e-law

UKELA Making the law work for a better environment

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EDITORIAL

Peter Kellett, UKELA Chair

Happy New Year. UKELA has a lively programme of events and activities planned for 2010 and I hope one of your resolutions will be to join in.

I would remind you to renew your membership if you haven't already done so. You should have received reminders about this by now. If you've lost them or need to check something please contact our Member Support Officer, Alison Boyd.

Our Working Party Support Officer, Rosie Oliver, is working hard to co-ordinate UKELA's responses to the National Policy Statements on Energy and Ports. We'll be monitoring the other NPSs as they emerge and will be commenting on them if they affect the interests of our working parties. Given their importance we've made them a pre-election priority.

I hope you'll be able to join us at an event happening near you soon. The next London meeting (February 10th) discusses nuclear issues; we've got a climate change seminar being planned for the spring or join us at the annual conference in Exeter at the end of June. You can book onto these events and find out about others on the UKELA website.

Student members should be aware that our competition deadlines are only days away. Now is the time to get on with those essays and moot skeletons. We've got some great prizes and any student or supporter is very welcome to join us for the competitions day at UCL on March 30th. Just let Alison know if you would like to come along.

Finally, on a personal note we would welcome your support. Council members Begonia Filguera, Bridget Marshall, Colleen Theron and I, together with others, have put on our running shoes to raise money to make sure our public information website, Law and Your Environment is looked after. As you know UKELA, like most charities at present, has a very tight budget. Our team is running a half marathon in the Forest of Dean to raise funds. You can read more about it later in e-law but if you haven't got time just visit www.charitygiving.co.uk and sponsor the team with whatever you can afford. We'd be very grateful.

Contact details for Alison, Rosie and others are at the end of e-law.

In this issue

MEMBERSHIP RENEWAL FOR 2010

Now is the time to renew your UKELA membership for 2010 - many thanks to all those who have already done so. If you have yet to renew, please do take a moment to send off your payment together with any changes to your details that we need to know about to our Membership Secretary, c/o CIWM, 9 Saxon Court, St Peter's Gardens, Marefair, Northampton NN1 1SX. If you have any queries about renewing or have mislaid the original renewal request (which was sent by email at the beginning of December) please contact alisonboyd.ukela@ntlbusiness.com

GARNER LECTURE 2009

Left to right: Peter Kellett, UKELA Chair, Nigel Howorth (Clifford Chance); Prof Philippe Sands QC; Lord Justice Carnwath (UKELA President); Stuart Popham (Clifford Chance)

The relationship between science and the law in international water disputes was the focus of the annual Garner Lecture, given on December 2nd 2009 by Prof Philippe Sands QC.

Awaiting judgement (due shortly) on a dispute about the river Uruguay between Argentina and Uruguay, Prof Sands, used that case and two others to examine how scientific evidence is used in legal disputes.

The Uruguay case involves two huge pulp mills which discharge into the river. Scientific evidence has focused on the environmental impacts on the river and the local population.

"Water is life and there is no aspect of life that it doesn't influence", he said. Eight out of ten cases involving Prof Sands had water as a key issue. In the context of climate change this was likely to increase.

In international courts there can be seventeen or more judges. Prof Sands spoke of the difficulty of communicating complex scientific evidence: "There are 21 judges in the International Tribunal for the Law of the Sea from different cultures and backgrounds". After being involved in various cases which rested on scientific evidence he concluded: "the International Court is not well placed to arbitrate between well put scientific arguments". This was despite scientific facts often being crucial to the outcome.

He concluded that lawyers should keep the presentation of scientific information simple and to use scientists with specific expertise. International courts are anthropocentric, more interested in drinking water quality than the protection of biodiversity.

The Garner lecture 2009 was kindly sponsored by Clifford Chance. It will be published in full by UKELA and in Environmental Law and Management in the spring.

VOLUNTEERING OPPORTUNITIES WITH UKELA

UKELA is a charity which according to charity law must deliver a public benefit. We do this mainly in two ways – by influencing decision-makers to make the law work for a better environment and by providing information on environmental law to the public so they can help themselves to a better environment. UKELA receives a fantastic level of volunteer support. The individual council members provide a very high level of input and the patrons not only lend their names to the cause but also provide much needed advice, contacts and help at events. Any of you actively involved in a regional group, working party or special interest group will already know what a difference putting in some effort can make. UKELA has a tight budget, no office, two part-time staff for management and administration and a part-time contractor to support the working parties. So any help members can give is warmly appreciated.

The list below highlights how you can help our work and thanks some of those who are already helping.

Joining in our Sponsored Events

For the first time ever our members are raising money for UKELA in two sponsored events in 2010. You can read about how you can support these events on page 5.

Securing sponsorship for Law and Your Environment

Corporate members of UKELA are offered opportunities to sponsor the Law and Your Environment website. PLC has already taken up the offer to put a link on the home page of www.ukela.org which directs visitors to their news updates. We are grateful to volunteer Lyndsey Greer for contacting our corporate members to make them aware of these opportunities.

If you're a corporate member please look out for Lyndsey's call.

Updating Law and Your Environment and UKELA.org

Keeping Law and Your Environment up to date is a mammoth task. We also need to add more information on the law in Scotland, Wales and Northern Ireland. We're grateful to Council member, Jamie Whittle, for adding Scottish content and to member, Andy Stone, for helping with the technical side. If a qualified lawyer with expertise in any particular area covered by Law and Your Environment or the Environmental Law section on www.ukela.org could offer to review a section we'd like to hear from you. It's easy to cut and paste the material from the site, update it and then post it back to us to publish. Sections include: nature conservation; water; noise; planning; waste; air; contaminated land; climate change etc.

Contact: Vicki.elcoate@ntlworld.com

MEMBERSHIP DEVELOPMENT

We are now in a critical window for attracting new members. We can really only do this until the end of March as our membership year runs from January – December. We need one volunteer who can help us find out where the gaps are and let us know who to approach. This means checking through legal directories against our list of corporate members to see who's missing; identifying key academic institutions who are not members; finding out which environmental consultancies might benefit from joining. Full support will be provided by the staff. No legal expertise required. If you have any free time in the next few weeks please let us know.

Contact: alisonboyd.ukela@ntlbusiness.com

GENERAL HELP

We do from time to time need help with an activity or event. It might be checking through a list, updating a database of contacts or helping man a stall. If you would like to be added to our volunteer list (on the understanding that you can, of course, say no if your time does not permit), then please email us to let us know: alisonboyd.ukela@ntlbusiness.com.

FIRST UKELA BURSARY RECIPIENTS

By Donald McGillivray of Kent University

In 2009 UKELA launched a pilot Vocational Bursary Fund aimed at current or recently graduated students. The Fund was intended to further the charitable objects of UKELA and enable students to undertake a period of vocational placement (such as an internship or externship) in the field of environmental law, with host organisations ranging from public to private bodies, NGOs and universities. Two awards were made for 2008/09.

Poras Kumar was funded to work with Ceredigion County Council on the Cambrian Mountains Pilot Project. This project was at a stage where a Strategic Environmental Assessment needed to be carried out, and Poras drafted a Scoping Report as well as working on various rights of way issues which had to be dealt with following the Natural Environment and Rural Communities Act 2006. Poras has spoken of the value of the bursary in allowing him to explore issues which might not have been so readily explored had he been employed, and of the value in exploring a wide range of inter-related legal and non-legal issues. He concludes:

"Through working at the Council, I had the opportunity to explore the practical ways in which local government plays a part in environmental conservation and it helped me explore future career options in terms of getting involved in environmental conservation from a legal aspect."

The second bursary was awarded to Karen Buchanan, who used the funding to support a "challenging and insightful" two-week period in Quito, Ecuador volunteering with ECOLEX, an NGO working to promote capacity building and local participation in environmental development, with a particular emphasis on engaging rural communities (indigenous, mestizo, and Afro-Ecuadorian) in exercising their environmental rights over land, resources and the natural environment. Job-shadowing ECOLEX's environmental lawyer, amongst other things Karen took part in meetings, revised technical documents and formulated recommendations, including with respect to climate change issues, access to environmental information, environmental damage and to the Ecuadorian national report on compliance with the Convention on Biological Diversity. One of the motivations for travelling to Ecuador was the 2008 change to the Constitution, giving the environment rights in itself, one of the poster-children on the Wild Law movement. As Karen reports:

"Mini copies of the 2008 Constitution are to hand at all times and cited in meetings and seminars, though there is a general scepticism about the actual effect of the environment rights afforded by the new legislation as no test cases have been brought yet."

Karen notes that "It was also possible to introduce UKELA (at the start of every event) and it was a surprise to many other participants that there was someone there representing a British environmental law organisation!" and concluded her report to UKELA by saying that she would "thoroughly recommend any aspiring environmental lawyers to take the initiative and experience work in another setting like ECOLEX!"

Following the pilot scheme, further funds have been set aside for bursaries in 2009/10, and the criteria widened to allow awards to be made to those who have graduated but not yet found full-time employment (and not just those who have just graduated), something which might be of particular benefit in the current climate.

The Bursary Fund is a terrific opportunity to access funding for travel and accommodation, to support both those at the start of their environmental law-related careers and to further the broader mission of UKELA.

Details of the current scheme, the deadline for which is closing fast (19 Feb 2010), are available at http://www.ukela.org/rte.asp?id=102.

RAISING MONEY FOR THE LORD NATHAN MEMORIAL FUND

Launched by UKELA last June, The Law and Your Environment (www.environmentlaw.org.uk) helps people help themselves to a better environment by giving them the basic plain English information they need to:

- understand how environmental regulation works for common problems (from noisy neighbours to pollution to wildlife crime);
- assert their legal rights to challenge potentially damaging environmental impacts to their communities; and
- understand that with those rights come responsibilities.

The website is already receiving over 2000 visits a month.

Because we recognise how difficult it is to raise ongoing funding for a website, UKELA's Council decided to raise an endowment from individual members, law firms and chambers designed, once mature, to pay for the development and maintenance of the website. So far we have secured pledges and donations of over £40,000 towards a target of £285,000. Council, Patrons and our President have all pledged support, and some members have already supported the appeal, either personally or through trusts linked to their chambers or firms (thanks again to Clifford Chance). The family of Lord Nathan (after whom the endowment is named) has also generously backed the appeal.

We now have a number of fundraising initiatives for the fund which we are asking you to consider supporting.

Support our runners

UKELA's Chair, Peter Kellett, is leading a team from the private and public sectors in a half marathon to raise money for UKELA's public information website, Law and Your Environment.

The race is in the Forest of Dean on Sunday 28th March 2010 and Peter is currently forming the team (thanks to Begonia Filgueira, Guy Linley-Adams, Bridget Marshall and Colleen Theron for already getting into training):

Any other UKELA member who would like to join the team is very welcome to do so. Peter says: "It's a lovely run through woods and past lakes and can be taken at any pace from the seriously competitive (under 2hrs) to beginners (2-3.5 hrs)". You can read more about the area at http://www.visitforestofdean.co.uk/attractions/ or view information about the half marathon at: http://www.forestofdean-halfmarathon.co.uk/

Law and Your Environment provides information on environmental rights and responsibilities http://www.environmentlaw.org.uk/. Any money raised will be put into the Lord Nathan Memorial Fund for the Environment, the income from which will help maintain the website in the long term. As you will realise it's vital that the information is kept up to date and relevant to individuals and community groups who might use it.

If you want to run:

Email Vicki.elcoate@ntlworld.com to receive joining instructions

Please sponsor our runners:

Visit http://www.charitygiving.co.uk/environmentrunners

Corporate Members and Sponsorship

We are also seeking sponsorship partners for Law and Your Environment. If you're a corporate member and are interested we'd like to hear from you.

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

Fundraising

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 2000 unique visits last month – growing steadily since its launch in June).
- 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

Is this something your company might be interested in?
It costs £750 to appear alongside no more than two others on the home page.
Or £100 to appear on our supporters' page.
You get your logo on the site and a link to your site.
The agreement is for one year initially.
If you are interested please email Vicki.elcoate@ntlworld.com.

Contributions - David Hart QC

IS PUBLIC LIABILITY INSURANCE ENVIRONMENTAL INSURANCE?

David Hart QC - 1 Crown Office Row

1. This article explains why the answer to my question is an emphatic "No". Many environmental claims are not covered by the typical public liability policy available in the UK. This is not what many insureds would expect, and it is therefore necessary to see where the line is drawn between events which are covered by the average public liability policy, and those which are not and may need separate or bespoke environmental insurance.

2. So I will consider a conventional policy, and how the law has interpreted it. Public liability policies cover occurrences which happen during the period of insurance; they provide "indemnity against legal liability for damages"; but the occurrences or incidents have to be "sudden" otherwise they are excluded.

3. Consider the type of event which causes environmental claims, and the sort of claims which result. Fires cause explosions which can cause widespread air pollution, contamination of land offsite, and contamination of surface and ground water from escaped chemicals or firefighting foam. Structural failures (e.g. many hundreds of thousands of tons of sewage sludge) can damage offsite structures, block rivers, and threaten other businesses both with further slips or by depriving those businesses of water or power. Such events can also cause the insured to spend substantial sums preventing or mitigating losses to others.

4. There are very broadly two types of claims which result. The first are private-law civil claims (usually nuisance claims) brought by neighbours. When it is a one-off event, these are usually claims for compensation for what has already happened. The second are claims brought by the Environment Agency as environmental regulator. The EA has

    (I) powers to clean up and charge those who caused or knowingly permitted water pollution: s.161 Water Resources Act 1991

    (II) may serve works notice instructing D to clean up, under s.161A WRA;

(III) may serve remediation notice in respect of contaminated land under Part IIA of Environmental Protection Act 1990

(IV) may serve notice under Environmental Damage (Prevention & Remediation) Regs 2009 (SI 2009 No.153).

The insuring clause: liability for damages

5. The rule of thumb is that the civil claims by neighbours may be covered by a public liability policy, whereas the claims arising out of regulatory action are not covered.

6. The problem with the statutory claims is that the courts have decided that such statutory claims do not give rise to "liability for damages", within the meaning of the typical insuring clause.

7. The clearest decision on these lines was that of HHJ Hegarty QC in *Bartoline v. RSA* [2006] EWHC 3598, [2008] Env LR 1. A fire at Bartoline's factory caused contamination of a stream, and led the EA to spend over £600,000 on clean-up and claim this from Bartoline under s.161. Bartoline also spent nearly £150,000 on complying with an EA works notice under s.161A WRA. Bartoline sued insurers to recover both sums. The judge held that neither sum was recoverable. The liability to pay the £600,000 was not a liability to pay damages; it was a liability to pay a debt under a statute. Equally, Bartoline's expenditure on works carried out by itself could not amount to a liability to pay "damages."

8. *Bartoline*, as a first instance decision[1], is not by itself binding on any other first instance judge. However, the main principles underlying the decision do come from authority in the Court of Appeal, and for all practical purposes, the law is settled unless and until a case reaches the House of Lords on the point.

9. There are essentially two strands of reasoning supporting the judge's conclusions. The first is a series of marine insurance cases (e.g. *Hall Bros Steamship v. Young* [1939] 1 KB 748) in which payments under statute were not held to be liabilities by way of damages.

10. The second is the decision of the Court of Appeal in the Deighton tip case, *Yorkshire Water v. Sun Alliance* [1997] 2 Lloyds Rep. 21. Yorkshire Water had spent £4.6m on urgent flood allevation works on its own property, with a view to preventing further damage to other properties (who included ICI) and hence to prevent or mitigate further claims from ICI and others arising out of the slip of the sewage sludge. It sued insurers on the basis that these sums were incurred in respect of that slip and were done pursuant to a legal liability to prevent further losses occurring.

11. The Court of Appeal held that this argument was wrong. In this sort of public liability policy, the trigger for the indemnity is not simply the occurrence (the fire or the slip) but the liability to pay damages to others in respect of that occurrence. One's own expenditure cannot be such liability. An attempt to imply a term that the insured would make reasonable efforts to avoid such losses and if he does so the insurer would indemnify him against the costs of such efforts was sharply rebuffed by the Court.

12. Both *Bartoline* and *Yorkshire Water* were examined in a more recent decision of the Court of Appeal, *Bedfordshire Police Authority v. Constable* [2009] EWCA Civ 64. Property-owners sued the police for damage caused by a riot at a detention centre, relying upon a statutory liability under the Riot (Damages) Act 1886 . The police sought indemnity from insurers, who refused to do so on *Hall Bros, Yorkshire Water & Bartoline* principles. The Court of Appeal ruled against insurers. Even though the police's liability was a statutory one and a strict one, the statute reflected an underlying historical common-law liability or "*notional responsibility to preserve law and order in the locality.*"

13. At first sight, the *Bedforshire* case might be thought to case doubt on the earlier cases. Here is a statutory liability, and a strict one at that, giving rise to a liability in "*damages"* for PL purposes. However, if anything, it supports insurers' arguments. First, it amounts to a general application of the *Hall* and *Bartoline* principles, and the judge's analysis in *Bartoline* that the *Hall* principle of "responsibility" was derived from marine insurance cases was expressly broadened by the Court of Appeal so as to apply *"in general, to public liability insurance"* para.28. Secondly, there is an easy point of distinction between the outcome and the earlier cases. There never has been any common-law liability owed by a polluter to the EA; the EA is a creature of statute, and so are the liabilities of polluters under the WRA. Contrast the common-law responsibility of the police for keeping good order.

1 There was an appeal, but this was compromised before being heard.

The outcome

14. There are some fairly obvious anomalies in this result. Take an escape of contaminated liquid from a factory which pollutes a river and causes land contamination. If the river is privately owned, its owner may clean up, and sue the factory-owner for damage to both river and land. If this happens, the factory-owner can claim on his PL policy. But if the EA steps in and carries out urgent river decontamination works, and claims the money under the statute, then the factory-owner must bear those losses himself.

15. There is a similar problem where the factory-owner carries out preventative works so as to avoid causing damage to his neighbour. If he does so, *Yorkshire Water* tells us that he cannot recover those losses from his PL insurers. If he does not do so, and the damage reaches his neighbour, then there is the possibility of recovery in respect of the neighbour's claim. But the factory-owner must not be too slow about his remedial works, otherwise insurers will repudiate on the basis that he failed to take reasonable precautions to avoid the liability in question.

"Sudden"

16. Assuming our insured's claims against him qualify as liability for "damages, he has still not necessarily done enough to achieve an indemnity. This is because since about 1990, there have been pollution exclusions in most PL policies.

17. Although the wording differs slightly between the standard ABI and Lloyds wordings, the gist is the same. Bartoline's policy with the RSA is typical: *"The indemnity will not apply to legal liability…caused by or arising out of pollution or contamination...unless the pollution or contamination is caused by a sudden identifiable unintended and unexpected incident which takes place in its entirety at a specific moment in time and place during any Period of Insurance; Provided that all pollution or contamination which arises out of one incident shall be considered by [the insurer] for the purposes of this policy to have occurred at the time such incident takes place."*

18. The clause operates as an exclusion, and then a limited write-back. But what is written back?

19. It is reasonably clear that in a Bartoline-type case, the policy would respond. If the air pollution or water pollution had contaminated neighbours, this would be as a result of a *"sudden identifiable…incident."* But there are a whole host of cases where the result is not so clear. A very common occurrence which gives arise to claim is an escape from an underground fuel tank. The usual problem is evidential. Unless insured or insurer has carried out substantial investigations, they will not know how and over what period the leak occurred. There is also an ambiguity in the word "*incident."* Is the incident the leak from the tank, or the event which gave rise to the third party liability, i.e. the escape of the hydrocarbons from the land causing offsite contamination? We have seen that the occurrence giving rise to liability is the latter, but is "*incident"* to be similarly interpreted?

20. An example may help. There is a long-running seepage from an underground tank into the insured's land. A flash flood washes the contaminants from the insured's land onto the neighbour's land. If "incident" refers to the seepage, the claim is excluded. If "incident" refers to the escape of the contaminants, then the claim is not excluded.

21. The answer may depend on how the pollution exclusion fits within the rest of the policy, but I think that there is a lot going for defining the incident as the escape from the land rather than the seepage into the land. There is no case law on it, though the issue arises time and time again in practice.

Policy years

22. These public liability policies are of course claims-occurring policies, rather than claims-made policies. This means that the relevant insurer is the one who wrote the policy in force at the time of the occurrence or incident. This may be many years before the third party brings the claim against the insured. If the same insurer has been on risk throughout, then the only issue may be what level of deductible was applicable in the relevant policy year. But if the insured has chopped and changed his insurers over the years, then he faces a further obstacle. Which insurer was on risk when the "occurrence" or "incident" occurred? That may not be easy to determine, if the leak or escape happened underground.

Conclusion

23. The short answer to my question is that Public Liability insurance is only in a limited sense environmental insurance. This means that those who wish comprehensive environmental insurance will have to negotiate this separately. This can

be in done a number of ways. The first, and simplest, is to find an insurer who will be happy to extend conventional PL cover to preventative costs and/or statutory claims by the EA. This may still retain the gradual pollution exclusion – whatever that may mean, and will usually lead to an increased premium, but will provide an indemnity in the *Bartoline*-type case.

24. The second, which will be applicable to the more complex and substantial sites, is to obtain a specific environmental liability policy, but this will almost certainly involve some sort of site-specific audit/investigation and may be only available on a claims-made basis. Hence the insured will have to maintain insurance for as long as he may be on risk for events arising out of his ownership of the land in question.

AARHUS AND PRIVATE LAW CASES RELATING TO THE ENVIRONMENT

Developed from a seminar presented in April 2009

Jeremy Hyam – I Crown Office Row

1. In the recent decision of *Morgan and Baker v. Hinton Organics* [2009] EWCA Civ 107 the Court of Appeal for the first time reviewed (without actually deciding) the applicability of the Aarhus Convention to private law environmental disputes. The purpose of this paper is to review the arguments both for and against the extension of the Aarhus principles into the sphere of private as opposed to public law, and to make some suggestions about how the Aarhus principles might be applied in practice.

The appeal in *Morgan and Baker*

2. The appeal raised two key issues of principle:

(a) Was the application for an injunction against the Defendant within the scope of Article 9(4) of the Aarhus Convention[2]?

(b) If yes, what is/was the nature of the Aarhus obligation on the Court when exercising its discretion on costs (regardless of whether or not the Convention is raised by one of the parties)?

3. The background facts were essentially that the Defendant was the owner and operator of a waste recycling facility at Charlton Field Lane, near Keynsham, Bristol. The 1st Claimant was the joint owner and occupier of a property situated around 300 metres from the site. The 2nd Claimant was the owner and occupier of a property around 500 metres from the site.

4. The injunction sought concerned complaints of odours being released from the waste site which adversely affected the Claimants' homes and which were causing them a nuisance. The Particulars of Claim had set out a series of regulatory breaches by the Defendants as supporting their claim in nuisance. Despite such breaches and complaints by the Claimants and other local residents to the Defendant, to Bath and North East Somerset CC (BANES) and the EA, the Claimants considered that no effective remedial action had been taken by the Defendant, and no effective enforcement action (to prevent further breaches) by BANES or the EA.

5. They therefore sought injunctive relief against the Defendant on an interim basis until trial to prevent the Defendant from causing odours to emanate from the site.

6. In the witness statement in support of the injunction the Claimants made plain they considered an undertaking in damages inappropriate for the reason that the Claimants were simply asking the Defendant to comply with its own waste management licence conditions.

7. The Defendant objected to the absence of an undertaking and the Claimants replied by suggesting the proceedings might be avoided altogether by an undertaking which mirrored closely the requirements of the Waste Management Licence.

2 The full title is the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – hereafter "the Aarhus Convention".

8. No such undertaking was agreed and the matter came before HHJ Seymour QC on 9th November 2007 who was satisfied that: (i) there was a serious issue to be tried as to whether offensive odours affecting the enjoyment of the claimant's properties were generated by the Defendant or not (ii) that damages would not be an adequate remedy and that (iii) that the balance of convenience favoured the Claimants in relation to the form of order put forward by them.

9. The crafting of the order in the terms approved by the judged was influenced, among other things, by decision of the Divisional Court in *Environment Agency v Biffa Waste Services* [2007] Env LR 16, 330 that an odour condition in terms: '*There shall be no odours emitted from the permitted installation at levels as are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the permitted installation officer, as perceived by an authorised officer of the defendant[the EA]*'; did not offend against either the principles of certainty (clarity and forseeability), nor did it have the effect of usurping the fact-finding and adjudicative roles of the court by bestowing on an authorised officer the functions of establishing relevant facts and obliging the court to convict whenever it was satisfied that the officer honestly perceived those facts. As Ouseley J. held in that case, at §25:

> *"I construe the closing words of the condition as requiring evidence relevant to the requirements of the condition from an authorised officer of the agency as a necessary ingredient in the case. It is a requirement that is likely to be a safeguard from officers against irresponsible prosecutions. It does not limit the jurisdiction of the court to decide, on the basis of all the evidence presented to it, whether odours had been emitted at levels which offend against standards and conditions."*

10. Essentially the Claimants sought by their order a mechanism whereby an independent body viz. BANES/EA would police the order made and report (as part of their ongoing statutory obligations) if there was any specific breach of it. In the event neither BANES nor the EA wished to be drawn into the dispute or to become adjudicators of it, and thus the matter came back before the judge who eventually discharged the injunction for want of any effective means of enforcement/policing.

Aarhus - background

11. The Aarhus Convention came into force in October 2001 and was ratified by the UK in February 2005. In line with the Convention procedures the UK became a full party to the Convention in May 2005, 90 days after the date of ratification.

12. The key provisions of the Aarhus Convention relevant to the present issues are:

Article 3(8): Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

Article 9(3): In addition and without prejudice to the review procedures referred to in paragraph 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Article 9(4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

13. As is explained in the Sullivan Report, at §10, Aarhus is an international convention, and the parties to the convention have established a Compliance Committee that can investigate alleged instances of non-compliance. But the European Community has also ratified Aarhus, giving the European Commission the right to ensure that Member States comply with the Aarhus obligations in areas within Community competence – see *Commission v France* Case C-239/03 (2004) ECR I-09325, and the opinion of Advocate General Kokott delivered on 15th January 2009, in *Commission v. Ireland* Case C-427/07. Further, and as explained in the Sullivan Report at §11 the Convention has been inserted into two key EC environmental directives:

(I) Art. 10A of the EIA Directive 85/337/EC; and

(II) Article 15a of the IPPC Directive 2008/1/EC.

In both directives there are now provisions that procedures for legal challenges must be "fair, equitable, timely and not prohibitively expensive" – in other words, directly transposing the wording of Article 9(4) of the Aarhus Convention into

Community law[3].

14. For a good example of the application of Article 10A, see Collins J.'s decision in the EIA case of *R(Louisa Baker) v. BANES and Secretary of State* [2009] EWHC 595 Admin at §48.

15. Such judicial consideration of the Aarhus Convention as there has been by the domestic courts has been limited, and has focussed largely on Aarhus obligations in relation to consultation and PCO's in the context of judicial review:

(I) *R (Burkett) v LB Hammersmith and Fulham* [2004] EWCA Civ 1342; para's 74-80

(II) *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 at para 49: "…Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to…[the Aarhus Convention].

(III) *Val Compton v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 – at §20 in particular;

(IV) *R(McCaw) v. Westminster City Magistrates Court* 19th June 2008 *(unreported)* Divisional Court[4]

(V) *R (Buglife) v Thurrock Gateway Development Corp and another* [2008] EWCA Civ 1209, in particular at §17.

16. No case had directly considered the question of the extent of the Aarhus obligation on the Court (i.e. the obligation derived from Articles 9(3) and 9(4)) the Aarhus convention) in relation to injunctive proceedings (whether in the context of private or public law).

Is an injunction in private nuisance proceedings within the scope of Article 9(4) of the Aarhus Convention?

17. The first question to be answered is whether or not the provisions of the Aarhus Convention apply to a private law application for an interim injunction in nuisance proceedings.

18. This question boils down to asking whether a particular private law claim under consideration is claim about a contravention of the *national law relating to the environment.*

19. What then is the "*national law relating to the environment"*. The common law? Statutory provisions relating to the environment?

The Claimants' case

20. The Claimant's case was that the application for the interim injunction was a challenge to an act or omission by a private person [the Defendant] which contravened provisions of national law relating to the environment – see Article 9(3).

21. If, the Claimants at trial were to prove their factual case then:

(I) they would have established a tort;

(II) they would have established contravention of the terms of the Waste Management Licence made under the EPA 1990;

(III) and potentially would have established a statutory nuisance under s.79 EPA 1990; –

The consequence was (it was argued) that an interim injunction pending determination of those facts, must also be covered by the Convention. The specific reference in Article 9(4) of the Aarhus Convention to "*injunctive relief if appropriate*" reinforces this. The reference to "injunctive relief" cannot, on a proper interpretation, be limited to final relief at trial.

22. The argument ran that there are no criteria laid down by national law which prohibit the Claimants making the application for interim relief, and the logical interpretation of the Convention is that the Claimants, as members of the public, should be deemed to have the right to seek such a judicial remedy.

23. Therefore, as a matter of fact, and law, the claim for interim injunctive relief plainly fell within the scope of the

3 See for example implementing directive 2003/35 referred to in the *Commission v. Ireland* case supra.

4 In this case the Divisional Court (Latham LJ and Nelson J.) held that the application under consideration (a procedural argument as to whether multiple applicants could be named on a single information charging statutory noise nuisance) did not fall within the Aarhus Convention and declined to grant a PCO. Although certifying the point of law as one of public importance the Divisional Court refused permission to appeal to the House of Lords.

Convention[5].

The Defendant's response

24. The following is taken from the Defendant's speaking note for the Court of Appeal as drafted by Stephen Tromans Q.C. and Richard Wald:-

1. There is a fundamental distinction between actions to vindicate general public rights to a clean and healthy environment for the benefit of present and future generations, and actions to protect private property rights.

2. Private nuisance is concerned solely with the latter:

Hunter v. Canary Wharf Ltd [1996] 1 AC 655

687G-688E per Lord Goff, quoting at 688B Prof Newark: "A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens"; see also 692C; 694H-695A

696A-C per Lord Lloyd

707C-E per Lord Hoffmann

724D-F per Lord Hope

There may be an issue of how an award of damages to the owner relates to just satisfaction of a claim by non-owning occupiers under Art 8 ECHR (see Dobson v. Thames Water Utilities Limited [2009] EWCA Civ 28) but that does not affect the basic distinction.

3. In its own terms , it was never the intention of Aarhus 9(3) and 9(4) to affect private actions between private parties: the thrust of the provisions is to allow the citizen to enforce national environmental laws, which may be done in various ways (administrative complaints, criminal prosecutions, "person aggrieved" type procedures as under section 82 EPA 1990 for statutory nuisance, statutory "citizen suit" provisions as under US federal and state environmental laws, constitutional actions as in MC Mehta v. Union of India (1998), or constitutional rights to sue for harm to public resources as in Ontario Province Bill of Rights).

The Aarhus Implementation Guide [Authorities 3/134 under the heading "Adequate and effective remedies" gives a further clue when it talks about "The ultimate objective of any administrative or judicial review process is to obtain a remedy for a transgression of law"

4. The fundamental distinction between a person seeking a remedy to protect their private rights and the citizen seeking an injunction or other remedy to enforce legislation is clearly stated in Gouriet v. UPW [1978] 1 AC 435:

481A-F, 482A-D per Lord Wilberforce

490E-H, 494G-H per Viscount Dilhorne

497G-h, 498F-H, 499D-H per Lord Displock

508G-h, 512F, 517G-H per Lord Edmund-Davies

520H, 521C-E per Lord Fraser

5. A claimant seeking an injunction in private nuisance may incidentally assist in improving general environmental standards and possibly reinforcing national laws: bit that of itself does not make it an Aarhus proceeding.

6. Equating private nuisance claims with Aarhus article 9(3) actions would open up a broad and indeterminate field of private law claims which could be argued as subject to a different costs regime and possibly other procedural differences. Note in this regard the breadth of private nuisance: Laws v. Florinplace Ltd [1981] 1 All ER 659.

7. Equally, providing a special regime for any civil action which can be said to "challenge acts and omissions by private persons ... which contravene provisions of national law relating to the environment" is wide and

5 See footnote to paragraph 51 of the Sullivan Report viz. the question of whether or not a particular case falls within the scope of the Aarhus Convention is a matter for judicial determination.

indeterminate when the concept of the environment which appears at Art. 1(3) of the Convention is noted.

8. In this case the claim was always a private nuisance action (see Skeleton paras. 13, 14). Seeking, ultimately unsuccessfully, to use the Waste Management Licence "officer's nose" condition as a peg on which to hang a formula to try and make the order workable, does not bring this claim within the ambit of Aarhus.

9. Further, there is the problem of how to give legal effect in proceedings between private parties to an international convention. There is no route via Community law for the reasons given in our Skeleton, paras 20-21. The fact that the Community does not regard private actions as within its sphere of competence also appears from the way it has dealt with the Aarhus Convention in the Environmental Liability Directive 2004/35, Arts. 12 and 13.

The Court of Appeal's response

25. The Court of Appeal answered this question in the following way:

44. These arguments raise potentially important and difficult issues which may need to be decided at the European level. ***For the present we are content to proceed on the basis that the Convention is capable of applying to private nuisance proceedings such as in this case****. However, in the absence of a Directive specifically relating to this type of action, there is no directly applicable rule of Community law. The UK may be vulnerable to action by the Commission to enforce the Community's own obligations as a party to the treaty. However, from the point of view of a domestic judge, it seems to us (as the DEFRA statement suggests) that the principles of the Convention are at the most something to be taken into account in resolving ambiguities or exercising discretions (along with other discretionary factors including fairness to the defendant).*

45. Mr Tromans also relies on the need to see the requirements of the Convention in the context of the full range of proceedings permitted by domestic law. The Convention gives a right to access to justice, but no right to any particular form of legal remedy. As Mr Tromans points out, there are other procedural routes which might have been chosen by the claimants. He mentions four:

i) Seeking judicial review of failure by the Agency or the Council to enforce the relevant site licence conditions or serve a statutory nuisance abatement notice.

ii) Making a complaint to the Parliamentary Ombudsman or Local Government Ombudsman in respect of such failure.

iii) Initiating a private prosecution for alleged breach of the relevant waste management licence conditions.

iv) Making a complaint of statutory nuisance under the summary procedure provided by section 82 of the Environmental Protection Act 1990.

Thus, he says, even if it were found that the private nuisance claim entailed "prohibitive cost", there would be no breach of the Convention unless it were established that the other possible routes were also defective in that or some other way.

46. We accept that the particular remedy sought in a particular case needs to be seen in the wider context of available remedies generally. However, the argument brings with it other questions. Reference to the Ombudsman raises the same issue of legal enforceability mentioned by the Advocate-General in respect of the Irish Ombudsman. The other remedies would need to be considered individually in terms not only of cost but of legal efficacy. The very diversity of jurisdictions leads to another question which has been the subject of lively debate but no resolution: that is the possible need for a separate environmental court or tribunal to further the Aarhus ideals by ensuring that remedies in the environmental field are both coherent and accessible (a "one-stop shop", as Lord Woolf and others have proposed: see Carnwath Environmental Litigation – a way through the Maze? (1999) JEL 3 13).

Summary

26. Although not definitive of the position in domestic law the Court's response in §44 is an encouraging sign from the point of view of an environmental law claimant. Aarhus may apply to private law cases. The problem which seemed to trouble the Court was not so much the potential applicability of Aarhus, but the practical application of its principles to cases which might come before it in various guises, e.g. by way of an injunction in a private law nuisance/trespass claim. At most, thought the Court it was a factor to be taken into account, not a trump card capable of overriding the general discretion as to costs vested in the Court under the CPR.

27. It has been suggested (perhaps by reference to Article 300 of the EC Treaty) that the provisions of Aarhus are directly effective even in the absence of a directive specifically implementing the provisions to the private law sphere relying in part upon Article 300 of the Treaty which concerns the ability of the Community to become party to international treaties, and, by doing so, make agreements which *"shall be binding on the institutions of the Community and on Member*

States": Art.300(7).

28. But such an argument, which results in saying that Aarhus has "trump card" or "direct effect" status, will give rise to issues as to whether it is sufficiently clear precise and unconditional.

29. Although the Community is itself a party to the treaty, and by becoming such a party the terms of the Convention becomes a document adopted by the Community, it is usually by its specific application to particular situations that it obtains its clear and precise meaning –Phrases such as that contracting states provide "*adequate and effective remedies, including injunctive relief as appropriate, [which are] fair, equitable, timely and not prohibitively expensive*" may be matters of context, and it may be argued they must be seen in the light of the provisions (both procedural and substantive) of national law to which they relate.

30. In C-213/03 *Syndicat des pêcheurs v. EDF* at §39 it was held that: *"a provision in an agreement concluded by the Community with a non-member country must be regarded as being directly applicable when, regard being to its wording and the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.."*.

31. It is likely to be argued that Article 9(3) of Aarhus presupposes at least some implementing measures by the member states – since we do not know what these are, and since the Community has refrained from stepping into the sphere of private law environmental claims (amongst other things out of respect for the principle of subsidiarity) it is hard to say that such provisions are obviously sufficiently unconditional, clear and precise.

32. Against that it may well be said that the provisions which have been transposed into, for example Article 10a of the Environmental Impact Assessement are sufficiently clear – see Collins J. in *R(Lousie Baker) v. BANES* supra.

33. The consequence is that absent any specific applicable EC Directive the Convention by itself does not create any enforceable obligations on the Court other than to march in step with the thrust of the an international obligation to which the UK is a signatory. In the absence of an EU Directive specifically governing the dispute in question, the Aarhus Convention is simply a factor to be taking into account when the Court exercises its wide discretion on costs.

What then does Article 9(3) and (4) require of a Court when exercising its discretion in relation to a case which falls within its scope?

34. First, it requires the Court to have regard to the fact that the costs in relation to the proceedings, and any costs order made are "*not prohibitively expensive*" to the Claimant.

35. *Prohibitively expensive,* here, the I suggest has the meaning given to it in the Implementation Guide at p.134, viz.:

> … the cost of bringing a challenge under the Convention, or to enforce national environmental law may [must] not be so expensive that it prevents the public, whether individuals or NGO's, from seeking [judicial determination] in appropriate cases.

36. In other words, no costs order (whether pre-emptive or consequential) should be framed in such a way as effectively to prohibit the maintenance or continuation of the litigation by the person challenging, or seeking to enforce, provisions of national law.

37. The "costs" referred to here are not simply the costs of issuing the application, see the Court of Appeal at § 47 adopting the reasoning of AG Kokott in *Commission v. Ireland*.

38. Further, the question of whether the "costs are prohibitively expensive" is really one of fact. This would tend to suggest a subjective, rather than objective test (see Sullivan report footnote 44 p.21 for an interpretation that it is more an objective test). In practice it is unlikely to make that much difference. An adverse award of costs of £25,000 against a private persons seeking to enforce the terms of a Waste Management Licence in circumstances where, on their case, there has been ineffectual enforcement action by the relevant state bodies despite continuing breaches may well be "prohibitively expensive".

39. However, any Court deciding an "Aarhus" case must take into account as a relevant consideration the UK's obligation that any order it does make with regard to costs should be (i) fair; and (ii) does not prohibit the or prevent the commencement, continuance or disposal of the proceedings by reason of expense.

40. There a many ways in which this can be done.

Cost-capping

41. It is suggested that the scope for the court to impose cost capping orders at the outset of an Aarhus case may be one way of seeking to avoid proceedings being or becoming prohibitively expensive. The current White Book commentary on cost capping (CPR 3.1.8) is relevant, and there is clearly good sense in the suggestion that the appropriate time to apply for a costs capping order is at an early stage of the proceedings when the parties and the court can together plan the steps needed to bring the matter to trial, the costs implications of those steps and whether a cap is appropriate. How such costs-capping will work in practice, and whether a reciprocal costs cap (c.f. *Cornerhouse/Compton PCO's)* are required as a matter of routine, remains to be seen. It sometimes may be as much to the advantage of a Defendant than that of a Claimant for their to be a cap on costs.

Undertaking as to damages

42. Equally, the Court is likely to take into account as an additional factor against the requirement of an undertaking in damages, the obligations under the Convention. It would be wrong however to think that the Aarhus obligation will necessarily remove the need to provide an undertaking in damages as the price of the injunction, rather, it is likely to result in cases where there is a serious issue to be tried coming on before the Courts more quickly.

Use of experts

43. Any environmental claimant, unless his/her case is very straightforward will usually need at least some expert evidence to prove the claim. In a complex case more than one expert may be necessary. How can the needs of justice and fairness be met while at the same time ensuring that proceedings are not "prohibitively expensive". For most people of moderate means (say a family with a joint income of £50K (well over the legal aid threshold), a mortgage etc.) a disputed nuisance claim which requires expert evidence is, or is likely to be beyond their means without some means of funding of legal expenses i.e. BTE or ATE insurance. How are such claims to be best case-managed? These are difficult but important questions. The CPR is a sufficiently flexible instrument to allow for orders to be made limiting the amount of expert evidence to that strictly necessary, single joint experts etc, but even using those powers, the District Judge confronted with an Aarhus claim must somehow arrange the proceedings so they are fair (to both sides) timely and not prohibitively expensive.

Conclusions

44. Looked at in the round the decision of Morgan and Baker, provides the first real insight into how the Court is likely to deal with Aarhus private law claims. It is suggested that while their may be dispute at the margins of what is or is not a dispute concerning the national law relating to the environment, there will be a central core of cases, perhaps *nuisance/trespass/Rylands v. Fletcher cases* which clearly relate to damage to the environment even if that environment is the back garden or flats of a group of private persons, whose pre-condition to the protection of the "national law" is their interest in the relevant property.

45. In all cases where an Aarhus point is to be taken there is no doubt that it should be taken as early as the case permits. The procedural means by which the Aarhus objectives are then achieved are various, and it will be of real interest to both Claimant and Defendant environmental lawyers see how they are developed. Such development must also be seen in the context of a more wide-ranging review of the funding of litigation in particular by CFA by Jackson LJ.

46. In short, the practical application of Aarhus principles in civil cases is far from straightforward and will need careful working out, most probably on a case by case basis. In the meantime, it is hoped that seminars such as this may provide a useful starting point for consideration of how these cases might be developed.

ENVIRONMENTAL IMPACT ASSESSMENT AND HABITATS UPDATE

based on a paper given at the Landmark Chambers Planning High Court Challenges update 2009 seminar

Richard Turney- Landmark Chambers

1. Inevitably, another year passes with another flurry of High Court challenges based on issues regarding environmental impact assessment and the effect of proposed development on protected habitats and species. With judgment awaited in several other important cases, it will of course be business as usual again for next year.[6]

2. This paper attempts to provide a brief overview of a couple of key topics which have arisen in the past twelve months, rather than being either a complete review of the year or a full exposition of the law[7]. It does not purport to comprehensive on either front.

Screening opinions & the scope of EIA

3. Screening development proposals to assess whether environmental information in the form of an environmental statement will be required by the authority determining the application is at the heart of the system of environmental impact assessment in Directive 85/337 and the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. This first stage of scrutiny determines the practical scope of EIA: how many development proposals will be subject to this form of assessment? The European Commission has noted that there is potentially inconsistent application of the Directive in this regard, with the number of EIAs being required in particular member states varying from less than 100 to 5,000[8].

4. The first step in the process is the adoption of a screening opinion. The ECJ revisited the question of screening opinions in a judgment of 30 April 2009 in case C-75/08 R (Mellor) v SSCLG [2009] 18 EG 84 (CS). The issue in Mellor is one which had been dealt with in a series of English cases, namely whether reasons are required to be given when an authority adopts a negative screening opinion or the Secretary of State gives a negative screening direction. It is plain on the face of the EIA Regulations that reasons are required when an authority concludes that development is EIA development: reg 4(6)(i). However, there appears to be nothing to support a requirement to give reasons where the authority considers that it is not EIA development. The position in the national courts was that no reasons were required[9].

5. In January 2008 the Court of Appeal hearing the Mellor case referred the question to the ECJ. Mellor concerned an application to construct a secure hospital unit in Nidderdale, North Yorkshire. Planning permission was granted by Harrogate Borough Council but later quashed by the High Court because of an absence of any screening opinion. On the remitted application, the Council adopted a negative screening opinion which was disputed by the claimant. Partnerships in Care, the developer, wrote to the Secretary of State for a screening direction. In the meantime, Harrogate reconsidered their position and decided that the development was EIA development. However, the Secretary of State subsequently adopted gave a negative screening direction. The claimant challenged that decision. The High Court held that no reasons had to be given for the Secretary of State's decision or, alternatively, that the reasons given were adequate. The claimant appealed and requested the reference.

6. Three questions were referred to the ECJ:

   1. Whether under Article 4 of Council Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC Member States must make available to the public reasons for a determination that in respect of an Annex II project there is no requirement to subject the project to assessment in accordance with Articles 5 to 10 of the Directive?

   2. If the answer to Question 1 is in the affirmative whether that requirement was satisfied by the content of the letter dated 4 December 2006 from the Secretary of State?

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6 Last year's paper is available at http://www.landmarkchambers.co.uk/data/assets/pdffile/0013/32233/3.2EIAandProtectedHabitats.pdf

7 For reasons of time I do not attempt to deal with Strategic Environmental Assessment in this paper.

8 *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the EIA Directive (*Directive 85/337/EEC, as amended by Directives 97/11/EC) (COM/2009/0378), para 3.1

9 *R v Secretary of State for the Environment, Transport and Regions, ex p Marson* [1998] Env LR 761. That case was followed in *R v St Edmundsbury BC ex p Walton* [1999] Env LR 879; *BAA Plc v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 610; *Gillespie v First Secretary of State* [2003] 1 P&CR 30; and *R (Probyn) v First Secretary of State* [2005] EWHC 398 (Admin).

3. If the answer to Question 2 is in the negative, what is the extent of the requirement to give reasons in this context?

7. The ECJ ruled that the determination itself did not need to contain reasons for the position adopted. However:

[57] ...third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.

[58] Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.

[59] In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 Heylens and Others [1987] ECR 4097, paragraph 15).

[60] That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.

8. In short, there is no need to give reasons on the face of the opinion or direction, but the reasons underlying the determination must at least be available on request. Should the authority decide to give reasons on the face of the determination, the Court held (in response to the second and third questions) that those reasons must be "such as to enable interested parties to decide whether to appeal against the determination in question, taking into account any factors which might subsequently be brought to their attention" ([64]).

9. In my view, the ECJ's judgment makes considerable sense. It has always been open to a third party to challenge the rationality of the adoption of a negative screening opinion or direction, and that inevitably requires the authority concerned to produce a justification. The European Commission has for several years produced a "screening checklist" which sets out the sort of questions which the authority must consider[10]. One practical difficulty which arises is where the authority simply accepts the word of the applicant for planning permission in their request for a screening opinion. The authority will need to produce its own reasons for accepting the word of the applicant.

10. Mellor will be back before the Court of Appeal in a few weeks time, although I understand that the factual position in respect of the proposed development has now changed. It is not clear whether the Court will give further guidance in assessing whether the screening direction in that case (which purported to give brief reasons) satisfied the ECJ's requirement that the reasons be "such as to enable interested parties to decide whether to appeal against the determination in question".

11. The following points about screening opinions are worth remembering:

a. Although it is not necessary for all uncertainties to be resolved before screening, the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment: R (Jones) v Mansfield DC [2004] Env LR 21, per Dyson LJ at [39];

b. In making a screening assessment, an authority cannot simply rely on information about environmental effects being provided in future surveys: see R (Lebus) v South Cambridgeshire DC [2003] Env LR 17, per Sullivan J at [13] and [39]. See also Younger Homes (Northern) Ltd v First Secretary of State [2003] EWHC 3058 (Admin) per Ouseley J at [34] and, on appeal, [2005] Env LR 12 per Laws LJ at [41]. However, a full assessment of possible environmental effects is not necessary: Younger Homes;

c. Prospective remedial measures can be considered in deciding whether the development is EIA development. However, where prospective remedial measures are "not plainly established and not plainly uncontroversial", it cannot necessarily be concluded that those measures render an EIA unnecessary: see Gillespie v First Secretary of State [2003] Env LR 30, per Laws LJ at [46];

d. The environmental impacts to be considered include the effects of the process of the development: Gillespie per

10 http://ec.europa.eu/environment/eia/eia-guidelines/screening_checklist.pdf

Pill L at [39] and R (Mortell) v Oldham MBC [2007] JPL 1679 per Sir Michael Harrison at [38].

12. A few other cases from the past year on the issue of screening are worth considering:

a. The interesting case of R (Baker) v Bath and North East Somerset Council [2009] Env LR 27 concerned a proposal which would result in the intensification of use of a composting facility and compost being transported between two facilities. The objectors (including the complainant) were concerned with unpleasant odours created by the process. No EIA was carried out in respect of the proposal. The claimant successfully challenged the grant of permission, and in so doing persuaded Collins J that the EIA Regulations properly to implement the Directive:

   i. Collins J found that Schedule 2 to the Regulations improperly sought to limit the application of EIA in respect of changes to existing development. His lordship held it was "plain beyond any peradventure that it is not appropriate, in the light of the jurisprudence of the court and the purpose behind the Directive, to regard only the modification itself and not the effect on the development as a whole of any such modification to it" ([45]). It was necessary for the authority to consider the environmental effects rather than concluding that the threshold in Schedule 2 had not been met; and

   ii. Whilst members of the public could request a screening direction from the Secretary of State (reg 4(8)), there was further non-compliance with the Directive because there was no requirement to inform members of the public of their right to make such an application.

The Secretary of State was joined to the proceedings in light of the potential finding that the EIA Regulations failed to implement the Directive. However, there has been no appeal against Collins J's findings. We can expect an amendment to the Regulations to follow in due course. In the meantime, those concerned must show more caution in screening "amendment" proposals.

b. See also R (Wiltshire CPRE) v Swindon BC [2009] EWHC 1586 (Admin) on an example of an "amendment" scheme;

c. Should new information arise after a negative screening opinion, further information may suggest to an authority that it should revisit it. It would appear at least possible for them to do so, but there appears to be no duty to do so: R (Friends of Basildon Golf Course) v Basildon DC [2009] EWHC 66 (Admin), relying on R (Fernback) v Harrow [2002] Env LR 10. The position with screening directions is not so clear;

EIA and unlawful development

13. Ardagh Glass Ltd v Chester City Council [2009] Env LR 34 concerned an application for a mandatory injunction requiring enforcement action by the Council against the interested party, who had built a factory without planning permission. The application was granted. However, it is interesting to note Judge Mole QC's careful judgment on the question of whether the prospect of retrospective grant of planning permission undermined the scheme of the Directive. His lordship identified a concern that:

[101] ...Easy regularisation would encourage developers to ignore the criteria of art.2(1) and the DirectIve.

[102] This proper concern is at the heart of the court's decision. It may be met by making it plain that a developer will gain no advantage by pre-emptive development and that such development will be permitted only in exceptional circumstances. Such an approach, it seems to me, could preserve and protect the objectives of the Directive. It is one that would be accommodated easily within the procedures for judging whether planning permission ought to be granted for development subject to an enforcement notice. It is an approach that the Secretary of State would be able to take in deciding an appeal against an enforcement notice on ground (a), namely that planning permission ought to be granted for the development enforced against

[103] I am clear that, with one reservation, the enforcement procedures under English law are effective and are well able to take into account and protect the fundamental objectives of Directive 85/337 . Once an enforcement notice is issued, either there will be no appeal, in which case the development ought to be removed by one method or another; or there will be an appeal and the Secretary of State will consider whether planning permission ought to be granted for the development enforced against. In that case permission will not be granted unless the Secretary of State is satisfied that a satisfactory EIA has been undertaken. The Secretary of State can and in my view should also consider, in order to uphold the Directive, whether granting permission would give the developer an advantage he ought to be denied, whether the public can be given an equal opportunity to form and advance their views and whether the circumstances can be said to be exceptional. There will be no encouragement to the pre-emptive developer where the Secretary of State ensures that he gains no improper advantage and he knows he will be required to remove his development unless it can demonstrate that exceptional circumstances justify its retention.

[104] The reservation I have is that English law does leave open the possibility that the pre-emptive developer might achieve immunity without any proper EIA.

> [110] In my judgement, a purposive interpretation of art.2(1) strongly suggests that for the defendant councils to permit the Quinn Glass development to achieve immunity, whether by a positive decision not to take enforcement action or by mere inaction, would, as Schiemann L.J. contemplated [in R (on the application of Prokopp) v London Underground Ltd [2003] EWCA Civ 961], amount to a breach of the UK's obligations under the Directive. It may be that the provisions of s.171B need to be re-examined and perhaps disapplied in the case of EIA development so that for such development immunity would never arise and pre-emptive EIA development could only become lawful by, after full public participation, undertaking a comprehensive EIA comparing both initial and current circumstances and establishing exceptional justification. However, the circumstances of the Prokopp case are very different from the present case and, in my view, distinguishable. Whether the correct analysis would be to say that action or inaction on behalf of the planning authorities in the present case would be equivalent to development consent, is not a matter I need to decide. That is because there is no doubt that once enforcement notices are issued, as I order, and there is an appeal to the Secretary of State, as I anticipate there will be, any consent that might be given on the deemed application for permission would certainly be "development consent".

14. I have set out those passages in detail because I consider it to be useful and accurate summary of the principles governing unlawful development and EIA.

Relief

15. One point which concerns many developers is the extent of the court's discretion to refuse relief where it find that there has been a breach of the EIA regulations. This matter was considered in R (Aldergate Projects Ltd) v Nottinghamshire CC [2009] JPL 939, a case in which the judge found there to be unlawfulness in failing to provide a screening opinion. The defendant submitted that relief should be refused. Collins J held (my emphasis):

> [39] Mr Kolinsky [for the claimant] has accordingly relied upon a decision of Sullivan J in R (Lebus) v South Cambridgeshire District Council [2003] Env LR 17. That case concerned a failure to produce a screening opinion in relation to a development which was for a proposed egg production unit possibly containing 12,000 birds. That fell within Schedule 2 because it was a building of more than 500 square metres. The point in that case was that there was no document which could properly be regarded as a screening opinion. The learned judge in that case took the view that in those circumstances it was unlawful and he said in paragraph 53 of his judgment, having referred to the Berkeley case in the House of Lords :
>
> "53. In the present case I accept that consideration was given as to whether or not this proposal was an EIA development, but there was a complete failure to appreciate that this consideration had to be carried out and recorded and made publicly available in a formal manner in accordance with the Regulations. There is simply no written statement of Mr Hussell's opinion as to whether this development is an EIA development, save in so far as one finds references to that effect in the reports to Committee. But they merely record an earlier decision…"
>
> Then he said the council had simply failed to recognise that screening decision cannot be taken informally. He then referred to submissions by counsel inviting him to refuse relief on the basis that there had been no separate challenges to the screening decisions, and that in any event the applicants are well aware that the screening decision had been taken, albeit not properly recorded. Effectively, it was a plea to the discretion of the court not to grant relief in the circumstances. The judge refused to do that.
>
> [40] It seems to me that it is open to this court to refuse to grant relief in the exercise of its discretion, even if there has been a failure to comply with the obligations, if it is clear that the matter has been given consideration and there could be no detriment to the individual claimant resulting from the failure, but it is clear, and Mr Straker accepts, that if there has been a failure to comply with the regulations, and thus unlawfulness in the process which led to the grant of planning permission, it is for the defendant to establish that it is an appropriate case for discretion to be exercised against granting relief. Normally, unlawfulness will lead to the quashing of the permission affected by that unlawfulness.
>
> [41] Even if I have formed the view that the failure to consider the imposition of a condition in order to protect the claimant's position did not amount to an error of law, it seems to me that it is obvious that, were this permission to be quashed and reconsideration to be given, it would be open to the committee to decide to impose some sort of condition. It may well be that, in the light of the matters I have referred to earlier in this judgment, it would be unreasonable for the committee to fail to consider whether some such condition would be appropriate. Accordingly, I am not persuaded that I should refuse to quash the condition in question.

16. In R (Edwards) v Environment Agency [2008] Env LR 34, Lord Hoffmann opined:

> [63] It is well settled that "the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary" (Lord Roskill in Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] A.C. 617 , 656.) But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it. So in Berkeley v Secretary of State for the Environment [2001] 2 A.C. 603 it was conceded, and the House decided, that the Court of Appeal had been wrong to refuse to quash a planning permission granted without the impact assessment required by the EIA directive on the ground only that the outcome was bound to have been the same. The relevant domestic legislation provided that in such a case the grant of permission was to be treated as not within the powers of the Town and Country Planning Act 1990. Lord Bingham of Cornhill said (at p.608) that even in a domestic context, the discretion of the court to do other than quash the relevant order "where such excessive exercise of power is shown" is very narrow. The Treaty obligation to give effect to European law reinforces this conclusion. I made similar observations at p.616. But I agree with the observation of Carnwath L.J. in Bown v Secretary of State for Transport, Local Government and the Regions [2004] Env. L.R. 509 , 526, that the speeches in Berkeley need to be read in context. Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered. In Berkeley, the flaw was the complete absence of an EIA and the sole ground for the exercise of the discretion was that the result was bound to have been the same.

17. Both these cases clarify that, despite the position seemingly adopted in Berkeley that a discretionary refusal of relief would be truly exceptional in the case of non-compliance with the EIA Directive, there is scope to persuade a court that relief should be refused. One example of a situation where there is often a discretionary refusal of relief is of course delay, and in R (Finn-Kelcey) v Milton Keynes Council [2009] Env LR 17, the unsuccessful appellant petitioned the House of Lords on the basis (among other things) that the discretionary refusal of relief on the grounds of delay failed properly to give effect to the UK's obligations under the EIA Directive. That petition was refused by the House of Lords.

Habitats

(i) Protected species

18. In R (Woolley) v Cheshire East BC [2009] EWHC 1227 (Admin), the High Court had to consider whether there had been a failure on the part of the local authority in considering the grant of permission for the demolition and replacement of a building by not properly taking into account the effect on protected bat species. Circular 06/05 encourages planning authorities to have regard to the duties to the Habitats Directive in discharging its functions. In assuming that the impact on bats would be dealt with by the bat licence from Natural England, the council had failed to have regard to the duties in respect of protected species. HHJ Waksman QC said (at [27]):

> In my view that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is given. But it means that if it is clear or perhaps very likely that the requirements of the Directive cannot be met because there is a satisfactory alternative or because there are no conceivable "other imperative reasons of overriding public interest" then the authority should act upon that, and refuse permission...
>
> [28] I have considered whether the Council could discharge its duty simply by making the obtaining of a licence a condition of the grant of permission. But that is not sufficient. After all, if no licence is obtained it is a criminal offence so there is a clear incentive to obtain one anyway. And the making of a condition is not in truth engaging with the Directive.

19. Woolley is a salutary warning to local planning authorities dealing with applications which may have an effect on protected species.

(ii) Appropriate assessments

20. In R (Boggis) v Natural England [2009] Env LR 20, Blair J had to consider whether a designation of a site as an SSSI could amount to a "plan" within the meaning of Article 6(3) of the Habitats Directive, therefore requiring an appropriate assessment on the effects of the designation on the special protection area to the north of the cliffs. The designation of the SSSI meant that the maintenance of the sea defences could not be carried out in their present form. Blair J analysed the issue as follows (my emphasis):

> [100] For the purposes of art.6(3) of the Habitats Directive , a "project" is (among other things) an intervention in the natural surroundings and landscape (Waddenzee at [24]). A "plan" is a formal statement of an intended course of future action in respect of the authorisation of such interventions. The reason for making such plans subject to an appropriate assessment, is that they govern subsequent decisions of the authority whose plan it is on what to authorise (Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland at [51]–[56]).
>
> [101] It follows that in my view, a notification under s.28 Wildlife and Countryside Act 1981 of English Nature's (now Natural England's) opinion that an area is of special interest together with a list of operations requiring consent will normally neither be a "plan" nor a "project" within the meaning of art.6(3) of the Habitats Directive...
>
> [105] ...The position at the time of notification in December 2005 was that the Easton Bavents sacrificial sea defences had been put in place. As I have said, the claimants say that they were constructed lawfully, though Natural England disputes that. Be that as it may, Natural England submits that it did not "authorise" the removal of the sea defences, since this was done by the sea. But I agree with Mr Gregory Jones that the notification in the light of the reasons given amounted to a statement that authorisation for the maintenance of the defences would be withheld in the future, with the inevitable consequence that they would be washed away over time. The putting of the sea defences in place was clearly an intervention in the natural surroundings and landscape, but so in my view was the prohibition on their maintenance.
>
> [106] It is correct to say that the claimants could have asked Natural England for consent. When I asked Mr Jones why his client had not done so, he said (with justification in my view) that the outcome was seen to be a foregone conclusion. With considerable hesitation, and on the very unusual facts of this case, I have concluded that so far as it applied to the authorisation of the maintenance of the Easton Bavents' sea defences, the notification and confirmation of this SSSI did include a formal statement of an intended course of future action. Applying the test set out above, it was in that respect (but that respect only) a "plan" within the meaning of art.6(3) of the Habitats Directive...

21. One might anticipate that the stark finding in Boggis that a declared policy of not maintaining a structure (by prohibiting works on it through the designation of an SSSI) can amount to a plan caught by the Habitats Regulations will cause some problems.

Conclusions

22. I conclude by mentioning the link between the habitats and environmental impact assessment. It is clear that the effect on protected habitats is a particular consideration in any EIA, regardless of the concomitant appropriate assessment obligations. However, The Commission has recently suggested combining the systems of habitats regulation and EIA[11]:

> Member States have established both informal and formal links between the EIA Directive and the Habitats and Birds Directives (in particular Article 6(3)-(4) of the former). Although no major problems have been reported, the Commission's implementation experience shows that the requirements of Article 6(3)-(4) are not taken properly into account in the context of EIA procedures. Furthermore, EIA procedures focus on the impact on Natura 2000 sites, while the species protection provisions tend to be neglected.
>
> The EIA Directive does not make explicit reference to the concept of biodiversity (it only refers to fauna and flora). Many MS replied that the provisions of the EIA Directive already take sufficient account of the substance of the Biodiversity Action Plan (BAP) and that their national EIA systems are effective in preventing biodiversity loss. However, it appears highly unlikely that the EU will meet its 2010 target of halting biodiversity decline; intensive efforts will be required. In this regard, the biodiversity considerations could be expressly reflected within the text of the EIA Directive. In addition, a single assessment procedure for projects falling under the EIA Directive and Article 6(3)-(4) of the Habitats Directive could be established.

23. Whether such a change on a European level would make any practical difference in the UK will remain to be seen. However, as ever, expect the High Court to have to grapple with it in due course.

11 *Report on the application and effectiveness of the EIA Directive* (footnote 3, above) paragraph 3.5.3

CLIMATE CHANGE: WHAT CHANCE A DAMAGES ACTION IN TORT?

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Introduction

1. At the time of writing, the world has only recently staggered away from the negotiating table at Copenhagen. The result will be a considerable disappointment to those convinced that anthropogenic global warming, commonly referred to as climate change, represents a real threat to the planet. It also represents a political failure to act on the consensus scientific view that significant steps must be taken to reduce and reverse greenhouse gas emissions now, rather than at some future point.

2. If the scientific majority is right, the likely outcome of the continued emission of greenhouse gases at or even above present levels will be a rise in global temperature of 2ºC or more over the coming years as those gases continue to accumulate in the atmosphere. If such a rise does occur, the consequences for many parts of the planet, and millions if not billions of people, are predicted to be dire. Land will be lost, either to rising sea levels or desertification, and many will die either as a direct or indirect result. Even now, that same scientific majority tells us that, even now, the world's increasingly unpredictable weather patterns already represent one manifestation of the effects of manmade climate change.

3. Anthropogenic climate change which is said to have has caused tangible damage to land, crops and humans, in short to have created human "victims" of its effects, has already been the subject not only of debate but also litigation, notably in the United States.

4. A question of interest to those who sit on both sides of the climate change debate, or indeed agnostically on the fence, is whether or not such "victims" might now or in the future be able to mount a successful action in tort against persons they say have caused their loss. Many environmentalists would argue that it is only when those who profit from greenhouse gas emissions see their bottom line under real attack that behaviour will change. Damages actions are one way that might happen. So far as is known, no such claims have yet been brought in this jurisdiction.

Scope

5. This article will discuss the issues at play in our jurisdiction, relevant to an English law tort based damages action in respect of anthropogenic climate change, and will ultimately attempt an answer to the question posed in the title. It will proceed in stages, first by attempting to anticipate the facts that might make up a claim before the courts, then the most relevant possible causes of action, before analysing the possible judicial approach to such claims. It will include brief comment on jurisprudential developments in the United States.

The possible factual matrix

6. Let us postulate a scenario, one of many possible scenarios and no more than a working example.

7. At various places across the world, even here in the United Kingdom, sea levels will rise with global temperatures, and in doing so will affect both land and its human owners or occupiers. The melt of previously undiminished snowcaps or glaciers will do likewise.

8. Land may be lost to water entirely, or those to whom the land belongs, or who have rights over it, may lose crops, buildings and infrastructure. Some may even suffer personal injury through the effects of flooding or associated extreme weather. These are our victims, and putative claimants – a class who have suffered both property damage and also personal injury.

9. Let us, for argument's sake, proceed on the basis that our putative claimants are entitled to bring their claims in the courts of England and Wales and in accordance with English law. In practice, it seems that the great majority of climate change "victims" will reside outside not only the United Kingdom but also the European Union, and that many of the barriers that potential claimants have to surmount in bringing a claim will be jurisdictional or will turn on conflict of laws principles. Within the European Union, of course, Rome II, Art.7 enacts a special choice of law rule for claims arising out of environmental damage, which supplants the usual choice of law rule under Art.4 and allows the claimant to choose between the law of the place where the damage occurred and the law of the place where the event giving rise to the damage occurred, an important advantage. For present purposes, though, we will assume that the victims are able to bring a claim in this jurisdiction and at English law.

10. Let us say further, that experts within the scientific community will tell our victims that their damage has been caused by manmade emissions of greenhouse gases that have brought about global warming; which they will term generically "climate change". They will say that absent those emissions the damage would not have occurred.

11. However, the scientific experts will be unable to point to any particular person as having been so heavy an emitter of greenhouse gases that without their contribution the damage would not have occurred.

12. The experts might just be able to point to one or more particularly heavily emitting nations as having decisively tipped the balance, but claims against sovereign states are outside the scope of this article. The necessary combination of treaty mechanisms, international courts and international will required to make such actions possible, whether brought by individuals or other nations, is currently absent.

13. Hence our focus so far as putative defendants are concerned is on private persons, and inevitably particularly those corporations that have produced and continue to produce truly significant quantities of greenhouse gases, or possibly the fuels which others burn to produce such gases. One obvious example is power companies that burn fossil fuels to generate electricity, such as those made defendants to the claim brought by eight US states, beginning with the State of Connecticut, the City of New York and three land trusts in the Southern District of New York in 2005 under docket nos. 05-5104-cv and 05-5119-cv (*Connecticut v American Electric*). Whilst it may well be right that the political answer to climate change lies as much in identifying and targeting individual carbon consumption, so effectively shifting the focus from the producers of carbon-intensive items in the developing world to those who purchase those products in the developed world,[1] no legal action could proceed on that basis.

14. As regards such putative corporate defendants, let us assume that the experts will tell our victims that humanity's contribution to greenhouse gas emissions is too much a collective endeavour, spread over too great a period, and too intertwined with non-human environmental contributions, to allow them to say that as a matter of scientific fact "but for" the emissions of one corporate personality the damage would not have occurred.

15. Consider that the plaintiffs in *Connecticut v American Electric* assert that as at 2004[2] the defendants represented the "five largest emitters of carbon dioxide in the United States and…among the largest in the world", and put their collective emissions at 650 millions tonnes of CO_2. Yet in 2006 the US Environmental Protection Agency estimated total anthropogenic carbon dioxide[3] emissions at approaching 30,000 million tonnes.[4] So even the pleaded CO_2 emissions of the American "big five" amounted to only around 2% of the manmade total in 2004, and their individual contributions would be smaller still. That is before naturally occurring greenhouse gas emissions are brought into the equation.

16. The factual scenario could just as easily involve land lost to extreme weather, or damage very much more serious than mere damage to property that the scientific majority is prepared to attribute to humanity's emissions of greenhouse gases. Death or injury by reason of the direct effects of extreme weather, or indirectly by reason of attributable crop or livestock failure, salination of water sources and so on, would be examples. Those may well be the topics that dominate actual climate change litigation, albeit some of them would surely involve claimants barred from the English courts on jurisdictional grounds, or whose claims our courts would have to determine by reference to foreign law. The reality for the foreseeable future is probably that the citizens of the wealthier nations such as the UK will be protected against the most serious health and safety effects of climate change, in the absence of some catastrophic event such as flooding or tidal surge, which it may be impossible to link to climate change.

17. Could the victim or victims we are presently concerned with bring a successful claim?

Possible causes of action – English claimants at English law

18. The causes of action of most interest are nuisance and negligence. Trespass cannot be entirely ruled out, but seems unlikely. The Climate Change Act 2008 does offer the possibility of a public law challenge against the state in relation to a failure by the United Kingdom to meet its statutory obligations to reduce greenhouse gas emissions,[5] including meeting the carbon budgets set under that Act, with which could, conceivably, be allied a claim for damages under the Human Rights Act. However, the prospect of meaningful damages recovery there seems remote and will not be discussed further.

19. The greatest obstacle to claims in both nuisance and negligence is likely to be causation. First, a brief explanation of both causes of action, then analysis of how climate change litigation might progress under them.

Nature of action in nuisance

20. Nuisance, the modern day form of the ancient action on the case, splits into two; public nuisance and private nuisance. Both require a condition or activity which unduly interferes with the use of enjoyment of land.[6] Private nuisance is confined to injuries to proprietary interests caused by another's unreasonable use of land, and aptly described as a tort between neighbours. Classic examples are tree roots that spread from an adjoining property and cause damage, or stenches from one property that make enjoyment of another impossible. By contrast an action in public nuisance may be brought in respect of personal injury[7] caused by a harmful condition or activity affecting the population at large. Public nuisance very often involves obstructions to the public highway, but if harmful substances are released that affect a sizeable proportion of

1 *The Economics and Politics of Climate Change*; Helm and Hepburn OUP.
2 The date of the pleadings.
3 Considered the most important of the six greenhouse gases in terms of contribution to global warming.
4 http://www.epa.gov/climatechange/emissions/globalghg.html (accessed 06.01.2010).
5 Which include a statutory obligation to reduce greenhouse gas emissions by 80% by 2050.
6 *Clerk & Lindsell on Torts* (19th ed), 20-01.
7 *Claimants appearing on the Register of the Corby Group Litigation v Corby Borough Council* [2009] 2 WLR 609, CA.

the public, then that too may be public nuisance.[8] It is a tort actionable at the suit of a person who has suffered particular damage over and above that suffered by the population at large.[9] It can cover both matters which are private nuisance that affect a sufficiently large group of people and, in this sense, both types of nuisance will turn upon the concept of reasonable, or unreasonable, user. Public nuisance can also cover actions which involve interference with the safety or comfort of the public generally, but which would not be a private nuisance at common law.

21. There is a distinction to be drawn between cases where a person has deliberately or recklessly acted in a way that he knows will cause harm, and those where the harm was reasonably foreseeable. In the former case, liability will attach if the user is held unreasonable, however careful the defendant has been. In the latter case, where damages (as opposed to an injunction) are sought liability will attach if the activity in question[10] causes foreseeable injury. Here nuisance effectively elides with negligence.

22. That distinction is relevant. In the context of climate change litigation, allegations of deliberate or reckless acts creating a nuisance would likely fail, certainly at present. Corporations do not make it their purpose to generate greenhouse gas emissions, but profit. Emissions tend to arise as a by-product of often useful activity. As such it is that class of nuisance most closely aligned with negligence upon which attention should be focused.

Nature of action in negligence

23. Negligence is a more modern tort than nuisance. It has tended to be at the forefront of recent developments in the law of tort.

24. In common with nuisance, the essence of negligence is the law's condemnation of acts that are foreseeably harmful. Unlike nuisance, negligence does not turn upon considerations of reasonable user, but on the existence of a duty of care, and breach of that duty causing damage that is both reasonably foreseeable. As such it is a tort which could potentially apply not only to major emitters of greenhouse gases from their own land, but by analogy with product liability to major producers of fuels which, when used by others, will generate greenhouse gases. This point is of course significant because of the high proportion of such gases which arise from multiple, individually small, sources. Moreover, negligence could potentially bring into the net those whose emissions are not from stationary sources, i.e. airlines and major transport undertakings.

25. The imposition of a duty of care is something that the courts have approached incrementally, testing whether or not justice demands the alleged tortfeasor be responsible as between himself and the claimant by concepts such as "proximity", or "neighbourhood" (but not in the sense that word is used in nuisance). The classic test is that provided by Lord Bridge in *Caparo Industries v Dickman*:

> "in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that he law should impose a duty of a given scope on the one party for the benefit of the other".[11]

26. Some well-known examples of negligence include a snail allowed to be present within a bottle of drink, a floor left slippery by unsigned cleaning and an employer's failure to provide a worker with the training required for the job to be done safely. An action in negligence may lie for breach of a duty imposed by statute just as much as breach of a duty of care owed at common law.

Unreasonable user in nuisance/duty of care in negligence; remoteness/foreseeability

27. The scientific consensus as to the consequences of continued emissions at current rates of greenhouse gases now means that corporations responsible for significant greenhouse gas emissions are almost certainly already fixed with knowledge that their emissions or products are at least contributing to climate change, and so to potential harm to others. It would be difficult to argue, given the daily commentary on these issues in the media, that such consequences were not (if they eventuate) reasonably foreseeable.

28. It can be ventured, then, that allegations that it is now reasonably foreseeable that such emissions will eventually cause damage would meet with judicial sympathy. Whilst greenhouse gas emissions are not in themselves likely to cause direct damage to person or property, at least in normal circumstances of exposure, once they begin to accumulate and cause global warming, science tells us harm will flow. So whilst such releases are far removed from the smell of a tannery, or the corrosive effect of some chemical leaching through the soil, or asbestos fibres, just as courts would hold it a nuisance/ negligence if the careless release of some substance into a riparian owner's stream reacted with chemicals within the water to form a compound harmful to, say, fish, so courts might well be prepared to take a similar approach here, where the emitted gases combine with others in the atmosphere to bring about tangible adverse effects.

29. This conclusion impacts equally upon actions in both nuisance and negligence. That is not to say, however, that

8 For instance, the Buncefield litigation *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm), Steel J, or the Corby group litigation itself *Claimants appearing on the Register of the Corby Group Litigation v Corby Borough Council* [2009] EWHC 1944 (TCC), Akenhead J.

9 See *R v Rimmington; R v Goldstein* [2006] 1 AC 459 and Lord Bingham's careful analysis of the nature of nuisance, both public and private, at pp.467.

10 See *Cambridge Water Company v. Eastern Counties Leather plc* [1994] 2 AC 264; *The Wagon Mound (No. 2)* [1967] 1 AC 617.

11 [1990] 2 AC 605 at 617/8.

the obvious remoteness issues simply fall away. Rather they present themselves in the more fundamental questions, which remain at large; in nuisance, whether or not the user itself was reasonable; in negligence, whether or not a duty of care ought to be imposed.

30. The two questions are legally distinct. After all, whether or not user of land is reasonable is a different legal question from whether or not it is fair, just and reasonable that a duty of care be imposed. However, when considering these are two questions, that both ultimately turn on what is reasonable, the courts will tend to give the same answer.

31. Weighing the balance between the consequences of greenhouse gas emissions and the benefits derived from the burning of fossil fuels, it is difficult to see the courts finding there to be unreasonable user in relation to greenhouse gas emissions per se at present. Put simply, the economy and modern civilisation as we know it depends upon the burning of fossil fuels. However, it might be that the courts would be prepared to take a different view in relation to reasonableness of use if a corporation from, say, a certain point in time failed to take reasonable steps to reduce its greenhouse gas emissions. One issue that would however have to be addressed is the fact that greenhouse gas emissions in the UK, certainly in the case of the major emitters, are not purely a matter of corporate choice. Under the EU emissions trading scheme as transposed into UK law emission carries with it the obligation to hold a greenhouse gas emissions permit and to surrender allowances to cover annual emissions. Having said that, it is of course the case that in the absence of quantitative limits on emissions or the requirement to employ specific abatement technology (such as carbon capture and storage), the emitter can choose to purchase enough allowances to cover its chosen level of emissions, which presumably it will do if it derives sufficient profit from the activities generating the emissions. Moreover, even where the activities are regulated, the law is clear that the relevant permit does not provide a defence to an action in nuisance.[12]

32. That it is possible to foresee such an approach to nuisance, means it is eminently possible to envisage something similar in relation to negligence.

33. Perhaps more importantly, it seems likely that if the predicted consequences of climate change do eventuate and are seen to do so, then judicial attitudes will gradually harden in relation to events that occurred many years before the matter comes before the courts. Much as judicial attitudes have hardened over time in relation to asbestos exposure, and even exposure to noise at work.[13] As with nuisance it is possible that arguments might be raised on the basis that at the time of emission the defendant was not in breach of EU or domestic law, there being no standards set for individual greenhouse gas emissions. Such an argument might find echoes in the 1980s case brought against oil companies in respect of the harmful consequences on children exposed to exhaust gases of lead in petrol.[14] In that case there was judicial unwillingness to impose liability based on some standard other than that set in legislation. With greenhouse gases there is currently no such standard; the inference might be that those who emit greenhouse gases in potentially climate-changing quantities are not prevented from doing so, but act at their peril if foreseeable harm results. Though some judges might tend to view climate change initially as a political rather than legal or judicial issue, litigation based on damage to property or even personal injury is eminently a matter for the courts, not Parliament. The law of tort has always seen the courts decide issues that have political, or policy, ramifications; at the most basic level the courts do so each time they decide that a person is reasonably entitled to drive a car down a residential street at a speed above a crawl in order to allow efficient flow of traffic, even though had the driver remained at a crawl the risk of injury to a pedestrian would have been all but eliminated. Moreover, British public opinion appears to be markedly more persuaded by anthropogenic climate change than, for example, public opinion in the United States, and our judiciary perhaps less sceptical.

34. So we are probably unlikely to see a repeat in the English courts of the early jurisdictional rejections of climate change claims on the basis that they are caught by the "political question" doctrine seen in various US district courts up until *Massachusetts v EPA* before the Supreme Court.

35. What can be said with some confidence, is that no fundamental shift in the law of tort would be required for the courts to find unreasonable user/the existence of a duty of care and damage that was not too remote/unforeseeable. The only development needed there would be incremental.

36. Causation, though, is an entirely different matter, and it is this that would represent the greatest single barrier to a successful action.

The difficulty presented by causation

37. What climate change claims in both nuisance and negligence would undoubtedly have in common is the principles that govern causation.

38. It is for the claimant to prove that the defendant's tortious act caused the damage complained of. Here the facts of climate change, discussed above, pose considerable, if not insurmountable, problems. In a world where there are over 6 billion human emitters of greenhouse gases, and many more non-human, pinning damage to any one individual, however great an emitter, will be difficult indeed.

39. Ordinarily, the courts will require proof that "but for" the breach of duty, the damage would not have occurred. In most tort cases the straightforward "but for" test will provide a just result; the tort and resultant road traffic accident either did cause back pain due to soft tissue injury from whiplash, or it did not as this was caused by unrelated degeneration, or the

12 *Wheeler v. JJ Saunders Limited* [1995] 3 WLR 466.

13 *Baker v Quantum Clothing* [2009] PIQR P19 is a significant recent illustration in relation to industrial deafness.

14 *Albery and Budden v. BP Oil Limited and Shell UK Limited* (1980, unreported)

accident was only responsible for the pain over a certain period of time.

40. As noted, it is impossible to imagine a court being persuaded that the emissions of even the most prolific corporation would pass the "but for" test.

41. However, the courts have shown a real willingness to step beyond the rigid "but for" test where justice so demands, particularly in recent years. The relevant advances have occurred almost entirely in cases involving personal injury or death and chiefly in the context of industrial disease, and that fact ought not be forgotten when we are postulating climate change claims that might only relate to property damages. But the radical reworking of the rules of causation in tort that has now occurred at the very least holds out the possibility that the courts might, in future, be prepared to further push the boundaries of causation should they deem it merited.

42. It is important to trace and analyse this mini-revolution in the context of our putative climate change litigation.

43. It is a frequent problem that tortious behaviour can bring about exposure to a harmful substance to which the victim already suffers non-tortious exposure in any event, and science is unable to say whether the condition that the victim has developed as a result would or would not have occurred in the absence of the tortious exposure. In those circumstances, the claimant cannot satisfy the "but for" test. Yet the defendant has negligently exposed him to the very substance that has caused his injury. Well over sixty years ago now, the House of Lords was willing to modify the "but for" test in order to address what their Lordships perceived as an otherwise inherent injustice. In *Bonnington Castings Ltd v Wardlaw*[15] the plaintiff had developed pneumoconiosis through inhalation of silica dust at work. His exposure there had been a mixture of tortious and non-tortious, "guilty" and "innocent". Although there was no evidence of the specific proportions of the two, by far the most significant was the innocent exposure, and such evidence as there was meant that the plaintiff could not prove "but for" causation. Yet their Lordships were prepared to both draw an inference that the guilty dust had made a material contribution to the plaintiff's development of the disease and hold that it was enough for the plaintiff to prove that in order to recover. Even today, the advance that this represents is striking. A material contribution need only be something more than *de minimis*, rather than the sole or even the most substantial cause.

44. Damage caused by climate change will, inevitably, have been brought about by a mixture of emissions, past and present, some natural, some diffuse, some from the cooking fires of the Third World, some from the power station. To that extent the courts will face facts analogous to those in *Bonnington v Wardlaw*. Yet there will be one vital difference, which for the sake of argument we will assume will not be the absence of some personal injury to the claimant. As discussed above, even those persons individually responsible for emissions of greenhouse gases that run into hundreds of millions of tonnes per year are responsible for no more than perhaps one percent of mankind's total. This makes a real difference to a court. When the question is asked, "does a contribution of 1% or less amount to "de minimis" so as to fall below the level of "material"?", most courts would answer that it does.

45. That is even before we add in the fact that it may be impossible to bring the world's greatest emitters in the US or the developing economies before the English courts for jurisdictional reasons (again, a matter outside this article).

46. Certainly, it would be a very optimistic lawyer who advised his clients that causation would be made out in climate change litigation on the basis of material contribution following *Bonnington v Wardlaw*.

47. Yet more recently still, at more or less the same time as their Lordships were calling time on attempts to fix liability upon defendants, often public bodies, in situations where "common sense" demanded individuals bear the consequence of their own negligence, so steering English law away from some of the more notorious US development,[16] the House of Lords has shown itself willing to relax the rules of causation even further for the right case. That case being exposure to asbestos, and more particularly mesothelioma probably caused by such exposure, as was before their Lordships in *Fairchild v Glenhaven* [2003] 1 AC 32. *Fairchild* represented a genuine revolution in the rules governing causation for those cases to which it applies, for all that their Lordships in *Barker v Corus* [2006] 2 AC 572 whilst explaining the conditions governing the exceptional approach taken in *Fairchild* also sought to row back somewhat from its most dramatic consequences.

48. The facts in *Fairchild* may be simply stated, and it must be remembered are fundamentally different from those involved in our putative climate change litigation. The victim, in fact deceased - the claim being brought on his behalf and by his widow, had been negligently exposed to asbestos fibres in a variety of employments. Shockingly for so deadly a disease, science tells us that mesothelioma can be caused by just a single asbestos fibre. As such, it was impossible for the claimant to prove that exposure in any one employment had been a material cause of the disease, let alone satisfy the "but for" test. Their Lordships made no particular bones about the fact that their conclusions, for all that they were reached by different routes, were based on policy; the possible injustice to a defendant at being found liable for damage he had not, in fact, caused, was outweighed by the injustice that the claimant, negligently exposed to a harmful substance liable to cause his injury but which he could not trace to any particular exposure, would suffer if he could not recover. Their Lordships found that in the "exceptional" circumstances of the case, it was enough if a material increase in risk could be shown.

49. In doing so the House of Lords looked again with approval at *McGhee v National Coal Board*.[17] There an earlier House had allowed a plaintiff to recover in respect of dermatitis caused by exposure to "innocent" and "guilty" brick dust through his employment, where he could not show that "but for" the "guilty" dust he would not have contracted the condition. Their Lordships had found that where it was uncertain whether or not the defendant's breach of duty was the actual cause, it

15 [1956] AC 613

16 ie *Tomlinson v Congleton BC* [2004] 1 AC 46.

17 [1973] 1 WLR 1, HL.

was enough for the plaintiff to show that it made the risk of injury more probable, and that in these circumstances a material increase in risk was to be treated as equivalent to a material contribution to the damage. A later House of Lords had suggested that *McGhee* represented no more than a particularly robust approach to the drawing of inferences,[18] but that was rejected in *Fairchild*, with *McGhee* essentially seen as consistent with the approach now taken by their Lordships.

50. For a helpful analysis of *Fairchild*, and indeed *Barker*, see the judgment of Smith LJ in *Sanderson v Hull*.[19]

51. Following *Fairchild*, and subsequent appellate cases, we know that in certain, exceptional, cases it will be enough for a claimant to show that the defendant's tortious act materially increased the risk of him suffering the damage that has, in fact, eventuated.

52. There must be no misunderstanding. Even following the refinement and explanation of *Fairchild* offered by *Barker*, the circumstances in which the courts will allow such a departure from the normal rules of causation will be very rare indeed. And climate change falls well outside those circumstances as articulated in *Fairchild*. It involves no employer/employee relationship, an area where the courts have long been astute to protect the worker, and, more importantly, is a cumulative rather than indivisible condition. Hence it is not "inherently impossible",[20] for the claimant to prove how the damage was caused, as opposed to inherently impossible for the claimant to prove that any one actor made a material contribution to the damage. Moreover, the same considerations that lead to the conclusion that individual corporations are unlikely to have been a truly "material cause" of damage brought about by climate change could easily point to the same conclusion as regards a material increase in risk.

53. Any climate change claim that attempted to base its causation case on application of the "conditions" laid down by either Lords Bingham or Rodger in *Fairchild* would almost undoubtedly fail. And it is worth bearing in mind the tobacco litigation, to some extent analogous. For all the success eventually achieved by plaintiffs in the United States, albeit through forced settlement, our own courts have shown claims the door.

54. None of this, though, is quite the point.

55. What is fascinating about *Fairchild* is that the House of Lords were prepared to turn causation on its head in order to achieve a result consistent with justice, whatever the strict application of legal rules might have suggested the result ought to be. Moral imperative demanded a certain result, and their Lordships achieved it. If the consequences of climate change do begin to manifest in ever more devastating form, might their Lordships now sitting in the new Supreme Court be prepared to reach a similar conclusion regarding climate change, and hold that justice demands that those whose activities have led to substantial emissions of greenhouse gas pick up a share of the bill for the damage brought about? The tentative suggestion is made that whilst such a result is unthinkable at present, the position could easily change over the coming years.

56. To an extent, US jurisprudence supports that analysis.

United States jurisprudence

57. Consider recent developments before the United States Courts of Appeal for both the Second and Fifth Circuits. In *Connecticut v American Electric*, mentioned above, the Court of Appeal for the Second Circuit reversed the judgment of the District Court for the Southern District of New York dismissing claims brought under the federal common law of nuisance as non-justiciable as caught by the "political question" doctrine.[21] Similarly in *Comer et al v Murphy Oil USA et al*,[22] the Court of Appeal for the Fifth Circuit reversed the judgment of the District Court for the Southern District of Mississippi dismissing common law claims in public and private nuisance, trespass and negligence on grounds of standing and the "political question" doctrine (it upheld the lower court's decision to dismiss claims of unjust enrichment, fraudulent misrepresentation and civil conspiracy as non-justiciable, but that is not relevant here).

58. Although both claims have at their heart allegations that the defendants' emissions have caused or contributed to global warming, the two were and are very different beasts.

59. *Connecticut v American Electric* is a claim brought by various public bodies and certain land trusts alleging that the defendants' emissions amount to a public nuisance. They point to the present and future effects of global warming upon their land and, in the case of the public bodies, the citizens for whom they are responsible. The plaintiffs seek an order requiring the defendants to abate the nuisance by first capping their greenhouse gas emissions, then gradually reducing them.

60. *Comer v Murphy Oil* is a class action brought by individuals who say that they suffered damage by reason of Hurricane Katrina, which damage they say was caused or made materially worse by the effects of global warming. They argue that global warming, and so the damage they suffered, was caused by the defendants' emissions of greenhouse gases. So, unlike *Connecticut v American Electric*, *Comer v Murphy Oil* is a classic action seeking damages for a loss that has already occurred.

61. What the US appellate courts have now shown is that they will not be swayed to refuse jurisdiction by arguments that suits seeking damages for the effects of allegedly manmade global warming/climate change involve determination of political questions. As the Fifth Circuit noted in *Comer*, the federal courts "must decide matters of statutory construction,

18 *Wilsher v Essex Area HA* [1988] AC 1074.

19 [2008] EWCA Civ 1211.

20 Lord Rodger's first condition in *Fairchild*, at para.170.

21 The "political question" doctrine being essentially that the courts cannot decide matters properly the preserve of the democratically elected administration.

22 No. 07-60756.

constitutional interpretation, and, when applicable, state common law and statutes, and cannot avoid this responsibility when their decisions may have political implications".[23] It seems, then, that the US courts have moved on from the jurisdictional challenges based on the so-called "political question" doctrine that dogged early climate change suits, and are now prepared to try these cases on their merits.[24] It would appear that the decision of the US Supreme Court in *Massachusetts v EPA* may have marked a turning point in this respect.

62. This is not of course to say that the US claims will now succeed. On the contrary, they face very considerable obstacles, not least the need for the plaintiffs to prove causation, where considerations similar to those discussed above in English law apply. At least, though, the district courts will now have to grapple with the substantive issues.

63. The legal debate in the United States has moved on. It is true that the claims there have now passed over a hurdle that, as noted, it is unlikely will present in our own courts. To that extent it is something of an Aunt Sally, not to be relied upon as pointing the way towards a successful tort based claim in this jurisdiction. Yet it does show that as the debate and the state of scientific knowledge advances so can judicial attitudes.

Conclusion

64. For now, the prospect of a successful action in tort in respect of damage due to climate change brought in this jurisdiction in accordance with English law seems remote. However, in our view, when and if the effects of climate change begin to truly manifest themselves, not only in fact but in the public consciousness, the position could change very rapidly indeed.

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23 p.27, top, *per* Dennis CJ.

24 Those who have followed the emerging US climate change jurisprudence may wish to note that Dennis CJ in *Comer* described the district courts' decisions in *California v General Motors Corp.* 2007 WL 2726871 (N.D. Cal.2007) and *Connecticut v American Electric Power Co.* 406 F.Supp.2d 265 (S.D.N.Y. 2005) as "legally flawed and clearly distinguishable" (p.29, top).

REMOVING GRAFFITI / PLANTING TREES

Jessica Holt

Jessica wrote a dissertation on the relationship between Environmental Law and urban conservation in London for her MSc in Conservation at the Department of Geography at UCL. A particular focus of her study was whether UKELA's "Law and Your Environment" website helped local communities protect their own environments. She carried out online research and in person interviews.

In an earlier issue I explained the questions and objectives which formed the basis of research I was conducting to coincide with the launch of the 'Law and Your Environment' web resource. This article discusses how the results of that research will apply to the future development of the website and the importance of the provision of information about environmental law to nature conservation in deprived communities.

It is estimated that in the next thirty years, nearly all predicted human population growth will occur in urban areas; the need for housing will increase, but this will not coincide with a decrease in the need for urban green space (Kinzig et al., 2005). In London alone 24,000 new homes are expected to be built every year; the people who live in these houses, like the people who already live in London, will measure their quality of life partly through the green spaces they have access to (Harrison & Davies, 2002). Many peoples' primary experience of nature will occur in an urban setting, influencing not just the future of physical spaces but also the policies that will come to shape them. Urban green spaces were once the forgotten nature, urban conservation movements have endeavoured to alter this perception, demonstrating that urban green space can provide important wildlife corridors in places where there would otherwise be none and that some rare British species rely on urban environments (Kinzig

et al., 2005; Hinchliffe, 2008). The need for successful conservation in an urban setting is clear, but ultimately the long-term future of these spaces is dependent on the people who interact with them.

The importance of environmental law to urban nature conservation should not be underestimated even if it is not usually part of the public persona of environmentalism. Attitudes about environmental law reflect which aspects of the urban environment are perceived to be of value, which are threatened and what people feel able to do about it. The surveys carried out indicated that urban communities are concerned about a wide range of local environmental issues but that nature conservation is not viewed as separate from problems of a more social nature; for example one respondent answered 'Removing Graffiti / Planting Trees' to the question 'Have you ever been involved in any local nature conservation?'. I concluded that it is important that UKELA (and similar agencies) are prepared to engage with social issues that do not fall neatly within the remit of environmental law.

Respondents were particularly concerned with the lack of visible enforcement by local authorities, which affected how people used urban green space and how effective they perceived the law to be. Enforcement is important to local people because it is part of a reciprocal system of respect and trust between communities and local authorities. When an urban community faces the visible consequences of an environmental crime, such as fly-tipping, but does not get the desired response from the local authority concerning the issue, it causes considerable frustration. The results suggested that where people feel unable to positively affect change in their environment they become apathetic or move towards activism. These reactions exacerbate the problems which affect urban nature conservation.

The results showed that respondents who were involved in nature conservation felt they knew more about environmental law. This suggests that knowledge of environmental law has a positive relationship with local nature conservation participation. The results also showed that the people who felt they knew more about environmental law were more confident about dealing with local environmental issues. It is possible that an enhanced ability to solve local problems could also enable people to be more proactive in addressing local enforcement issues. The 'Law and Your Environment' website is uniquely placed to empower communities to positively change environments as the results showed that over 80% of the respondents would use the internet to find information on environmental law and that more than 50% would like to know more about how they can deal with local environmental issues. The quality of information provided and its relevance to local communities is not disputed but, in order to be most effective, the website must reach disadvantaged communities.

The first challenge for UKELA is to raise awareness of the resource and promote its availability directly to local people. This could be done through developing direct links within communities such as through internet cafés, local libraries or community centres. The second challenge is to communicate with local authorities and key service providers used by urban communities to demonstrate the potential benefits of accessible environmental information and to convince them to include the 'Law and Your Environment' website in their information provision.

At the heart of the survey results there is a suggestion that environmentalism in urban communities begins at home. Deprived urban communities constantly deal with very intrusive environmental issues and these issues cause considerable concern. A greater understanding of environmental law enables urban communities to be more able to address their local issues, overcome frustration, access their local parks and experience the natural world and potentially seek to conserve it. The lack of a more global focus in the London borough survey responses could be construed by some as a form of NIMBYism, this however completely misses the importance of community based action. Empowering lower communities was described by one lawyer interviewed as, 'an important part of the jigsaw'. In order to facilitate a better understanding of environmental problems on a global scale, urban communities much first be convinced that they can make a difference closer to home. Thus urban communities must be given the environmental law information which will enable them to engage with and be proud of their local green spaces; community participation is crucial to long term nature conservation.

If you would like any further information about the research or a copy of the full report please contact me- Jessica.Holt87@lawcol.co.uk.

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Wild Law Spreads like Wildfire!

Australia's first conference on Wild Law

A report by Liz Rivers[1]

"The future is not somewhere we are going, it is somewhere we are creating"

In October 2009 Australia held its first conference on Wild Law. Attended by over 60 participants, representing every state in Australia, and greatly influenced by the annual UKELA Wild Law weekends, it was a resounding success. The participants included a mix of students, lawyers, civil servants, activists and educators.

Delegates at the Australian Wild Law Conference

I was privileged to be invited to deliver the keynote address, giving an overview of Earth Jurisprudence (the philosophy on which Wild Law is based) and an update on developments in this field around the world. I commented that I felt like an Olympic torch bearer, carrying the flame across the world and connecting the existing Wild Law network with the flame in Australia, so that we are all connected and the network is enlarged and strengthened.

The event was the brainchild of Peter Burdon, a student who is currently doing a PhD on Earth Jurisprudence at Adelaide University, Department for Law, Society and Religion. It was organised entirely by a volunteer group from Friends of the Earth Adelaide, with sponsorship from the University. I was impressed with how this group pulled off such an ambitious project so successfully. I was also pleased to be able to share with them what we have learnt at UKELA from hosting our own Wild Law events for the past five years, and they drew heavily on our methodology and ethos when planning their own event.

Range of contributions

Peter was successful in engaging an impressive variety of presenters to input on a range of topics. Presenters were drawn from academia, government, NGOs and other activists. We heard about:

- Rights for nature
- Nature as property
- Earth Jurisprudence and Science
- Economics
- Aboriginal perspectives on Earth Jurisprudence
- Wild Law and Alternative Dispute Resolution

Dr Greg Ogle of the Wilderness Society told us about activists' unsuccessful attempts to mount a legal challenge to the construction of the largest paper mill in the southern hemisphere in a wilderness in Tasmania, which demonstrated very clearly the inadequacies of our current regulation systems. He observed that sustainable development is currently interpreted as pushing the system to its limits, but as long as those limits are not exceeded we still judge the system to be "sustainable". This is very different to genuinely living in harmony with nature.

Dr Nicole Rogers commented that what we call "environmental law" is really development law – it is not primarily about protecting the environment.

We also heard about the "de-growth" movement and challenges to the growth model of progress. I was surprised to learn that as early as the1840s the philosopher JS Mill posed the question: "towards what end is society tending by its industrial progress?" The question is just as relevant and even more urgent today.

Where the Wild Things Are

1 **Liz Rivers** is a member of the UKELA Wild Law group and has been involved with planning and facilitating UKELA Wild Law conferences and workshops since 2004. A former commercial lawyer, she works as a mentor and coach to leaders in the sustainability field as well as being a speaker and thought leader in the field of Earth Jurisprudence.

I particularly enjoyed a presentation by Dr Nicole Rogers of Southern Cross University, New South Wales on cultural perspectives on "wildness" by reference to the 1963 children's book "Where the Wild Things Are" by Maurice Sendak! She read the story to us and then drew out some of the underlying assumptions it makes such as: wilderness is something that needs to be controlled and subdued, wilderness is seen as separate from civilisation, it is a place where there are no other human beings and it is a place where white people go to play. It was fascinating to have these assumptions drawn out and brought alive by reference to an apparently very simple and much-loved children's story.

Indigenous perspective

Earth Jurisprudence draws heavily on indigenous wisdom. One of the very interesting aspects of doing a workshop such as this is that in Australia the juxtaposition of indigenous perspectives (Aboriginal) and "first world" attitudes is very sharply defined, unlike in Europe where our dominant culture has evolved over millennia. There was a very lively breakout session on Aboriginal perspectives, led by Rebecca Butler, who attended the UKELA wild law weekend in 2008, and works in the field of aboriginal land rights in the Northern Territory of Australia.

Mind and Body

The event took place in the Adelaide Hills, in an outdoor activity centre, and in time-honoured "Wild Law" fashion we spent time in nature as a way of integrating the ideas we were listening to indoors. We were led in exercises designed to reconnect us with our senses and our natural surroundings. I loved connecting with the Australian trees and plants, and noticing the differences from European flora.

One of the most delightful features of the weekend was that the catering was all done by Friends of the Earth volunteers. On Saturday evening they prepared a "bioregional banquet" where all the food was sourced locally. The head chef read out a list of ingredients and their sources before we tucked into our feast. I felt deeply touched by the effort and care which had gone into sourcing and preparing this meal, down to rosemary from a neighbour's garden and eggs from the chickens kept in the chef's back yard! It was both ethical *and* delicious.

Declaration

On Sunday morning a group worked on a declaration as follows:

"We the participants of Wild Law, declare that the perceived separation between nature and human beings is a fundamental cause of the current environmental crisis. Our law reflects this by treating nature as property and in restricting rights to human subjects. We contend that law needs to transition from an exclusive focus on human beings and recognise that we exist as part of a broader earth community. We recognise that the universe is composed of subjects to be communed with, not primarily of objects to be used. Each component member of the universe is thus capable of having rights.

In many diverse ways we commit to evolving law so that it protects the natural world from destruction and cultivating Wild Laws that are consistent with the philosophy of Earth Jurisprudence."

The start of something big?

By the time we came to the closing circle, friendships and deep connections had been made. Many reported on feeling inspired, plus a sense of relief in meeting like-minded people and a resolve to go back to their workplaces and communities and explore ways to put these ideas into practice. I was struck by how similar the atmosphere was to events in the UK, and once again felt very grateful to be part of this global movement. I reflected that Amnesty International started in a kitchen in London in the early 1960s and now has 2.1 million members worldwide. Are we starting a similar social movement?

Next steps

In addition to organising the conference, Peter Burdon has also arranged for a book to be published on Earth Jurisprudence by Wakefield Press in Adelaide. It will be a collection of essays by all the leading thinkers in this field. With over 30 contributors, it is due for publication in October 2010. The plan is to make the Wild Law Australia conference an annual event (possibly hosted by different Friends of the Earth groups around Australia), with the next event coinciding with the launch of the book.

My favourite quote of the weekend was from participant Alessandro Pelizzon, a PhD student:

"Earth Jurisprudence is to law what quantum physics is to science."

60 second interview

Bridget Marshall

What is your current role?

Head Solicitor at SEPA. My department consists of 18 solicitors and we deal with environmental, regulatory and public law.

How did you get into environmental law?

My first degree was a geography degree. I have always had a keen interest in environmental issues. 2 years after qualifying I moved from a busy commercial litigation department in private practice to the NRA which shortly after my arrival became the Environment Agency. I feel lucky to have found a career in law that allows me to combine my legal skills with my interest. I never have a boring day.

What are the main challenges in your work?

Ensuring SEPA understands the complex legal framework within which it is required to make decisions.

What environmental issue keeps you awake at night?

Sadly, it used to be the definition of waste. I would wake up in the morning convinced I had resolved it! Now my children aged 1 ½ and 4 ½ keep me awake.

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

Getting people out of their cars

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

Scottish Regional Group/working party. Living in Scotland it is the obvious choice for me.

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

The inspiration from attending the annual conference. It reinforces the fact that those practising in all aspects of environmental law are a network. I have made good friends from attending the UKELA conference over the years.

Students

STUDENT ADVISOR TO THE UKELA COUNCIL 2010

Claire Collis

As the newly appointed Student Advisor to the UKELA Council 2010 I would like to take this opportunity to introduce myself. I have always had an interest in the environment, volunteered for conservation charities and enjoy hiking and scuba diving, but it was during my undergraduate course; BSc Environmental Geoscience from Cardiff University, that I developed a specific interest in environmental law. This interest and various work experiences led me to study for the Graduate Diploma in Law at the University of Plymouth, and to join UKELA. Currently I am studying for LLM Environmental Law and Management at Aberystwyth University on a part-time, distance learning basis and upon completion of this course I will begin for the LPC at the College of Law, Bloomsbury, with an aim to becoming a solicitor within the environmental field.

Students

I have been a member of UKELA since 2007 and during the time of my membership I have seen the incredible developments already made to involve students in the growing field of environmental law. The current series of student competitions, the Student Social and Careers evening and the many free and subsidised places at events on offer are allowing more students, who have an interest in environmental law to explore the field, thus raising UKELA's student profile Over this year I hope to continue the work of Kirsten Griffin in a similar vein. I aim to help UKELA grow and further serve the interests of students in environmentally related fields by creating a more informal point of contact and source of information through the use of social networking sites and also through contact with universities' careers services and law departments directly. Furthermore I hope to continue Kirsten's work on the Student Handbook and with the Regional Student Representatives and I will be looking at the possibility of other events to involve a wider range of students.

I am keen to hear from anyone, student or otherwise, with any comments or suggestions of their own initiatives that UKELA could develop for the benefit of students and UKELA.

I look forward to hearing from you.

Claire
collisclaire@hotmail.com

STUDENT COMPETITIONS 2009/2010

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. The deadlines for the Andrew Lees Prize and the Moots are rapidly approaching (before the end of January) so if you thinking of entering please get on with it now!

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

You can find out more about the competitions and schemes by going to our website and clicking on the student pages www.ukela.org

COMPETITIONS DAY – March 30th

Students and supporters of student finalists are warmly invited to join us for the first UKELA Competitions Day.

Venue: University of London, Faculty of Laws, Bentham House, Endsleigh Gardens, London WC1H 0EG

Students/families/supporters are welcome to attend all or part of the day but you will need to book.

Tea/coffee on arrival in the Keeton Room

Registration from 1030

11am

Introductory talk on the subject of the Andrew Lees Prize: Richard Kimblin (5 mins) – "The UK's care of the environment has been more hindered than enhanced by European Law"

Finalists' presentations and judging.

Lunch

1.30 Welcome by Jane Holder, UCL and short talk on UKELA and students by Claire Collis.

Moot semi-final, judged by the Master of the Moot, Richard Kimblin of No 5 Chambers

Tea break in the Keeton Room

4.15

Students

Welcome by UKELA Council member to the Moot final

4.30

Moot Final before Lord Justice Carnwath; Judgement and decision

Prize giving – with thanks to No 5 Chambers, OUP, Lawtext Publishing, UKELA

6.30

Drinks for moot participants and guests

To book or for enquiries please contact Alison Boyd, alisonboyd.ukela@ntlbusiness.com. Please let her know whether you plan to attend all or part of the day.

This event is free of charge

With thanks to the main sponsor: No 5 Chambers

UKELA events

WILD LAW: POST-COPENHAGEN DISCUSSION

Date: **Wednesday 27 January 2010**
Time: **Drinks from 6pm, talk at 7pm with time for discussion to follow**
Venue: **Sir Richard Steele Pub, 97 Haverstock Hill, London, NW3 4RL**
(5 mins walk from Chalk Farm tube)
RSVP **wildlawevents@live.co.uk**

Members of UKELA's Wild Law Group invite you to discuss the implications of the Copenhagen conference for the Earth Community, and what is next for Wild Law principles in protecting the earth's ecosystems and preventing catastrophic climate change. To find out more about Wild Law go to: www.ukela.org/rte.asp?id=5

'Wild Law: post–Copenhagen' is an opportunity for lawyers and others interested and involved in environmental protection to meet each other, to discuss the legal ramifications of the Copenhagen talks, and to learn more about wild law and earth jurisprudence.

Fresh from her return from Copenhagen, we are pleased to invite Polly Higgins to share her involvement and observations on the COP negotiations: Barrister, initiator of the Universal Declaration of Planetary Rights and Rights of All Beings, and Founder of Trees Have Rights Too (www.treeshaverightstoo.com).

The other speaker is Linda Siegele, staff lawyer at the Foundation for International Environmental Law and Development (FIELD) (www.field.org.uk), on her experience of Copenhagen and hopes for the future. Linda has a varied professional background including renewable energy, international environmental law, intellectual property, traditional knowledge and biodiversity issues in East Africa.

South West Regional Group seminar

Thursday 4 February 2010 at Clarke Willmott offices in Bristol

This early evening seminar will look at what the next 5 years hold for Environmental Law. Booking details will be available shortly at www.ukela.org

UKELA London Meeting

Nuclear Energy

Wednesday 10 February 2010 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 **Opportunities & challenges facing the next generation of UK nuclear power stations.**

The speakers will cover:

Prof Paul Leonard- Corporate Risk Associates Ltd.,
The development of the UK power station programme, locations of existing sites, the challenges of commissioning, operation & decommissioning. Public awareness and concerns as well as radiological safety assessments.

Scott Lyness- Landmark Chambers
Scott specialises in all aspects of planning and environmental law and will consider the planning regime for the new generation of nuclear power plants.

Dr Jon Douglas or Peter Frost – Frazer Nash
An engineer with extensive experience in the nuclear industry will look at the challenges and opportunities for those operating in the nuclear sector.

The Chair of the meeting will be confirmed shortly. Thanks to Simon Boyle of Argyll Environmental for organising the meeting.

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 £20 for Members and £30 for Non-members. Students and Unwaged members are free. Your booking is not confirmed until a cheque 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)

WASTE CONFERENCE

10th and 11th February 2010

In London

The Lawyer's inaugural conference on Waste Management, Business Risk and the Law will provide a comprehensive legal analysis on the establishment and procurement of waste management initiatives in the UK.

At a time when the waste agenda continues to change and the industry race to meet the three European Landfill targets, getting complex waste management projects to the finish line is still notoriously difficult. Learn from the 'hands on' experience of regulators, corporate counsel, financiers and lawyers involved in existing and successfully delivered projects.

An exclusive 10% discount is available to UKELA members, simply enter "UKELA" (upper case) in the "Promotional Code" field when registering online.

For further information visit http://www.centaurconferences.co.uk/brands/thelawyer/events/wastelawrisk/overview.aspx?afcode=UKELA

A SPECIAL EVENT WITH THE HUNGARIAN PARLIAMENTARY COMMISSIONER FOR FUTURE GENERATIONS

Chaired by UKELA Patron, Tom Burke

February 25th, Ministry of Justice, London

Dr Sándor Fülöp

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. Dr Sándor Fülöp was elected in May 2008 and his role potentially offers useful insights for lawyers, policy makers and civil society in the UK. This event provides an opportunity to reflect on the Parliamentary Commissioner's work to date.

Registration from 5.30pm. Speaker at 6pm. Reception from 7.30-8.30pm.

The event has been organised jointly by UKELA, the Foundation for Democracy and Sustainable Development, and the Government Legal Service Environment Group. It is kindly being hosted by the Ministry of Justice at 102 Petty France London, SW1H 9AJ.

To register for this special event, please send an email with your name, organisation and position to greenombudsman@fdsd.org.

There is no charge for attending. However demand is likely to be high and spaces will be allocated on a first come first served basis.

To allow for security procedures at the MoJ no registrations will be accepted after 18th February.

WILD LAW EXPERIENCE LONG WEEKEND - SCOTLAND, APRIL 2010

Limited places (women only as the men's spaces are full) are available for the Wild Law weekend at Loch Ossian in Scotland the weekend of 30 April – 2 May 2010; book now to be sure of securing one of the remaining spaces. please contact alisonboyd.ukela@ntlbusiness.com if you are interested in attending or go to our Cvent page on wild law in Scotland to book and for more details.

CLIMATE CHANGE AND THE CHANGING FACE OF REGULATION

UKELA ANNUAL CONFERENCE EXETER 2010

25th – 27th June 2010

Have you booked your conference place yet?

Hear about the work of the Infrastructure Planning Commission, the negotiations at Copenhagen and from the regulators on applying civil penalties. The UKELA 2010 conference will gather leading speakers from the public and private sectors with a full programme of lectures and field visits, dinner at Powderham Castle, working party, Wild Law and academic sessions. 8 CPD points (TBC).

Outline plenary programme:

- Opening with Douglas Evans – first Director of Legal Services at the Infrastructure Planning Commission
- Climate Change session: hear from Defra what it was like in Copenhagen; climate change litigation; and the story of renewable energy projects
- Changing Face of Regulation session: how regulatory models are evolving; civil sanctions; how do tidal barrage schemes reconcile energy and wildlife
- Hot cases

Saturday afternoon:

- Dawlish Warren Nature & Wildlife Reserve;
- Exeter City Walking Tour and Cathedral Visit;
- River Cruise on the River Exe;
- Watch the World Cup

Delegate fees remain excellent value at the 2009 rate:

- Choice of en suite or reduced price shared bathroom
- Special rates for those on lower incomes

Travel: Exeter has fantastic train connections (e.g. just over 2 hours from London or Cardiff, 7 hours with one change from Edinburgh)

Book online for the annual conference.

Thanks to our main sponsors:

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WILD LAW AUTUMN WEEKEND WORKSHOP

Diary Date: This year's Wild Law weekend has some great speakers lined up. Please put the date in your diaries now: September 24-26. It's being held at the Youth Hostel in the Lee Valley Country Park, just north of London. Full details on the programme and how to book will be released shortly.

USING UKELA'S ONLINE BOOKING SYSTEM FOR EVENTS

Ten Tips to help you

1. Make sure you retain details of your UKELA membership number which is sent to you every year via email by our Membership Secretary. You will need it to register for some events such as the Annual Conference.

2. If you are part of a corporate membership, then up to 10 of you will have the same membership number. If more than one of you wants to register for the same event and a membership number is required, then pick one name as the main registrant and register everyone else as a guest.

3. If you know you can't make the event to which you have been invited, please click the NO button on the invitation email when you first receive it. This will ensure you don't continue to receive reminders to book.

4. When registering, please make sure you click the FINISH button at the end of the registration process otherwise your registration will not go through.

5. Keep a note of your registration number handy - you will need this to modify your booking or if you need to cancel for any reason.

6. Don't leave it to the last minute to book your place. Our events are very popular and often become booked up quickly. If you have left it too late to book and found that the event you want to go to is full, the booking system operates a waiting list so please add your name to that and we will let you know if a space becomes available.

7. Please pay by credit card if possible. We operate a secure system and payment in this way helps UKELA to save on administration costs.

8. If you do pay by cheque, please take a note of the address to where payment should be sent and to whom the cheque should be made payable. In most cases, this will be PO Box 487, Dorking, RH4 9BH with cheques payable to UKELA, but the registration pages always have plenty of reminders about where to send payment. Please make payment promptly so we don't have to chase you! We cannot guarantee your place at an event without payment. When sending your payment, please make sure you include your name, the event for which you are paying and do not use staples.

9. If someone is booking on your behalf such as a secretary or clerk, it is better if they use your email address to make the booking. This will ensure you don't continue to receive reminders to book and any follow up information such as directions to the venue and feedback is sent directly to you.

10. If you have can't remember whether you have paid or details about the event you are attending such as the address or start time, you can check this via your registration number (see tip number 5). Or take a look at our events page for details of events. This will also include CPD details.

Still stuck? Then please contact alisonboyd.ukela@ntlbusiness.com for help.

COSTING THE EARTH - MAGISTRATES ASSOCIATION

Suella Fernandes - No 5 Chambers

"The despoliation of the environment is arguably the gravest of all the problems we are going to hand on to our children and grandchildren. They will not thank us- particularly those of us who work in the administration of justice- for having done too little about it at a time when action and prevention were feasible." This is the warning urged by the Rt Hon Lord Justice Sedley in his foreword to Costing the Earth, published in September 2009.

As the debate over the environment has moved from tree-huggers in hippy communes to MPs in Parliament and business executives in board rooms, so has public awareness of the issue grown.

As a result, a growing number of environmental cases are reaching court. The area of law, although defined and established, is still evolving and many of the legal, technical and procedural details remain novel to those with jurisdiction in this area.

Costing the Earth was first published in 2002 by the Magistrates Association in recognition of the lack of guidance on their sentencing powers relating to environmental offences. A revised second edition, designed by and for Magistrates, is intended to "provide experience and expertise in evaluating cases in order to ensure that the criminal justice system works effectively and appropriately in sentencing those found guilty of environmental offences".

The key aims of the guidance are to explain the effects of a range of pollution and other offences, to clarify some of the complex and technical aspects of such offences and to raise awareness among magistrates of the environmental impacts, the legislation and case-law relating to environmental crimes.

The guidance is divided into three parts: the first sets out the general sentencing guidelines for magistrates; the second is comprised of 13 specific subject-areas and their individual offences, including offences relating to pesticides, water, genetic modification, fisheries and air pollution. Generally speaking, this section provides good overviews of each topic, giving the reader a flavour of the legislative framework, the good questions to ask when assessing any such offence and a useful worked example which helps to bring life to the theory. The third and final part of the Guidance lists useful organisations and further information available for practitioners.

With a first chapter entitled: "The importance of sustainable development", one instantly gets the impression that this guide is written on an assumption that the reader is a novice to all things environmental. The definition of "sustainable development", albeit useful and general, itself does imply considerable ignorance on the part of its reader. The explanations of the three principles relating to environment protection, ie the preventative principle, the precautionary principle and the polluter pays principle suggest that this is no Blackstones or Archbold but rather a "Nutshells" version, or dare I say, a "Noddy Guide" of sentencing guidelines in environmental cases.

And this is definitely the tenor of the guidance. The first part of the guidance goes on to analyse and elaborate on the two stages of determining sentence: assessing the seriousness of the offence and the considering other sentencing criteria. The guide takes the reader quickly through application of these principles as prescribed by s 143 of the Criminal Justice Act 2003, from the perspective of environmental offences.

The interesting points raised in this context concern the harm caused by the offence and the guidance helpfully suggests relevant factors to be taken into account and the level of detail required when doing so. For example, when considering the immediate and direct impact of an environmental crime, one could ask whether any dead fish were poisoned by the polluted water, how many fish were killed, whether the pollution travelled far downstream and what the long-term impact was? One could ask how long it would take to re-colonise and restore the local fish population? It appears from this guidance that such considerations are relevant and material to the determination of the seriousness of the offence.

Further questions to ask would touch on the wider effects in environmental, social and economic terms, as well as the state of mind of the defendant and the risks taken by him or her. The guide stresses the importance of the strict liability nature of many environmental offences, not as an indication of their lesser seriousness but rather the contrary. Concluding with relevant mitigating and aggravating factors, this first section is a useful introduction to magistrates' sentencing powers viewed in the context of environmental crimes.

Book review

Moving on, the sentencing criteria are then considered. It is noted that many environmental offences carry maximum statutory penalties of £50,000, greatly exceeding the standard maximum sentence that can be given under the Magistrates Courts Act 1980. Of particular resonance here is how sentencing policy has changed in light of the shift of focus away from a "just deserts" approach to one which is centred on reduction as, it is argued, is key in section 142(1) of the Criminal Justice Act 2003. This, it would seem, is consistent with the three core principles of environmental protection noted above (ie prevention, precaution and polluter pays principles). The interesting issue may well be to what extent these two approaches may be consistently applied if and when environmental crimes become more heavily policed and more publicly repugnant.

The guide tells the reader about the applicable criteria to sentencing, advises on how and when to commit to the Crown Court and how to set the level of sentence in very general terms.

Part II, however, is where the real value of the guidance is added. The specific case studies are probably the most useful part of the guidance to the intended reader, ie a practitioner or magistrate who is already (it is hoped!) sufficiently aware of the general principles set out in Part I. Here, we have the vast array of environmental crimes in all their forms: from illegal emissions of dark smoke under the Clean Air Act 1993 to the unlawful poisoning by pesticide under the Food and Environment Protection Act 1985. Each crime is introduced by way of a general overview and legal framework underpinning the elements of the offence and the penalties set. Followed by a worked example, a case study with questions posed on what the most appropriate sentence and other practical enforcement measures would be, the guidance achieves its aim of providing a practical insight into the key issues on sentencing. A "judicial opinion" is provided by way of answer to the questions as an example of how the discretion may be exercised.

The virtue of this guide is the breadth that it covers. By touching upon most, if not all, types of environmental offence, one gets a clear picture of the landscape within which one is working. However, the brevity with which it treats these subjects renders the guidance useful merely as an introduction. It is in no way a substitute for more authoritative advice. This is guidance and not statute and the first point of reference should always be the statute and case law interpretation. A deeper legal analysis by way of reference to decided cases on these subjects and judicial interpretation of the relevant factors would have given it more weight.

Notwithstanding these omissions, Costing the Earth does provide a useful overview and an interesting read. Indeed, I am sure that it would appeal to a wider audience beyond legal experts.

Costing the Earth, it is said in its introduction, has been produced to meet the concern that the levels of fines and sentences given in environmental cases has not been high enough. Its aim therefore is to educate magistrates on their wide powers and how to exercise them effectively and reasonably. The criminal justice system should, particularly in environmental cases, act as a preventative mechanism as well as a form of punishment for wrongdoers. If this aim is to be achieved, then rigorous "awareness-raising" needs to be carried out amongst those with the power. Costing the Earth makes a valuable contribution towards achieving this aim, but there is still more learning that is required if those who work in the administration of justice are to truly meet these aspirations.

Advertising

Advertising rates

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.

Advertising

£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

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E - LAW

The editorial team wants articles, news and views from you for the next edition due to go out in March 2010

All contributions should be dispatched to Catherine Davey as soon as possible by email at:

catherine.davey@stevens-bolton.co.uk by 11 March 2010

Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.

Letters to the editor will be published, space permitting