corner House*** itself the claimant's lawyers were on a CFA.

62. Aarhus was mentioned specifically in paras. 16 and 24 of the judgment. This included reference to the Sullivan Report App. 3 and the concern expressed therein that "claimant costs are being set at levels that (in general even if not necessarily in each particular case) are unsustainable and as a result stifle litigation. If unrealistic caps are set on a claimant's costs, lawyers who specialise in such cases will not be able to continue to work in this field. The impact of this requirement therefore threatens to undermine the contribution PCOs can make to access to justice generally and, if applied to environmental cases, to Aarhus compliance."

(iii) Morgan

63. In ***Morgan v Hinton Organics (Wessex) Ltd*** [2009] EWCA Civ 107 in the course of what were private law nuisance proceedings an interim order for costs was made against the claimants in the order of £25000 following the discharge of an interim injunction. The claimants appealed in respect of those costs. Carnwath LJ undertook a details analysis of the Aarhus Convention and also the case-law on PCOs - the discussion of PCOs in ***Morgan*** is obiter as the case concerns private law not public law proceedings..

64. However, on the issue of the private interest test Carnwath LJ nonetheless took the opportunity to review of the

developments since ***Corner House*** and concludes:

"39. On a strict view, it could be said, ***Goodson*** remains binding authority in this court as to the application of the private interest requirement. It has not been expressly overruled in this court. However, it is impossible in our view to ignore the criticisms of this narrow approach referred to above, and their implicit endorsement by this court in the last two cases. Although they were directly concerned with other aspects of the ***Corner House*** guidelines, the "flexible" approach which they approved seems to us intended to be of general application. Their specific adoption of Lloyd Jones J's treatment of the private interest element makes it impossible in our view to regard that element of the guidelines as an exception to their general approach.

40 The hope that the Rules Committee might be able to address these issues in the near future has not been realised. In the meantime, in our view, the "flexible" basis proposed by Waller LJ, and approved in ***Buglife*** should be applied to all aspects of the ***Corner House*** guidelines"

65. In ***Morgan*** the Court of Appeal provided the following summary of its consideration of the issues (references to "the Convention" are to the Aarhus Convention):

"i) The requirement of the Convention that costs should not be "prohibitively expensive" should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.

ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.

iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary "loser pays" rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion.

iv) This court has not encouraged the development of separate principles for "environmental" cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The ***Corner House*** statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied "flexibly". Further development or refinement is a matter for legislation or the Rules Committee.

v) The Jackson review provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee. Even if we were otherwise attracted by Mr Wolfe's invitation (on behalf of CAJE) to provide guidelines on the operation of the Aarhus convention, this would not be the right time to do so.

vi) Apart from the issues of costs, the Convention requires remedies to be "adequate and effective" and "fair, equitable, timely". The variety and lack of coherence of jurisdictional routes currently available to potential litigants may arguably be seen as additional obstacles in the way of achieving these objectives."

66. Of particular importance in ***Morgan*** are the conclusions of the Court of Appeal as to the status of the Aarhus Convention (see paras. 22 and 44) where it was said that:

I. The Convention has the status of an international treaty not directly incorporated and thus its provisions cannot be directly applied by domestic courts;

II. the ratification of the Aarhus Convention by the EC gives the Commission the right to enforce against a Member State in respect of the actions of Member States but does no give rise to a directly applicable rule of EC law;

III. thus "from the point of views of a domestic judge … the principles of the Convention are at the most something to be taken into account in resolving ambiguities or exercising discretions …".

(8) the Jackson Report

67. There are chapters (35 and 36 of Part 7) in Lord Justice Jackson's preliminary report considering judicial review generally and also environmental claims.

68. In the chapter on judicial review there is a review of the case-law on PCOs.

69. In the chapter on environmental claims Aarhus is discussed:

"4.1 Aarhus Convention. The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (generally known as "the Aarhus Convention") came into force in

October 2001. It was ratified by the UK and the European Community in 2005. The Aarhus Convention requires that there be proper consultation in respect of all administrative decisions which will affect the environment. Furthermore, Article 9 of the Aarhus Convention requires that members of the public with a sufficient interest must have access to a court or similar body in order to challenge developments which will have a significant effect on the environment. The procedures for access to justice must be "fair, equitable, timely and not prohibitively expensive".

4.2 Policy underlying the Aarhus Convention. The reasons for ratifying the Aarhus Convention and the public benefit of permitting interested persons to advance such challenges are discussed in numerous articles and reports. There is an obvious public benefit in consultation with all interested parties concerning administrative decisions which impact upon the environment. There is also public benefit in permitting proper judicial review challenges to such decisions. The arguments go beyond considerations of democratic legitimacy, important though those considerations are. The arguments are neatly stated by Steele as follows:

> "There are a number of things which citizens might offer to the decision-making process. One of these can be summarized as 'situated knowledge'. Those who are closest to a problem and its effects may in certain respects have derived a greater understanding of that problem than those ordinarily required to resolve it. This might be expected to be the case with citizens who can be referred to as 'affected parties' – the people who will feel the effects of environmental problems most closely. However, other groups may provide the opposite and complementary virtue, of bread of reflection. These could be referred to as 'interested' parties. 'Interested' parties are often those who have reflected broadly about a particular set of problems, such as conservation or biodiversity, including non-governmental action groups such as environmental groups. So 'interested' and 'affected' parties are important components of the deliberating group, with almost opposing virtues to offer.
>
> Furthermore, it is argued that dissenting views should be carefully considered where any claim to 'knowledge' is asserted, particularly in an area where there are many uncertainties. Scientific claims are increasingly debated in the public realm, and citizens are supposedly more able to gain access to information on the basis of which knowledge-claims can be asserted and questioned. It has been argued that civil society is thus increasingly well informed, and citizens increasingly aware that the claims of science are disputable. There is some difficulty with this claim, not least that scientific claims could equally well be seen as becoming increasingly closely associated with the industries which promote development, as those industries pay for more of the research. One suggestion here is that the public through its scepticism and willingness to question scientific claims, may provide important decision-making resources in respect of information, where those with responsibility for decisions choose to recognize this."

70. The Jackson Report concludes in this regard by saying at para. 4.7: "[a]s our costs rules now stand, on one view England and Wales are not complying with the provisions of the Aarhus Convention, to which the UK has voluntarily signed up." The Report continues:

"Three options for ensuring that there is compliance with the Aarhus Convention would be the following:

(i) to introduce one way costs shifting;

(ii) for protective costs orders to become the norm in environmental judicial review

cases (where the claimant is of limited means), applicable only to the claimant's costs liability;

(iii) for protective costs orders to become the norm in environmental judicial review cases (where the claimant is of limited means), with a substantially higher cap upon the defendant's costs liability than the cap upon the claimant's costs liability.

4.8 None of the above options may be palatable to public authorities. However, the burden upon them may be lessened if success fees cease to be recoverable (an option further discussed in chapters 35 and 47 of this report). It must be recognised that unless there are radical reforms along the lines suggested above, it is possible that England and Wales are in breach of their obligations under the Aarhuus Convention.

4.9 There is an obvious case for harmonising the reform of the costs rules in environmental cases with the reform of costs rules for other judicial review cases: see ***Compton v Wiltshire Primary Care Trust*** [2008] EWCA Civ 749 at [20]; R (***Buglife – The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation*** [2008] EWCA Civ 1209 at [17]; ***Morgan v Hinton Organics (Wessex) Ltd*** [2009] EWCA Civ 107 at [33] and [47] sub-paragraph (iv). It may therefore be the case that whatever expanded criteria are adopted for PCOs in environmental cases should then be extended to all judicial review claims. This is an issue which requires separate consideration during Phase 2."

71. A final report is expected later this year. Jackson LJ seems to be in favour on one way costs shifting in judicial review – including environmental claims. The effect of which would be to make the default position (applicable other than in special categories of case ("at-risk-cases") or where there is unreasonable conduct) that win or lose a claimant would not be liable for the costs of the defendant public authority (or other interested parties) but (as at present) where the claim

succeeds the defendant pays the costs of the claimant.

(9) Trends

72. Trends in this area are difficult to predict as many applications for PCOs are dealt with on paper and thus not reported. However, it does seem PCOs are being more readily made than a year ago especially in environmental cases. Interestingly in the Aarhus Compliance Committee proceedings the UK in response to the Client Earth communication said "We say that it is striking that [Client Earth] have not brought before the Committee any proposed Claimant in a recent environmental case in which a PCO has been refused, in breach of Article 9(4), who was not otherwise eligible for Legal Aid or a CFA. If there really were a systemic breach of the provision in Article 9(4) it would no doubt be possible to identify specific cases which had fallen through the net of measures in place to achieve compliance".

73. Looking at some of the environmental cases in Engalnd & Wales that have considered PCOs since ***Corner House***.

DATE	CASE	NOTES	OUTCOME
22/09/2006	***River Thames Society v First Secretary of State*** [2007] J.P.L. 782	Lady Berkeley's challenge to planning permission granted for the redevelopment of the Lots Road Power Station, Chelsea on the basis of misapplication of Blue Ribbon policies	PCO refused on the basis that the issues raised were not of general public importance
22/03/2007	***Kings Cross Railway Lands Group***	Planning case Collins J: "I have the gravest doubt whether the [private interest] limitation suggested in Corner House was correct. No doubt private interest is a relevant consideration which may in many cases mean that a PCO would not be appropriate, but I do not think it should be an absolute bar. I am satisfied that Goodson is wrong in this respect. In any event, since Corner House provides guidance and not rigid rules, that aspect can properly be reconsidered in individual cases".	
22/02/2008	***R (Buglife) v Thurrock Thames Gateway Development Corporation***	Judicial review of local planning authority's decision to grant planning permission for development of site that contained rare invertebrate species.	PCO granted with cap of £10,000; £10,000 reciprocal costs cap imposed.

1/7/2008	***R (Eley) v SSCLG*** [2008] EWCA Civ 1632	Collins J confirmed his view that "the no personal interest condition in ***Corner House*** is in my view unsustainable" and granted a PCO. This was a s. 288 planning challenge concerning the construction of a dozen new houses as backland development. Those affected were a small number of existing households. A PCO was granted. This was challenged on the basis that this did not amount to a general/ public interest	The Court of Appeal (Clarke MR and Waller LJ) dismissed an application by the Secretary of State for permission to appeal on 5 November 2008 and held that the fact that a person has standing for the purposes of bringing a claim for judicial review or a statutory planning appeal is not a bar to being granted a PCO.
04/11/2008	***R (Buglife) v Thurrock Thames Gateway Development Corporation***[2008] EWCA Civ 1209	Appeal from decision of High Court to dismiss judical review of local planning authority's decision to grant planning permission for development of site that contained rare invertebrate species.	PCO extended to appeal, but £10,000 reciprocal costs cap imposed in relation to appeal.
02/03/2009	***Morgan v Hinton Organics (Wessex) Ltd*** [2009] EWCA Civ 107	Action in private nuisance caused by the smell of a composting site.	Discussion of the principles of PCOs and Aarhus generally. No specific application for PCO.
2/09/2009	***?***	Planning judicial review concerning alleged lack of delegated authority for a planning decision by Leeds City Council. The case raises wider issue of whether numerous planning decisions going back 3 years were made with proper delegated authority.	PCO granted – because of scale of issue was in general public interest.

(10) PCOs in Northern Ireland

74. I could find only one case in Northern Ireland where an application for a PCO has been considered: ***McHugh, Re Application for Judicial Review*** [2007] NICA 26 [2007] (01 July 2007).

75. In that case the Court of Appeal (Nicholson, Campbell and Sheil LJJ). She who suffered from multiple sclerosis and applied for judicial review of a decision of Home First Community Health and Social Services Trust (the Trust) not to make arrangements to provide her with assistance for adaptation of her home. She asked for a declaration that the Housing Renovation etc. Grants (Reduction of Grant) Regulations (Northern Ireland) 1997 were ultra vires the Housing (Northern Ireland) Order 1992 and a declaration that a means test, provided for in the regulations, was not compatible with Articles 3, 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms and Article 1 of the First Protocol to the Convention. Kerr J. dismissed her application. The appellant appealed and sought a PCO. The Court of Appeal referred to ***Corner House*** but also to criteria drawn up by the Ontario Law Reform Commission in 1989 for PCOs.

76. The Court of Appeal held that "[i]t is only in exceptional circumstances that protective costs orders are made. The principles in ***Ex p Child Poverty Action Group***, as revised by the Court of Appeal in England and Wales in ***Corner***

House, provide guidance as to when such circumstances may be said to have arisen" (see para. 17). It was concluded that:

"[18] ... Because of her medical condition she needs to have work carried out to her home and this gives her a significant interest in the outcome of the proceedings. In an article entitled Protective Costs Orders by Stein and Beagent [2005] JR the authors indicate that at one end of the spectrum is the public law case where the individual claimant seeking the order is the only person to benefit from the litigation. The boundaries, they suggest, may be more blurred where a claimant is bringing a claim which, if successful, will lead to direct personal benefit to the claimant but the issues raised are of real public importance. If such an approach is adopted this is not a case which comes within the boundary despite any personal interest of the appellant by reason of issues of real public importance. A statement that the issues will impact on vulnerable members of society is insufficient to provide the basis for the private interest of the appellant in the outcome to be disregarded as being incidental to an issue of general public interest.

[19] Protective costs orders were made in R(CND) v Prime Minister where the issue was the legality of the war in Iraq and in R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1296, where the issue was the fairness of arrangements for processing asylum- seekers' claims. These two examples illustrate the type of case where such an order is appropriate. The Child Poverty Action Group wished to challenge the way in which the Lord Chancellor exercised his statutory power in relation to the extension of legal aid to cover at least some cases before social security tribunals and commissioners and it was decided that such an order was not appropriate. Although that decision was given prior to the overriding objective being included in the rules we agree with Richards J. in R v Hammersmith and Fulham BC Ex p Council for the Protection of Rural England [2000] Env LR 544 where he said that the relevant aspects of the rule are embedded in the principles stated in Child Poverty Action Group. This latter case provides an example that is much nearer to the present case than those mentioned earlier where a costs protection order was made.

[20] In the result we are not satisfied that the issues raised in this appeal are of general public importance or that the appellant has no private interest in the proceedings. This is not therefore one of those exceptional cases where it is appropriate to make a protective costs order and the application must be dismissed."

Contributions - Kevin Eaton

RAISING THE STANDARDS IN BROWNFIELD REGENERATION

KEVIN EATON – SiLC (keaton@uk.environcorp.com)

The remediation of contaminated land recently hit the mainstream news following the judgement that Corby Borough Council had become the first local authority to be found liable for negligence in the control and management of remediation works. The case relates to the uncontrolled impacts from contaminants to the surrounding area arising from remedial activities at a 257 hectare former British Steel Corporation site in the 80's and 90's. The judge concluded that the council "did not really appreciate the enormity, ramifications and difficulty of what it was setting out to achieve in terms of removing and depositing very substantial quantities of contaminated material."

It is well over 10 years ago since these works were completed, but this is still a wake up call to the industry regarding the potential consequences of their actions; and a reminder to regulators of the importance of ensuring that robust pollution controls are put in place. These events have highlighted the need for, and importance of, experienced professionals (whether within public or private sector organisations) who have demonstrable expertise and who can offer authoritative advice to help deliver safe, sustainable and exacting solutions.

However, a shortage of diverse skills in the Brownfield sector has been identified in the National Brownfield Strategy and it is Government policy to identify priorities for the development of such skills as set out in the recently published DEFRA report – Safeguarding our Soils – which outlines policy on improving our understanding of the threats to soil and the best practice in responding to them.

The Specialist in Land Condition (SiLC) registration scheme brings together professionals from a broad background advising on land condition matters and its status demonstrates a high degree of experience, competence and skill amongst the profession. This is illustrated by the continuing rise in the demand of the services of registered SiLCs, for example, the use of SiLCs is already cited in planning guidance, it is a requirement for specific areas of project work for some government agencies, and

significantly, it is now prerequisite for some commercial organisations and financial institutions.

In continuing to address the needs of the industry and to promote SiLC as the status practitioners in the sector would seek to achieve, the SiLC body with support from the Homes & Communities Agency is currently producing a Skills Development Framework (SDF). The SDF is a capability based system which will complement existing institutional frameworks in supporting an individual's career development; from graduate through to chartered and senior level membership status of a professional organisation, and eventually to SiLC registration.

Improving standards and engaging senior practitioners with recognised and well respected qualifications may in the future provide opportunities for self regulation of certain activities within the sector. Certainly the longer term vision of the SiLC scheme is to gain wider recognition for SiLC accreditation as an auditable 'sign off' process for a range of potential applications. This does not necessarily mean that an individual SiLC is expected to be a technical expert in all disciplines associated with land regeneration projects, but rather the SiLC ensures that relevant quality controls are appropriately applied throughout the assessment and implementation process. In this capacity, the SiLC would ensure that only competent practitioners who have the appropriate skills and experience are involved in undertaking specific assessments, oversee technical and management review procedures and from this, make certain that any conclusions and recommendations are reasonable and supported by accurate factual data. Such responsibility would of course be accompanied by an auditable process accountable to the Regulatory Authorities and supported by a complaints and disciplinary process administered by the SiLC governing body. The importance of the SiLC scheme and the credibility to deliver such 'sign off' products comes through the strong ethical code of conduct by which all SiLCs must abide.

Government advisory panels and other organisations serving the sector have long identified a need for competent professionals dealing with a wide range of technical issues. As such, there is a role for many professionals working in this sector to ensure higher quality standards are delivered and this can be achieved by actively supporting the SiLC scheme which has the capability to deliver these aims.

Further details can be found at www.silc.org.uk.

Contributions - Peter Scott

BOGGIS V NATURAL ENGLAND AND HABITATS DIRECTIVE IMPLEMENTATION

By PETER SCOTT, PARTNER- PARKINSON WRIGHT LLP

The recent decision of the Court of Appeal in Boggis v Natural England [2009] EWCA Civ.1061 is potentially a very significant development in an area where there has as yet been little case-law in the UK. Article 6(3) of the Habitats Directive places an obligation on member states that before any "plan or project" likely to affect the integrity of a Natura 2000 site is approved it must be subject to an appropriate assessment. As interpreted in the leading case in the European Court of Justice Landelijke Vereniging tot Behould van de Waddenzee and another v Staatssecretaris van Landbouw, Natuurbeheer en Visserij C – 127/02 ECR 2004 I-07405 a member state can only approve such a project (without specific derogation and compensatory measures to which Article 6(4) applies) after having satisfied itself that it can on the best scientific information available exclude the possibility that the integrity of the site may be affected, alternatively defined that the achievement of the conservation objectives of the site are undermined.

The Waddenzee test therefore sets an extremely high threshold for any plan or project to be shown to be Habitats Directive compliant. Even the slightest disturbance to migratory birds which may cause them to expend energy unnecessarily, or put them in a situation where they may have to compete with other species on alternative feeding grounds, has been argued by the nature conservation authorities in England to be a potential impact on the integrity of the site and therefore reason to deny approval to a project.

Traditionally the "plan or project" test has only been applied in the UK to what is understood to be a development project whether public or private sector, and regulation of activities pursued under public rights of fishery, way or navigation was thought to be subject to the general obligations under Article 6(2) of the Habitats Directive. Development plans were also thought to be outwith the scope.

This changed as to the first part with the Waddenzee decision which brought hydraulic cockle fishery authorisations into "plan or project" by analogy with marine mineral extraction; as construed generally by nature conservation authorities in England and Wales this placed a legal requirement on all fishery managers to apply the appropriate assessment test to all fishing approvals. The argument that general fishing vessel licensing is "plan or project" is currently raging, but raises considerations of DVLA vehicle licensing could also require, seeing that it authorises uses of vehicles on public highways through European sites.

As to the second part, development plans, the successful action by the Commission against the UK (Commission v UK C-6/04, 20th October 2005, ECR 2005 I-09017) established that the UK was in breach of its obligation to transpose fully Articles 6(3) and 6(4) of the directive because development plans (which the UK in any event accepted fell within the definition of "plan or project") were not subjected to any requirement of appropriate assessment. As a result of that decision, limited amendments were carried out to the Conservation (Natural Habitats &c) Regulations 1994 by the 2006 regulations, and revised advice was issued by DEFRA in relation to Shoreline Management Plans, which concluded: "It is accepted that SMPs and CFMPs are plans for the purposes of article 6(3) Habitats Directive. Whilst each plan must be considered on a case by basis, for the reasons given above, they are likely to have a significant effect on the site concerned, in that it cannot be excluded on the basis of objective information that such plans will have a significant effect on decisions relating to schemes or projects through their effect on strategies which in turn affect such decisions."

Certainly the uncertain boundaries of what "plans" or doings of public authorities fell into the class subject to a directly effective requirement to appropriate assessment exercised practitioners considerably.

The reason that the question arose in relation to the Boggis case is explained by what the claimant had in fact done. The settlement of Easton Bavents had been started by the family early in the 20th century as a seaside village. For various reasons no more than 30 houses were built. As a result of rapid erosion of the soft cliffs there now remain only 14 houses. In the late 1990's Peter Boggis determined to try to save his home and the homes of the other residents as well as the agricultural land abutting on the cliffs and initiated a sacrificial sea defence, which would ensure that material from a soft bank would be eroded and replenished in place of the erosion of the cliffs themselves. In a pilot project shingle was pushed up into a bank at the end of one of the two residential roads remaining. Subsequently waste exemptions were registered in 2002 and 2003 for a ramp down to the beach and a work that provided a 850m footpath across the beach. Large quantities of soil were deposited in front of the cliffs, without planning permission (which Mr Boggis believed he did not require).

This presented the local planning authority with a dilemma. While a scoping assessment had been carried out in relation to EIA, absent any power to require a planning application to be submitted, the only available response was to take enforcement action. Yet to require the defence to be removed would raise serious questions under Article 8 and Article 1 of the first protocol to the European Convention on Human Rights. Consequently the LPA in March 2005 did not consider it expedient to take enforcement action.

A meeting took place between the Environment Agency Waveney District Council and English Nature in October 2004 when English Nature explained that if the former SSSI had not fallen into the sea English Nature would not have given permission for Peter Boggis' works, and that they were minded to renotify the cliffs as they then stood in order to require Peter Boggis to apply to English Nature for a consent or to Waveney District Council for other consents.

A further meeting took place in October 2005, also including Suffolk County Council, discussed landscape issues and concerns that the waste material could be used to reinstate quarries.

Following a change in the Waste Management Licensing Regulations a further application for an exemption was refused because of the absence of planning permission. However, this did not prevent the deposit of material which was not waste.

There followed a further meeting described as a "Legal Case Conference Easton Bavents – Mr Boggis, bund" organised by English Nature in November 2005 which included also DEFRA and Crown Estate, in which each party discussed what powers it had to require the removal of the sea defence, and what decisions it had so far taken. English Nature minuted that it was convinced that action was needed, and it could be collective action, possibly via a joint injunction.

In this context, where all the relevant public state bodies were discussing the exercise of legal powers to require a coast defence to be removed or at least to be destroyed by the sea, and whether there was any legal liability in relation to houses subsequently falling into the sea as a result, English Nature proceeded to notify an SSSI which included not only a 250 metre coastal strip up to and including the cliffs but also the site of the sea defences themselves, on the basis that they interfered with the access to the cliffs and their erosion under natural processes.

Following many objections, the confirmation of the SSSI was considered by the Council of English Nature on 30 June 2006. At that point, noting that a consultant employed by English Nature had advised that the soft sea defence would be expected to reduce the rate of coastal erosion to the north of it by 50% and that the coast to the north included part of a Special Area of Conservation and a Special Protection Act, Peter Boggis' advisers raised with the Council that the confirmation of the SSSI would be unlawful because of the potential impact of requiring the sea defence to be destroyed on the European sites. In view of comments in the judgment in the Court of Appeal, it is appropriate to put on record that Mr Boggis counsel told the Council: "We also do make submissions strongly, and this picks up on a question that one of your Council members asked, on the erosion of the cliffs will lead to the loss of the saline lagoon at Easton Broad, and I set out there the various statutory and EU protection which applies to the SPA. We do say that the work that is proposed by English Nature will be contrary to the provisions of the directive". The Speaking Note provided to the Council by counsel stated specifically in paragraph 20: "In addition, unrestricted erosion of the Cliffs will lead to the loss of the saline lagoon at Easton Broad [the SAC], which is included within the current SSSI, and is designated both as a Special Protected Area (SPA) under Article 4 of the EC Directive on the conservation of wild birds (79/409/EEC), and designated under the Ramsar Convention on Wetlands…Should the inclusion of that land be confirmed by this Council, then that decision will be ultra vires, Wednesbury unreasonable, in breach of 79/409/EEC,…"

English Nature nevertheless immediately confirmed the SSSI notification and judicial review proceedings were brought by Mr Boggis in his name and on behalf of Easton Bavents Conservation (the title under which the sea defence works had been carried out). Leave was summarily refused at first instance on the papers by Mr Justice Sullivan as he then was. Subsequently leave was granted by the Administrative Court on the question of whether the notification was lawful under domestic legislation, shortly whether conservation could include destruction, and by the Court of Appeal on the Habitats Directive issue.

In the Administrative Court Mr Justice Blair was persuaded that the notification package, because it made clear that consent in relation to coast defence was intended to be refused, very unusually constituted a plan or project, and that on the information before the court it could not be concluded that an effect on the integrity of the SPA could be excluded. He also held that, as English Nature had been under a duty to consider the need for an appropriate assessment when it confirmed the SSSI, it was not possible for the court, as urged by Natural England, not to quash the relevant part of the SSSI on the grounds that, if reconsidered, the officers of Natural England would conclude that no appropriate assessment was necessary, and thus he applied Berkeley v Secretary of State for the Environment [2001] 2 AC 603. He noted that a refusal by Natural England of consent to maintain part of the soft sea defence had already been overturned by the Secretary of State on human rights grounds, and urged the public authorities to endeavour to resolve matters to ensure the protection of the houses.

On appeal before Lord Justices Mummery Longmore and Sullivan the only judgment was given by Lord Justice Sullivan. In relation to the issue of whether Natural England had generated a plan or project at all, Sullivan LJ regarded the notification of an SSSI as analogous to the making of a conservation area, AONB etc. He held: "Such notifications are not themselves plans, they are a means of ensuring that land use and other plans take proper account of environmental features of special interest.", and therefore determined that no notification of an SSSI could engage Article 6(3). He dismissed the views of English Nature officers in the process that consent would not be expected to be given as merely the views of officers, comparable to those in a planning officer's report to committee. Similarly he contrasted the provisions with regard to OLDs (which criminalise coast defence works without consent) to those with "teeth":- "However, the statement of English Nature's views was just that, a statement of its views with no further statutory significance. The statement made it clear that it did not constitute consent for any of the OLDs. For those OLDs requiring planning permission, including the erection etc. of sea defences, the views of English Nature could not in any event be determinative of the question whether the operation would be able to be lawfully carried out. While a grant of planning permission would obviate the need for a consent under section 28E(3)(a), the converse is not the case. The views of English Nature, whether expressed in the statement or otherwise, would be one, but only one, of the material considerations to be considered by the local planning authority, or on appeal the Secretary of State. The lack of any "bite" in a statement of views under sub-section 28(4) is confirmed by the other provisions in the 1981 Act relating to the management of the SSSIs: section 28J which enables English Nature to formulate "Management Schemes"; and section 28K which enables English Nature to serve "Management Notices" if owners or occupiers do not give effect to Management Schemes."

Sullivan J interpreted the judgment in Commission v UK as turning on the statutory presumption in what was then section 54A, whereas the OLDs list and views as to management had no statutory force whatsoever in relation to the grant of planning consent.

By necessary implication from Sullivan LJ's judgment, therefore, the position of DEFRA and the Environment Agency on Shoreline Management Plans and other plans, and DCLG on Regional Strategy Statements, that because of the influence they have on other decisions they can fall to be appropriately assessed as plans or projects, is incorrect and they are not liable to appropriate assessment at all, notwithstanding that for example, in relation to SMPs, through their implementation European

sites are planned to be lost through the abandonment of sea defences and policies of managed retreat. It is particularly ironical that the SMP for this section of coastline is awaiting confirmation at the present time, supported with an appropriate assessment which concludes that it will have effects on the integrity of European sites, and proposing compensation measures under Article 6(4).

However, the implications of the Court of Appeal in this decision go further. Sullivan LJ continued to address the question of the threshold at which the duty to consider application of appropriate assessment arose. He concluded, as a matter of law, that a person who subsequently challenges a decision for want of the decision-maker addressing the issue as to whether an appropriate assessment might be required, a screening assessment or an appropriate assessment must (a) notify the decision-maker expressly of the need for an "appropriate assessment" and (b) produce "credible evidence" prior to the decision that there was a "real, rather than a hypothetical, risk which should have been considered." Sullivan LJ in Boggis states: "In my judgement, a breach of Article 6.3 is not established merely because, some time after the "plan or project" has been authorised, a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been "excluded on the basis of objective information that the plan or project will have significant effects on the site concerned". Whether a breach of Article 6.3 is alleged in infraction proceedings before the ECJ by the European Commission (see Commission of the European Communities v Italian Republic Case C-179/06, para. 39), or in domestic proceedings before the courts in member states, a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be "excluded on the basis of objective information", must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered." "In the present case there was no such evidence prior to confirmation. It simply did not occur to anyone, including the Respondents, that there was a risk to the SPA which required an assessment under Article 6.3. Nor was there such evidence after confirmation."

Such an interpretation would, in effect, mean that no decisions not to screen for or carry out appropriate assessments could be challenged given that expert reports such as provided to the court could not be provided within the time-scale available for most decisions in relation to plans or projects, and the implementation of the Directive in the United Kingdom would be seriously defective. It would further make it impossible for the nature conservation agencies to influence decisions by section 28G authorities by arguing prior to decisions being taken that such decisions should be subject to appropriate assessment, given that the consultation periods are too short for the relevant reports to be commissioned.

The judgment also rests upon the proposition (para 38) that a risk of physical effects on Easton Broad i.e. on the physical integrity of the site has to be shown by an objector by reference to scientific studies to be "likely to undermine the conservation objectives". Lord Justice Sullivan stated: "The question was not whether there might be physical effects on Easton Broad if the Respondents' sea defences to the south were not maintained, but whether such physical effects were "likely to undermine the conservation objectives" of the SPA" (see paras.47 and 48 of Waddenzee, which must be read together with the approach to likelihood in paras.43 and 44 of the judgment). Professor Vincent very properly disclaimed any expertise in nature conservation. It follows that, even if the notification/confirmation of the SSSI was a plan or project for the purposes of Article 6.3, there was no breach of that Article."

While it would appear obvious that physical loss of part of a habitat which constitutes the European interest in a site is likely to have a significant effect on the integrity of the site, consistently with Natural England's own guidance in HRGN3, and Blair J was satisfied that the evidence before him could not justified a positive appropriate assessment, courts are now seemingly bound to dismiss any challenge which is not supported by substantial scientific research not only as to the probable incidence of physical effects on the European site but also, specifically, experts' reports in relation to the potential impacts of those physical effects upon the nature conservation interests in question. In the Boggis case these included bitterns, little terns and saline lagoons, therefore requiring three expert reports. Given the difficulty for claimants of obtaining expert reports independent of Natural England and specific interest groups, the determination that it is insufficient to show a risk of physical damage or loss of part of a European site makes it virtually impossible for third parties to challenge any such decision. Further, in those not infrequent cases where a nature conservation agency concluded its consultation that there is a need for appropriate assessment, the decision-maker in question can now appropriately respond that any challenge requires to be supported by detailed scientific papers which (given the timescales within which many decisions are made) will probably be impossible to provide. Therefore, following this decision (subject to any appeal), any challenge to a decision of a section 28G authority in relation to a decision to which Article 6(3) is alleged to apply must be supported by cogent scientific evidence, not only that there is a potential physical effect on the European site, but also that the physical effects are likely to undermine the conservation objectives. Not only that, but the objector must, prior to the decision in dispute, produce that evidence to the decision-maker in order that it may be placed under any obligation even to consider whether a screening assessment or appropriate assessment may be required.

The position of the decision-maker in that situation is strengthened by the idiosyncrasies of domestic law where, as is usual, European sites are "underpinned" by SSSI notifications. Where a 28G authority does not consider that an operation is likely to damage the SSSI and therefore does not notify the nature conservation body by reference to section 28I, but the nature conservation body disagrees, the delaying mechanisms in my view cannot be effective, because the ability of a nature conservation body to force a delay by submitting recommendations to the decision-maker is only triggered by the notification of the view of the decision-maker that effects on the special scientific interest are likely.

The risk to decision-makers of suffering a Boggis type challenge is further reduced by Sullivan LJ's conclusion that discretion is available to save an unlawful decision, distinguishing the opinions of the House of Lords in Berkeley on the basis that in relation to appropriate assessment consultation with the public is discretionary.

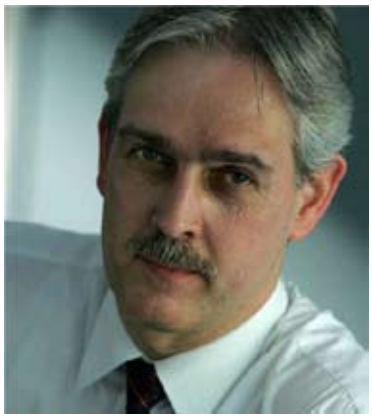
Consequently, as a result of the decision in the Court of Appeal in Boggis, it appears that not only has the potential scope of appropriate assessment been drastically reduced and limited to those cases where there is a statutory presumption in favour of the plan in question, but that also it has made it very easy for decision-makers not to address, or to ignore, the need for appropriate assessment even if the necessity for it is explicitly urged on them either by third parties or by the nature conservation agencies themselves.

THE HUNGARIAN PARLIAMENTARY COMMISSIONER FOR FUTURE GENERATIONS – Special Event

By HALINA WARD, Director, Foundation for Democracy and Sustainable Development.

UKELA has joined with the Foundation for Democracy and Sustainable Development (www.fdsd.org) - a small charity which works to find ways of equipping democracy to deliver sustainable development – to organise a special event.

The office of the Hungarian Parliamentary Commissioner for Future Generations (see further http://jno.hu/en) could offer useful insights for the UK. And as UKELA works to find ways to deliver better environmental outcomes through law, a forthcoming meeting with the Parliamentary Commissioner himself, Dr Sándor Fülöp, will provide direct opportunities to learn from this innovative office. UKELA members are invited to attend on February 25th 2010.



Dr Sándor Fülöp, Hungarian Parliamentary Commissioner for Future Generations

In 2007, the Hungarian Parliament resolved to create a new independent watchdog function, informally known as the 'Green Ombudsman', to safeguard the constitutional right of Hungarian citizens to a healthy environment.

The idea stemmed from work carried by a Budapest-based non-governmental organisation, Védegylet ('Protect the Future'). In 2000 Protect the Future had proposed an institution that could act as a spokesperson for those who are the "most excluded of the excluded" from democratic representation: that is, future generations. Protect the Future member and lawyer László Sólyom, now President of Hungary, was actively involved in crafting an early draft law to catalyse further legislative efforts. The legal basis for the Green Ombudsman's role was eventually established via amendments to the 1993 'Ombudsman Act' (Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman)).

In May 2008 the Hungarian Parliament elected environment lawyer, academic and former public prosecutor Dr Sándor Fülöp to become Hungary's first Parliamentary Commissioner for Future Generations for a six-year term. As Commissioner for Future Generations he is one of four Parliamentary Ombudsmen, with others addressing civil rights, data protection and freedom of information, and the rights of 'national and ethnic minorities,' respectively.

The UK already has an Information Commissioner (dealing with data protection and freedom of information) and four

Children's Commissioners (working to promote the views and best interests of all children and young people). But there is no direct equivalent of the Commissioner for Future Generations.

So is the model one that we should be considering more closely here in the UK? The UK's constitution, unlike Hungary's, does not directly recognise the right of UK citizens to a healthy environment. However, in August 2008, a report from the Joint Committee on Human Rights called on the Government to adopt an 'aspirational' UK Bill of Rights and Freedoms, arguing that there is a strong case for it to include a right to a healthy and sustainable environment (http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf).

In any case, the Hungarian approach has potential to offer inspiration even without a foundation in a written constitution. Certainly, the 'ombudsman' function is far from new to the UK. There are, for example, (at least) twelve government ombudsmen in the UK whose offices look into complaints about discrete organisations or kinds of organisations. And the British and Irish Ombudsman Association (http://www.bioa.org.uk/) lists 27 full voting members.

Ombudsmen typically work to investigate organisational or functional 'maladministration' of one kind or another. In the UK, the scope of the term 'maladministration' was famously drawn in 1966 by then-leader of the House Richard Crossman MP who said it applied to 'bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on'.

The Hungarian Green Ombudsman's functions are far broader even than this wide view. For whilst the Green Ombudsman is mandated to investigate complaints relating to a broad range of environmental issues (familiar 'ombudsman' territory which brings potential for fruitful exchange of information with the UK's practising environmental lawyers), the functions assigned to his role reach deep into the policy process.

The Green Ombudsman is also mandated to act as a policy advocate for environmental sustainability issues across all relevant fields of national and local legislation and public policy (including acting as a source of specialist advice to Parliament). He must comment on legislative drafts and policy initiatives concerning the environment at all levels of Government (including matters of EU decision-making and local government development and spatial plans and initiatives). And he may also call for the adoption or annulment of legislation and seek constitutional review by the Constitutional Court of any legislative act in force

Finally, the Commissioner has a wider mandate to widen the knowledge base: his third function is to undertake or promoting research projects targeting the long term sustainability of human societies.

This wide range of functions makes the Hungarian role not only unique, but also extremely challenging. How, for example, will the nexus between environmental and social issues play out in practice? And how will the Ombudsman gauge the interests of 'future generations'?

If the Green Ombudsman can be understood in part as an independent watchdog for sustainable development and future generations, the role already has some partial parallels here in the UK. For example, the Parliament's Environmental Audit Committee considers the extent to which the policies and programmes of government departments and non-departmental public bodies contribute to environmental protection and sustainable development. And the Sustainable Development Commission works as the Government's independent advisory body on sustainable development.

The Parliamentary Commissioner's mission to bring concern for future generations into the policy process could help further to inspire a recent proposal for a 'Congress for the Future'; one of nineteen 'Breakthrough ideas for the Twenty-first Century' selected by the Sustainable Development Commission following an open competition over 2008-9. The proposal, in SDC Commissioner Lindsey Colbourne's words, is to '*create a special Congress, convened by Parliament every year, to help build broad agreement and provide direction on long-term questions*'. (See Sustainable Development Commission, *Breakthroughs for the twenty-first century*, 2009). Participants in the Congress would be randomly-selected citizens and stakeholders, invited to engage on selected issues in an informed, deliberative process with the overall objective of reaching an informed consensus to give long-term vision and direction to the country.

In a second relevant initiative, the Corporate Responsibility (CORE) coalition (see http://corporate-responsibility.org/) whose members include some 130 civil society groups, some of the UK's best known charities among them, is pressing for the creation of a new UK Commission on Business, Human Rights and the Environment. The essential idea is that the Commission would provide guidance to companies on what standards they must adhere to when operating abroad, and act as a forum for hearing and resolving allegations of infringements. Whilst the Commission proposals focus on the extraterritorial impacts of UK companies,

the mix of functions that have been suggested – ranging from quasi-judicial dispute resolution and investigation to rule-setting – suggest that the Hungarian Green Ombudsman model is one that needs to be taken into account.

There are also parallels between the Hungarian Green Ombudsman's functions and parliamentary innovation elsewhere.

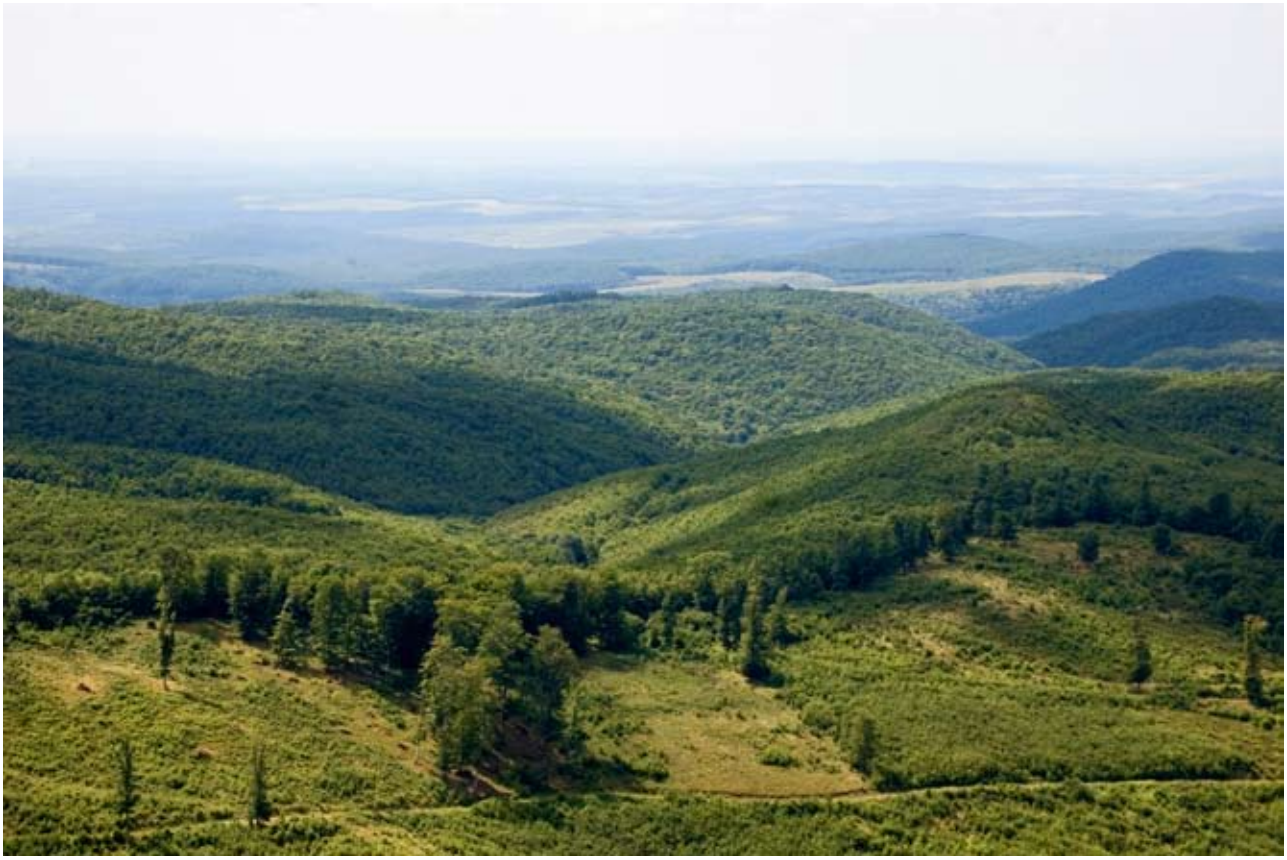
In Finland, the Parliament established a "committee for the future" in 1993, charged with carrying on an "*active and initiative-generating dialogue with the Government on major future problems and means of solving them*". And in a different approach, the Israeli Knesset passed legislation to enable the creation of a Commission for Future Generations, a non-political entity which operated from 2001 until 2006. The Commission's functions included providing parliament with opinions and recommendations on regulation and other issues relevant to future generations.

So far, there are no signs that a 'green ombudsman' or anything like it will feature in any of the major parties' pre-election manifestos here in the UK. And it is too soon to pass judgment on the effectiveness of the Green Ombudsman's role in strengthening implementation and enforcement of environmental law or in bringing the interests of future generations to the heart of the policy process. It is nonetheless clear that the UK should be prepared to watch closely.

With this in mind, on 25th February 2010, the Hungarian Parliamentary Commissioner for Future Generations will be speaking at a special evening event at the Ministry of Justice. The event is organised by UKELA and the Foundation for Democracy and Sustainable Development in collaboration with the Government Legal Service Environment Group.

Dr. Fülöp is keen to promote wider debate within Europe to strengthen decision-making in the interest of future generations. And he adds: "*I personally very much appreciate the robust development of environmental law in the UK, especially in the field of climate protection… I am looking forward to the possibility of meeting with representatives of the UK legal profession engaged in environmental matters and to generating a lively exchange in order to further strengthen our joint efforts in the interests of future generations*."

You can register to attend Dr. Fülöp's talk by emailing greenombudsman@fdsd.org with your name, position and organisation. Last booking dates for security purposes: February 18th.



Landscape of a beech forest in a national park in Hungary

WILD LAW WEEKEND WORKSHOP AT THE MAGDALEN PROJECT.

By David Waterston

With thanks to Kasper Palsnov for the photos of Stephen Harding and the circle

Resilience was a word that came up more than once at the Wild Law workshop this year. There are not, after all, many law conferences where half the delegates pitch their own tent on arrival. To my knowledge there is only one, and this year we were blessed with perfect Indian summer weather (and perfectly freezing nights) in the surroundings of The Magdalen Project, an organic farm in the rolling countryside on the Somerset/Dorset border.

The 5th Annual Wild Law Workshop brought together an array of lawyers and non-lawyers from academia, private and public practice, people with decades of experience of environmental law and those just setting out. What linked everyone though, is the strengthening conviction that law often fails to meet the problems we face, both in theory and in practice.

Resilience

At a typical wild law workshop at the very least you can expect to get yourself educated about the Earth. This year we weren't disappointed. Dr Stephan Harding from Schumacher College, started the Saturday sessions with a wonderful seminar on "Gaia, Resilience and Biodiversity." Its not often someone talks for an hour and half and is then begged to go back over some of the slides he had to skip. But Dr Harding was.

It seems hubristic to try to summarise a presentation so full of wit, passion, hard science and fascinating asides, but this is supposed to be a summary so here goes. "Gaia" stands for the insight that the Earth is demonstrably a self-regulating system. "Resilience" means the capacity of a system to absorb disturbances whilst maintaining its original function. Decreasing biodiversity in all its forms, from species to landscapes, is a major factor in decreasing resilience. On current trends our ecosystems will eventually fail to absorb the disturbances and will move to a new state of equilibrium. New eco-systems will emerge with new resilience, but they won't support life in anything like the abundance we have at present. Our ecosystems are already absorbing a high level of disturbance.

Walk around the Magdalen Project

Why has this happened?

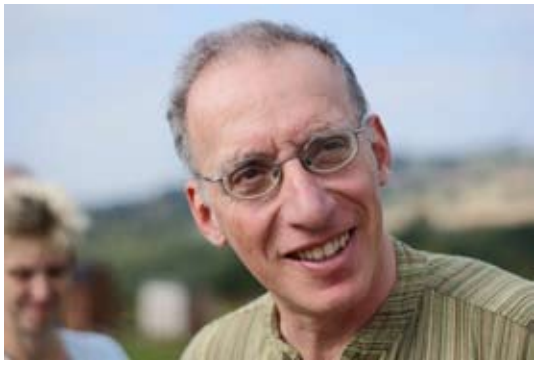
At the broadest level Dr Harding argued that over several millennia we have been infected by a world view that sees the Earth, and everything on it, including humans, as machines or mechanisms. Its not that you can't usefully describe a plant or a person's kidney as a machine, its just that if you *only* describe them as a machine then you inevitably have to suppress other ways of understanding and different values. Galileo famously said "the book of the universe is written in the language of mathematics" and this leads to an idea that mathematics is the supreme, possibly only, way of really knowing the world. This sidelines several other ways of knowing including evaluation through feeling and a more instinctual intuitive awareness. Carl Jungs' mandala of feeling, intuition, sensing and thinking was explored. In fact, even the most rational of scientists couldn't work without a dose of intuition: Eureka!

Oh no, I don't have to become an Animist do I?

Dr Harding told us that he is an Animist. I hope I don't misrepresent or oversimplify this belief by saying it is the view that everything, from the Earth itself right down to a humble atom, is permeated by its own kind of intelligence and responsiveness. As Thomas Berry put it, "the Universe is a communion of subjects, not a collection of objects." The world, for the Animist, is characterised by sentience, exchange and fluidity. It is not just a lump of rock smeared with a layer of organic matter, where the only true subjects are those with human consciousness.

One brave soul at the workshop said she found it hard to believe in Animism, which led Dr Harding to make a very important point when understanding Gaia theory: you don't need to be an Animist who believes the earth has a soul to accept the tenets of Gaia theory. Interdependence and the self-regulation of the whole are observable traits of life on earth, and whether you are a

Christian, an Atheist, an artist, a mechanist, or a follower of William Blake, you can consent to this.



Dr Stephan Harding of Schumacher College, the main speaker at Wild Law 2009

We can afford to be radically plural when it comes to our beliefs, Dr Harding said. He showed us the symbol of the Ecosophical Tree. The roots of the tree are our deep experience of connection with the Earth. So many roots, so many ways of connecting with the Earth. We are open to the fact that there are a plurality of ways of knowing (so you don't neurotically need everyone to see things the same way you do). The trunk is the hard and beautiful science of Gaia to think and reflect on while the branches and leaves represent our willingness to take concrete actions and appropriate lifestyle choices. This is best summarised in the works of the Norwegian philosopher Arne Naess, who first stated the deep ecological premise that all life has value irrespective of its value to human beings.

Wild Law and Emergence

A favourite word I learnt from the presentation was "biota" and its correlate "abiota", meaning the living organisms and non-living factors in a given ecosystem, respectively. I've been using them on my friends and family whenever I can. It is a striking fact that without biota, all the water on earth would have dried up 3000 million years ago because it is microbes in the mud that hold down the hydrogen atoms before they can whiz off into space, allowing them time to recombine with oxygen atoms. There being no water there would be no plate tectonics, no granite, and no continents either. Organic and inorganic forms of life have emerged together. For an amazing account of all this and the perilous journeys of carbon atoms through land, sea and air, read Dr Harding's book "Animate Earth". It's great.

So what does this mean for law? Dr Harding stressed that it was a key point for wild law that it must preserve the conditions for biota and abiota to come together and create emergent properties. Emergent properties are hard to predict (i.e. that sodium and chloride combine to produce the properties we call salt would never have been predictable in advance), but they are a vital part of how the Earth self-regulates. This brings us back to resilience and biodiversity. Lawyers and law makers have got a big job on their hands if they ever choose to take seriously the scientific fact that it is the interaction of biotic and abiotic life in all its diversity which creates and preserves the conditions for a habitable planet.

Doom and gloom?

Dr Harding made it clear at the outset: if this stuff doesn't depress you, you should see a therapist. He urged us to see through the graphs he was presenting and hear the chainsaws and witness the species passing out of existence. To help us get out of his graphs in the afternoon he led two walking groups around the meadows, noting the lack of biodiversity in terms of crops and grass as we went. He also lead a brief visualisation of the Earth while we lay on our backs (a popular move) looking up at the sky. I won't describe this in detail because reading about guided visualisations is not the same as doing them. We also saw frogs hopping through the grass, a swathe of non-indigenous Himalayan balsam and many happy pigs, one called Boris. After all that our spirits were lifted way beyond what is rational for beings in a period of mass extinction.

Wild Law Updates

Anyone who takes up the ideas of wild law may be convinced intellectually quite soon that a legal system which fails to pay attention to the wider laws of nature in the long run will not serve humans (or anything else in the biosphere) very well. Laws which confirm man as being in opposition to nature, or dominant over nature, or which view nature as a mere resource for humans, serve to prolong a battle which "man wins to find himself on the losing side " as E F Schumacher put it.

In the five years since I have been going to wild law conferences I have begun to see that intellectual conviction ripen into a confidence that these ideas are practically important, communicable to others and not so "far out" as they seem to be at first glance. The more you examine the ideas the more you sense that it's often the law which is "far out".

The past year saw a lot of activity, most notably with the publication of the Wild Law International Research Paper in March 2009 by UKELA and the Gaia Foundation. Ian Mason, barrister and co-author of the Paper, gave a brief presentation to delegates about the methodology and the findings of this extensive, though he admitted by no means exhaustive, survey looking for

evidence of Earth Jurisprudence in existing laws around the world. The conclusion of the Paper, which set out some indicators of what a wild law or system of governance would look like and ranked laws and judicial decisions accordingly, made it clear that there is very little evidence of any consistent intent by legislators to adopt wild law principles. By and large nature is seen as a resource to be used or even exploited by humans and protected only when the situation is really dire. Elements of wildness in law and administration do occur in various countries, but most stop at the model of sustainable development, which conflicts with wild law insofar as it does not seriously considers that humans may, indeed ultimately must, exist with nature in a mutually enhancing way. Nor does existing law consider that nature may have rights which need to be spoken for and represented in human legal systems.

Spreading Wild Law

We had several breakout sessions which were led by people on the weekend using Open Space Technology. Rather than be presented with a programme, we built an agenda ourselves and delegates offered workshops on topics that interested them. It's hard to explain how this works, but the impression was that it did work very well. Briefly we had sessions on:

- ***Use of Private Law to create wilder Land Law.*** Could current or new forms of private ownership create new land management systems based on wild law, where human uses are conditional upon a beneficial relationship to the environment? What duties would the landowner need to be put under? Who could enforce them? Could we create multiple user rights that together were self sustaining? The group also discussed private local arbitration and possible forms of community ownership.

- ***How to talk about values and ethics in a legal setting (without sounding crazy or getting laughed out of court)***. Linda Sheehan, Director of the California Coastkeeper Alliance, posed this question out of personal experience of being trapped in a "linguistic box" that keeps lawyers from expressing their values. Could we use the duty of care language extending it to animals, plants, and the environment? We must embrace our own shortcomings and risk expressing values in a legal context, despite fear of ridicule.

- ***Planning and EIA, avenues for promoting Earth Jurisprudence***. The EIA, Habitat and Water Framework Directives contain a considerable potential because the decision maker isn't allowed to ignore environmental consequences and has to find reasons to justify the project. But the way the law is applied depends too much on developers'/officials' values. This workshop explored ways of promoting pro-environment values within these laws and directives and considered the role of assigning monetary values to the environment and introducing values-based language.

Delegates at Wild Law 2009

- ***An update on the work of the Gaia Foundation***. Research into the origins of eco-cultural governance in the Colombian Amazon; legal advocacy in Venda, South Africa involving a community based campaign to regain community authority over their sacred lands. The process is in its infancy but hopes to bring in Earth Jurisprudence (EJ) principals in a future successful outcome. In the UK this year two communities - crofters in Scotland and fishermen in Ireland - approached the Gaia Foundation to assist them in securing protection of their traditional livelihoods and rights as indigenous peoples under international law and for support in applying the methodologies of Community Ecological Governance to strengthen their community and ecosystem resilience to climate change and other external pressures.

- ***How to be a wild lawyer;*** for many people who practice law there is a tension between having to deal with values which preserve the status quo and one's desire to be an agent of change. This was a reflection on different ways to escape the "lawyers mindset", nurture creativity, keep inspired and become a wild lawyer, rather then just thinking about it. Are you a hired gun or a healer?

- ***Improving environmental law "wildly".*** UKELA "Aim 5" is to improve the quality of environmental law. The Wild Law Group could use and support this aim by bringing wild law into the wider debates within UKELA, particularly by supporting the UKELA working parties. The benefits of the UK having an Environmental Ombudsman and how to achieve this was also discussed.

Wild Law

Education

The new Wild Law Education Subgroup spoke about bringing the concept of Earth Jurisprudence to students, academics and practitioners by offering guest lectures. It was agreed to focus on Universities and build up a database of speakers willing and trained up to give presentations on wild law.

The Gaia Foundation, with support of the EJ Network, continues to contribute to the evolution and practice of Earth Jurisprudence in memory of its founder - Father Thomas Berry, whose memorial service was being held in New York at the same time as the workshop. At a recent EJ Retreat with international partners practising EJ at community level, EJ principles were collated, distilled and revised. Monthly EJ study groups at the Gaia Foundation have also provided a space to further discuss the philosophy and practice of EJ.

The EJ Resource Centre run by the Gaia Foundation hopes to launch a website in 2010 as a source of educational materials including EJ principles, examples of EJ precedents around the world e.g. the Ecuadorian Constitution and Shapleigh Rights of Nature Ordinance, relevant publications and living case studies of EJ in practice. This will assist in enhancing eco-literacy and the practice of EJ - not just for lawyers but all of us as a more harmonious way of relating with Nature.

Film & Fun and other stuff.

Someone showed the film Earth Whispers about the inspirational relationship of some folk in New Zealand with land and nature. Yoga and meditation were optionally on the pre-breakfast menu for those who weren't drinking organic ale round the campfire too late. Finally, on Saturday some of us had a bit of a dance, though I was initially shocked by the revelation that we needed to "Free Nelson Mandela" all over again. In the end it was agreed we need to update our CD collection to remain in any sense wild on the dance floor.

Future Workshops

A huge thank you to Vicki Elcoate and Alison Boyd for the dedication it takes to organise and promote this event, now in its fifth year. In five years a wild law community has grown up thanks in large part to their enthusiasm and hard work.

Next year will be the first time the workshop is organised and run entirely by UKELA volunteers. We want to keep it inspirational and educational, and a place to build community and plan further actions to promote wild law.

The 2010 Conference will be held at a YHA in the beautiful surroundings of the Lee Valley Country Park from 24th-26th September. Booking will be open early in the new year.

60 Second Interview

KENNETH ROSS

What is your current role?

Partner of Brodies LLP, Solicitors, based in their Glasgow Office.

How did you get into environmental law?

As a commercial property lawyer I started encountering more and more questions relating to contaminated land. Once I had learned about contaminated land I discovered the area as a whole interesting and learned about further areas, both for the purpose of professional practice and for teaching.

What are the main challenges in your work?

Sifting through the mounds of information and data available to get the real issue, then sifting through the mounds of law to find the answer.

What environmental issue keeps you awake at night?

Energy supply. How do we continue to source sufficient energy to keep a modern society running – but in a sustainable way?

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

Simplification. I know it is an impossible dream but environmental protection and wellbeing would be better served by shorter, simpler legislation and regulation. Law is only good law if it can be understood.

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

Land contamination and insurance – because contaminated land is my main area of interest.

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

The chance to meet other people involved in environmental law.

Working Party News

Water Working Party – co-convenor needed

After a number of years in the role and a substantial contribution to the Water Working Party, Mothiur Rahman has stepped down because of other commitments. A big thank you to Mothiur for all his hard work and help.

The Working Party is looking to appoint a new co-convenor to work alongside Julie Adshead from the University of Salford.

If anyone wants to talk to Julie to get a flavour of the role, please get in touch with her:

0161 295 3716

Services

Practical Law Company (PLC) is delighted to partner with UKELA and to provide its members with access to weekly updates on environmental law via the UKELA website, www.ukela.org. The legal updates are taken from PLC Environment, the market-leading online legal know-how service. The service is aimed at all commercial practitioners, including lawyers in private practice, in-house counsel in companies, lawyers in the public sector, as well as environmental consultants, environmental managers in companies, investors and insurers.

PLC Environment provides uniquely practical materials including:

- Practice notes analysing environmental legalisation and case law.
- Legal updates covering the latest legal developments and include commentary on its implications for businesses in the UK.
- Standard documents accompanied by detailed drafting notes.

Our materials are written and maintained by a dedicated team of four experienced environmental lawyers who know what life is like for a front-line professional. Together they deliver the materials you need to remain focused on delivering commercial advice to your organisation and clients.

To access PLC Environment legal updates and find out more about PLC Environment visit: http://www.practicallaw.com/about/environment-UKELA

Job and Volunteer Vacancies

VOLUNTEER STUDENT ADVISOR

UKELA is looking for a successor to Kirsten Griffin, the first student advisor to UKELA's Council. Kirsten has done some fantastic work during her year in the role – she has helped design new student competitions, set up a mentoring scheme, put better information on the website and is still finalising a student handbook. However her family commitments mean she can no longer find the time to help out as actively as before.

The role of student advisor involves:

- Advising UKELA's Council on how to retain the current student members (what information, events and activities to offer and how to pitch the renewals mailing to make sure students stay on or convert to other grades of membership as they progress through their career)
- Advising Council on how to attract new student members
- Helping keep the student section on the website (www.ukela.org) up to date
- Helping co-ordinate the mentoring scheme
- Contributing articles for students to e-law
- Initiating student mailings as and when needed

Ideally the student advisor will attend the quarterly Council meetings (expenses covered) and be available to discuss ideas with the UKELA staff and Trustee responsible for mentoring. The advisor is also expected to attend the annual student careers advice and networking evening (November 2010) and the competitions day (March 30th 2010). There is a panel which supports the student advisor comprising UKELA trustees and competition organisers and they occasionally hold phone conferences to discuss important issues.

If you would like to be considered for the role, on a one year basis, please send a covering letter explaining what you would be able to offer to the role and a CV to Vicki.elcoate@ntlworld.com. The deadline is 5pm on December 16th 2009. The decision will be made by the student panel before Christmas.

SOLICITOR

Salary £30 - £40K (dependent on experience)

Since 1948, Fish Legal (formerly the Anglers' Conservation Association and now the legal wing of the Angling Trust in England) has used the law to fight pollution and other damage to our members' fisheries in the UK. It is a unique, not for profit organisation funded by membership subscriptions and backed with a substantial fighting fund.

We are seeking to appoint a solicitor qualified in English Law, preferably with some experience of civil litigation or environmental law, to join our small team based in Herefordshire. We would consider applicants with other legal backgrounds. Knowledge of environmental issues, angling or Scots Law would be an advantage.

For more details, contact mark.lloyd@fishlegal.net. More details on our website: www.fishlegal.net

Contract type: Permanent
Apply before: 01-Dec-2009
Contact Name: Mark Lloyd
Contact Email: mark.lloyd@fishlegal.net
Email applications to: mark.lloyd@fishlegal.net

ENVIRONMENTAL LAW FOUNDATION JOB VACANCY
HEAD OF CASEWORK AND LEGAL PROJECTS

Salary: £25,000 – £29,000 plus pension

1 year initial contract

Thriving environmental law charity seeks enthusiastic and energetic lawyer to head up its advisory services and work on its innovative legal projects.

The Environmental Law Foundation is the UK leading environmental law charity providing free legal advice and helping to secure environmental and social justice.

The role is central to the organisation's advisory services. The job will suit someone with at least PQ 2-3 years. Applicants should be articulate, competent litigators, ideally with planning, environment and public law experience.

All applicants must have a commitment to environmental protection, community participation. Knowledge of environmental/ planning law desirable.

Please see Job Description and Person Specification at http://elflaw.org/site/elf-job-vacancy-for-head-of-case-work-and-legal-projects.html

Deadline for Applications: 07/12/09

Interviews: 15/12/09

THE ENVIRONMENTAL LAW FOUNDATION INTERNSHIP PROGRAMME

The Environmental Law Foundation (ELF) is the UK leading environmental law charity providing free legal advice and helping to secure environmental and social justice.

ELF operates an internship programme for graduates and postgraduates who are interested in environmental issues and wish to gain practical experience of working in the sector by volunteering.

Job and Volunteer Vacancies

Volunteers join the ELF internship programme as caseworkers in the Advice & Referral Service, where they handle enquiries from the public and refer cases to ELF's network of legal and technical advisers. There are also frequent opportunities for caseworkers to contribute to other aspects of ELF's work, especially the Sustainable Communities Project.

Volunteers value our internship programme because they gain practical experience of working on environmental cases and they develop their case management skills. Training is always provided and includes training in the Advice & Referral Service and internal and external events such as lectures and seminars.

Typical activities include:

- Handling enquiries from the general public
- Interviewing clients over the telephone
- Signposting clients to other appropriate organisations
- Corresponding with clients in writing
- Reviewing client documentation
- Briefing legal and technical advisers and arranging case referrals
- Conducting client monitoring
- Collecting data and drawing up simple statistics

ELF is looking for volunteers who will be available approximately two to three days per week for three months. We recruit all year.

UKELA Events

UKELA LONDON MEETING - SUSTAINABLE BUILDINGS

Tuesday 24th November 2009 at 6pm

At Herbert Smith, Exchange House, Primrose Street, Exchange Square, London EC2A 2HS

UKELA members are cordially invited to this early evening session where the subject will be **Sustainable Buildings.**

Buildings account for 40% of total energy consumption in the EU. Proposals contained in draft European legislation may soon impose an array of obligations on Member States to introduce energy efficient measures in buildings, including what are called net-zero-energy buildings. These measures will reduce energy consumption, create up to 450,000 jobs across the EU and offer a £24 billion a year energy-cost saving.

In this climate of change, our meeting proposes to help you understand these obligations, their implications, including how to deal with green leases, and what is actually involved from a practical refurbishment point of view. We will also visualise the costs/benefits of energy efficiency measures by the use of new breakthrough technology in the form of a "Carbon Quilt".

The Speakers:

· **Professor Tadj Oreszczyn** has over 28 years of energy research experience mostly focused around the area of energy and buildings. His first degree was in Applied Physics followed by a PhD in Solar Energy. Before becoming Professor Tadj was Director of the Energy Design Advice Scheme (EDAS) regional office based at the Bartlett (the Faculty of the Built Environment) , UCL. Current research interests include energy efficiency, indoor air quality and building related health problems.

· **Peter Martin,** is a Director of CarbonSense, a company that helps organisations genuinely understand climate change and confront the challenges of moving to a low-carbon future. Peter leads the process design and research work as well as being

responsible for consulting assignments for many clients. Since 2003 CarbonSense has provided strategic thinking, board and management engagement and training, and carbon analysis for leading corporations including BT, Thames Water, HSBC, TNT, Honda Formula One Racing, Belgacom, Telenor and Herbert Smith.

Malcolm Dowden will review green leases, the changes to the EPB Directive and what these mean for lawyers and clients. Malcolm Dowden is a solicitor and environmental law consultant specialising in Energy and Climate Change. He is the author of EG Books' Climate Change -Law, Policy and Practice (2008) and regularly writes and presents on green leases and the CRC energy efficiency scheme, including the RICS-COBRA built environment conference and MIPIM 2009. He retains a role as consultant at City law firm Charles Russell and has recently advised a number of clients, including municipal authorities on issues relating to climate change adaptation and energy efficiency.

The Meeting will be chaired by **Begonia Filgueria**, UKELA Council member responsible for the London Meetings. Begonia is a Director of the Environmental Information and Regulation Centre (Eric) Ltd. She is an environmental lawyer qualified both as Solicitor and Spanish Advocate and was formerly at 2 of the top 5 City law firms. Begonia is currently a consultant to Northern Ireland's DOE working on cutting edge environmental legislation, Editor of Butterworth's' Encyclopaedia of Forms and Precedents (EF&P) environmental law volume and a visiting senior lecturer at City University.

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

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

1.5 CPD points will be available for all attending.

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

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

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

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

Credit: Clare Elcoate

GARNER LECTURE 2009

Wednesday 2 December 2009, 6pm at Clifford Chance LLP (5.30pm registration).

Speaker: Professor Philippe Sands

Professor Sands will give the annual Garner Memorial Lecture, on Water and Law. Water is probably the most important international issue, after climate change, and Professor Sands will be addressing it from an international perspective.

Philippe Sands is Professor of Law and Director of the Centre on International Courts and Tribunals at UCL, and a key member of staff in the Centre for Law and the Environment. His teaching areas include public international law, the settlement of international disputes (including arbitration), and environmental and natural resources law. He is also a member of Matrix Chambers.

Philippe is a regular commentator on the BBC and CNN and writes frequently for leading newspapers. He is frequently invited to lecture around the world. He was co-founder of FIELD (Foundation for International Environmental Law and Development), and established the programmes on Climate Change and Sustainable Development. He is a member of the Advisory Boards of the European Journal of International Law and Review of European Community and International Environmental Law (Blackwell Press). As a practicing barrister he has extensive experience litigating cases before the International Court of Justice, the International Tribunal for the Law of the Sea, the International Centre for the Settlement of Investment Disputes, and the European Court of Justice. He frequently advises governments, international organisations, NGOs and the private sector on aspects of international law.

Start Time: 5.30pm registration for 6pm start.

The event will conclude at 9pm after a drinks and canape reception. To book, click here.

UKELA NORTH WEST REGIONAL GROUP MEETING
THURSDAY 3 DECEMBER 2009

On 3 December 2009 Hammonds' Manchester office is hosting the North West UKELA "Environmental Law Update" event at which the guest speaker will be Stephen Tromans QC.

Following the event, there will be mulled wine and mince pies, and the opportunity to sample the legendary Christmas markets in the City Centre. We very much look forward to seeing you.

Please reserve a place early to avoid disappointment.

Time: 5pm registration for 5.30pm start followed by drinks and nibbles. End at 7.30pm.

Venue: Hammonds LLP, Trinity Court, 16 John Dalton St, Manchester, M60 8HS

Followed by question and answer session, chaired by Paul Bratt, Partner at Hammonds LLP and Convenor of the North West region.

1 CPD point (to be confirmed) To book, click here.

SCOTTISH REGIONAL GROUP AGM – TUESDAY 15 DECEMBER 2009

The AGM of UKELA's Scottish Regional Group will be held on Tuesday December 15th at 5.30. This is an important meeting to appoint new regional group committee members and officers, who will make sure UKELA delivers what its Scottish members want over the next year.

The meeting is being held at Anderson Strathern, 1 Rutland Court, Edinburgh, EH3 8EY.

Alternatively Scottish members can phone in.

Under the regional group guidelines most of the Scottish committee is likely to be standing down and we need some active successors to make UKELA's work in Scotland a success.

Scottish members will have received a mailing about this but if you have any questions please contact Alison Boyd.

YOUNG UKELA CHRISTMAS NETWORKING RECEPTION – WEDNESDAY 16 DECEMBER 2009:

Meet the Working Parties

- Meet senior practitioners
- Network with environmental law colleagues
- Discuss the 'hot topics'
- Find ways to become more involved in environmental law

Welcome from Mark Brumwell, Vice-Chair of UKELA and Key Note Speaker Anne Brosnan of the Environment Agency

Wednesday 16 December 2009 5:30-9pm
Registration 5.30
Welcome 6pm
Key Note address 7pm
DLA Piper UK LLP - 3 Noble Street, London, EC2V 7EE

Please join the Young UKELA group for our Working Party Networking event and Christmas reception. This will be an informal event with tables hosted by the UKELA Working Parties. Meet the members of the UKELA Working Parties and Special Interest Groups and find out more about their activities and how you can get involved. Excellent opportunities to develop your network and to meet other lawyers and environment professionals.

UKELA has a wide and varied range of working parties which meet regularly to discuss issues including the practice and impacts of environmental law, and recent developments and proposals for reform in relation to environmental law, policy and practice. They actively contribute to the development of their area of interest, and contribute working papers and responses to government in relation to the development and reform of environmental law.

Young UKELA is aimed at junior practitioners with up to 10 years' post qualification experience, but all are welcome.
CPD 1 point: to be confirmed.

Cost: £20 UKELA members, £30 non members, very limited number of free student places. To book, click here

WILD LAW 2010

Two events are planned: Wild Law in the Wilds of Scotland and the annual Wild Law workshop.

To book for the Scottish weekend at Loch Ossian (April 30th – May 3rd) click here:

The annual Wild Law Workshop, which is being organised by a team of volunteers who have attended previous workshops, is planned for the weekend of September 24th to 26th. It will be held at Lee Valley Youth Hostel near Cheshunt (close to London). The hostel is made up of six log cabins situated on the shore of a lake in the 10,000 acres of Lee Valley Country Park. Put it in your diary now – bookings will open early in 2010.

LONDON MEETING DIARY DATE:

The next London meeting after Sustainable Buildings will be on February 10th on the subject of Nuclear. It will be held at Herbert Smith and a notice circulated once the speakers are confirmed.

CORBY RECLAMATION LITIGATION CASE: LESSONS FOR THE FUTURE

10% discount for UKELA members
25th NOVEMBER 2009
09:00 – 17:30

Venue: Mayfair Conference Centre, 17 Connaught Place, London, W2 2EL
Cost:

- Subscribers to Brownfield Briefing, Property Forecast or Sustainable Building: £310+VAT (356.50)
- Regular Price: £355+VAT (£408.25)
- LA, public sector, university, not-for-profit and charity: £165+VAT (£189.75)
- Special Brownfield Briefing and conference offer: £586.50+VAT (£633)

Brief of Topics Covered:

The conference will keep individuals/organisations up to date with the implications of judgment in their profession and make them aware of the liabilities and potential opportunities arising from it. It will also highlight the ramifications of contaminated land going untreated, and what the future holds for urban land reclamation.

Topics that will be covered are:

- What will the judgment mean for the Brownfield industry?
- Could Corby happen again?
- How to minimise risk
- Good PR – Communicating the benefits of remediation

To book visit:
http://www.brownfieldbriefing.com/Corby+Conference/home

JOURNAL OF ENVIRONMENTAL LAW – ANNUAL LECTURE

Experts and the Environment
The Role and Influence of the Royal Commission on Environmental Pollution, 1970-2009

Professor Susan Owens
University of Cambridge

Chaired by
Professor Joanne Scott
UCL

Tuesday 8 December 2009, 6pm
Institute of Advanced Legal Studies, Charles Clore House,
17 Russell Square, London WC1B 5DR

The lecture is free, but requires registration.

Please reply to: Belinda Crothers, Academic Programmes Manager, Institute of Advanced Legal Studies, 17 Russell Square,

London WC1B 5DR. IALS.Events@sas.ac.uk

Sponsorship for the post-lecture reception kindly provided by
39 Essex Street Chambers, London

Further information may be found here: http://www.oxfordjournals.org/our_journals/envlaw/envlaw_lecture.html

FUTURE POLICY RISKS AND OPPORTUNITIES FOR THE UK'S ENVIRONMENTAL INDUSTRY: ANTICIPATING UK AND EU POLICY

8 DECEMBER 2009

Dan Norris MP, Minister of State at Defra, and Nick Herbert MP, Shadow Secretary of State for the Environment, will head up a unique programme of top policy makers, regulators and business leaders at EIC's forthcoming national conference.

www.eic-uk.co.uk/eicnationalconference2009.cfm

To help companies attend we are offering a *generous rate of just £345 +VAT*

10% off to UKELA members. Quote UKELA10 when booking online.

An Essential EIC Conference

EIC's conference will provide an *unrivalled analysis* of current and future UK and EU environmental policy, with *high-level policy makers and regulators* guiding delegates through the future for land, water, air, waste, energy and climate change policy – and how it will affect every sector of the economy.

Delegates will also hear *expert advice from business leaders* on how to exploit the *huge new business opportunities* these policies will create; how to access environmental finance and how export technologies and services abroad.

This is a *must attend event* for ensuring *your* business is not left behind in the race to secure the business opportunities environmental policy will create. You cannot afford to miss it.

UNIQUE CONFERENCE BENEFITS

Hear from the UK and EU's leading environmental policy-makers

Get advance warning of new environmental policy measures that will directly impact your business

Understand the RISKS and the BUSINESS OPPORTUNITIES that environmental policy will create for your company

Get first hand advice from business leaders that are commercially benefiting from environmentally sustainable operations

A unique forum for you to network with key companies, (potential) partners and customers

This event is kindly co-sponsored by *Halcrow* and *AECOM*.

Halcrow specialises in the provision of planning, design and management solutions. With interests in environment, regeneration, transportation, water, maritime and the built environment our purpose is to sustain and improve the quality of people's lives. *www.halcrow.com*

External Courses

AECOM is one of the UK's foremost environmental engineering and consultancy firms. We provide a multi-skilled and comprehensive capability to investigate, assess, design, and engineer solutions in all environmental fields. *www.aecom.com*

The Sweet & Maxwell
ENVIRONMENTAL LAW CONFERENCE 2009– SAVE £100

Sweet & Maxwell is holding its annual Environmental Law Conference in London on 9th December. UKELA members qualify for a £100 discount on the standard delegate fee.

The conference offers you succinct analysis of 2009's key environmental law developments – at both UK and EC levels – including the most significant cases. There are also sessions on renewable energy, carbon reduction, major infrastructure projects and the environmental liabilities of companies in receivership.

You will have the opportunity to discuss the issues with the speakers who include Stephen Tromans QC, Martin Edwards, Dr Laurence Etherington, Ross Fairley, Duncan Field, Rebecca Lawson, Kathy Mylrea, Chris Staples, and Paul Watchman.

The conference is accredited for 6.5 CPD hours.

For full details and online booking visit
http://www.sweetandmaxwell.co.uk/conferences-events/sweet-maxwell-conferences.aspx

To download the conference brochure visit http://tinyurl.com/yz99jzu

To obtain the discount please quote promotional code UKELA09

UKELA Competitions

The UK Environmental Law Association is delighted to be able to offer a range of competitions and schemes aimed at supporting and encouraging undergraduate and postgraduate students and newly qualified professionals studying or qualified in environmental law or related disciplines.

You can find out about the competitions and schemes here:

1. The Simon Ball Prize for Outstanding Academic Achievement supported by OUP
2. The 2009/2010 Andrew Lees Prize
3. The 2009/2010 Moots
4. The Bursary Scheme

UKELA Competitions

Some of the rules of the competitions refer to UKELA's Charitable Objects. The relevant charitable object of UKELA is:

"To promote for the benefit of the public generally the enhancement and conservation of the environment in the United Kingdom and in particular to advance the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment."

Invitations to the 2010 Competition Finals Day (for the Andrew Lees Prize and Moots) on March 30th will be sent out after Christmas.

Publications and Book Reviews

Costing the Earth: revised guidance for everyone concerned with environmental protection

A revised version of the invaluable guidance Costing the Earth is now available on the Magistrates' Association website at http://www.magistrates-association.org.uk/Earth. The guidance offers a reference and explanation to a wide range of environmental and sentencing questions. It uses 47 detailed case studies covering a wide range of environmental concerns from air pollution to wildlife.

Costing the Earth was first published in 2002 by the Magistrates' Association in recognition of the increasing number and importance of these cases and lack of any available guidance. While essentially prepared to help sentencers and their legal advisers, other organisations have found the guidance extremely informative and helpful in preparation of cases. The MA is once again grateful to the original author Dr Paul Stookes, a solicitor-advocate and partner in the specialist law firm Richard Buxton Environmental and Law, for updating and amending the guidance. The MA is also grateful to the School of Law, University of Hertfordshire for its publishing support.

Nicola Stell, chairman of the MA's Sentencing Policy and Practice Committee said,

'These offences are serious and magistrates are keen to play their part in effective punishment and deterrence, as well as in encouraging restoration of damage where that is possible. As magistrates deal with relatively few such offences this guidance will be of great assistance to the courts in arriving at sentences that are just and appropriate.'

Environmental Justice & The Rights of Ecological Refugees

by Laura Westra

Earthscan, 2009

ISBN 978-1-84407-797-7

Laura Westra is an experienced Canadian academic working in the field of environmental rights. In this book she explores the issue of 'ecological refugees', those who are forced into flight by environmental degradation. She addresses three broad questions: What causes people to become ecological refugees? What legal protection is available for them? What can be done to improve that legal protection?

Westra emphasises that ecological refugees arise out of many different types of environmental degradation; this is not just a matter of climate change and its associated effects. Toxic pollution, exhaustion of water resources and large development projects have all displaced large populations in recent years. Such occurrences reflect underlying political and economic forces, which Westra rather loosely labels as: 'the aggressive growth through capitalist structures inherent in globalisation'.

Legal protection for ecological refugees is presented as wholly inadequate. The key international instrument, the Convention Relating to the Status of Refugees 1951, does not acknowledge environmental causes within its definition of refugee status. Westra explores arguments for re-interpreting the Convention's provisions. But the Convention is also regarded as individualistic in nature, unsuited to providing for the movement of large groups, as is often the case in environmental cases. Other international instruments (the Guiding Principles on Internal Displacement, the Universal Declaration of Rights, the Vienna Convention and the World Heritage Convention) all offer relevant principles but lack the necessary specificity to give substantial protection.

In Westra's view, the only solution is to draw up a new international instrument. To this end, she supports proposals for a Framework Convention for Global Health. This would recognise a fundamental right to environmental health, fusing the right to life with the freedom from interference with the local environment. She further supports the invigoration of the World Health Organisation (WHO) to take on a major role in protecting this right. This new legal architecture would be preventive in nature, targeting environmental hazards before they force migration, but also protective of those already forced to move. She concludes by examining continuing academic discourse in this area, with an implicit acceptance that there is some way to go in a practical sense.

This is a powerfully-argued book but not without obvious flaws. For a book that stresses the global nature of the problem, there is somewhat limited coverage of examples outside North America. It would have been interesting to have read more on victims of climate change: for example those from small island states and low-lying coastal regions or those facing agricultural failure and desertification. But these are simply alluded to or assumed, almost to the point of neglect. Equally, this a polemical book, with a fondness for the sweeping statement, particularly in its analysis of alleged state 'complicity'. However these criticisms should not obscure the valuable contribution that this book makes to exposing a legal void. If there is one certainty, it is that the absence of legal protection will receive greater political attention in future years.

James Corbet Burcher

Credit: Clare Elcoate

UK ENVIRONMENTAL LAW ASSOCIATION

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

UKELA, PO Box 487, Dorking, Surrey RH4 9BH

Vicki Elcoate
Executive Director
The Brambles
Cliftonville
Dorking RH4 2JF
vicki.elcoate@ntlworld.com
01306 501320

MEMBERSHIP ENQUIRIES

Alison Boyd
Email: alisonboyd.ukela@ntlbusiness.com
Tel: 01306 500090

E - LAW

The editorial team wants articles, news and views from you for the next edition due to go out in January 2010
All contributions should be dispatched to Catherine Davey as soon as possible by email at:
catherine.davey@stevens-bolton.co.uk by 16 January 2010
Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.

Letters to the editor will be published, space permitting