e-law

UKELA Making the law work for a better environment

EDITORIAL

I wish a happy New Year to all UKELA members and I hope that 2011 will be peaceful and healthy for us all. In this edition you can read the 2010 Garner Lecture by Sir Konrad Schiemann on Access to Justice and European Law.

We have a busy events programme to look forward to, much of it engaging with the Government's plans for environmental law. Many of you have already booked onto our seminar to discuss the Localism Bill later this week. The Minister, Lord Henley, is going to tell us about his plans to address our environmental challenges at a session in February.

There are elections in Wales in early May and our seminar shortly afterwards will discuss the issues arising from the changing legislative and policy landscape in Wales. Scottish members have their AGM shortly to make plans for the year and we will be holding another autumn event in Northern Ireland. If you have any ideas for events we should be holding please let us know.

The working parties have got a challenging programme to address. The long awaited Contaminated Land consultation is now out. Other working parties have already diarised sessions to look at a range of issues from nature conservation and waste to climate change and environmental litigation. Do get involved if you're interested in any specific topics as there is a wealth of experience and knowledge out there to share.

And please do renew your membership if you haven't already done so.

I hope to see you at an event soon.

Peter Kellett

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In this issue

Minister

The DEFRA Parliamentary Under-Secretary, Lord Henley, will speak to and with UKELA members about the Government's plans at a special event, early evening on 15 February. He has a wide brief covering the interests of most of the working parties and the event should be very interesting. Thank you to Stephenson Harwood for hosting it. You should have received booking details (or visit www.ukela.org). You will be able to table a question in advance. UKELA's President, Lord Justice Carnwath, will chair the discussion.

Membership Renewals

May we take this opportunity to thank those members who have renewed already for 2011. Your continued support for UKELA is very much appreciated. If you have yet to renew, please take a moment to do so as we have an interesting and varied range of events coming up in 2011 for members. You should have received recently a reminder by email with all the details about how to renew. If you need any assistance, please contact alisonboyd.ukela@ntlbusiness.com

West Midlands region – Convenor and Committee needed

The current convenor of the West Midlands region is now heading up to the North West region leaving us with a vacancy.

This means we need someone new to step forward – could it be you? The role of convenor, supported by a committee, is to arrange events in the region for UKELA members. This usually means at least 2 speaker meetings per year and an AGM but we welcome other initiatives and ideas.

If you would be interested in this role or joining a committee and would like to chat to someone about what it might entail, please do contact the Regional Group Co-Ordinator on Council, Kenneth Ross at kenneth.ross@brodies.com or Alison Boyd, Member Support Officer at alisonboyd.ukela@ntlbusiness.com who will be pleased to help.

North West regional group AGM and meeting

The AGM of the NW regional group will take place on Thursday 20 January 2011 at the offices of Pinsent Masons in Manchester, 4.30pm registration for 4.50pm start. This is a free event focusing on the new Civil Sanctions for Environmental Offences together with the AGM to elect a Northwest sub-committee. Details of how to attend can be found on our website at www.ukela.org

North East regional group meeting

A video link of the NW meeting detailed above (not including the AGM) is being hosted at Pinsent Masons' offices in Leeds. If you would like to go along, go to www.ukela.org for details of how to book your place.

Aim 5

Our Aim 5 team – reviewing Environmental Law – has been joined by a new intern, Rebecca Findlay. Rebecca is working on her LPC at present and starts a training contract in September. She has a BA in Jurisprudence from Oxford University. She will be helping with research on models of scrutiny, taking over from Vikki Leitch who did an excellent job during her time as an intern.

Our thanks to the other interns – James Corbet-Burcher and Srijanee Bhattacharyya – who are continuing their

research and interviews with experts on various areas of Environmental Law. We plan to publish, in association with Kings College, an interim report in April which will go to all UKELA members for your views, which will inform our final report.

UKELA on YouTube

We have just held interviews for the role of Video Media intern and expect to have someone in the role shortly. We plan to produce short videos for YouTube on Environmental Law topics as a trial. If these go well we can work on a wider brief, which will tie in with information provided to the public via our Law and Your Environment website. Sir Konrad Schiemann's talk on Access to Justice (printed in this edition of e-law) will be appearing on YouTube shortly.

Wild Law

UKELA's Wild Law volunteers are doing a great job with organising events this year for those interested in Wild Law. You can book onto Wild Law in the Wilds of Scotland on the first bank holiday weekend in May, or diary a weekend workshop at the Sustainability Centre in Hampshire on September 23rd -25th. Plans for this workshop are currently being finalised and bookings will open soon.
You may also be interested in the new, independent Wild Law group which is about campaigning for Wild Law and earth rights, The next meeting is on Tuesday 18 January at the Sir Richard Steele pub (upstairs), in Belsize Park, at 6.30 - 9pm. The address is 97 Haverstock Hill and the nearest tube is Chalk Farm or Belsize Park (Northern Line). If you want to attend please email Mothiur Rahman, mottrahman@googlemail.com.

Lord Nathan Memorial Fund for the Environment

We're delighted that the Lord Nathan Fund raised nearly £12,000 in 2010, adding to the existing Fund to make over £30,000. UKELA is very grateful to all who have supported it. UKELA now has about £50,000 given or restricted for the purpose of maintaining the Law and Your Environment website. Fundraising continues in 2011 with the aim of raising £10,000 this year to add to the Fund. There are already mutterings about a sponsored bike ride and another kayak. Watch this space….

Facebook

UKELA's Facebook page isn't just for students. You can use it to network and share information.
http://www.facebook.com/home.php?#!/group.php?gid=480436435214

2010 Garner Lecture "The influence of European Union Law on Access to Justice in Environmental Cases[1]".

By Sir Konrad Schiemann

I Introduction

Since the United Kingdom joined the European Union[2] more and more authorities, Non Governmental Organizations and individuals have been in a position to contribute to the decision making process in environmental matters. I use the term decision making process both to embrace the process of the appropriate authority coming to a primary decision on the question at issue and also the process of challenging before the Courts that primary decision.

Union legislation has required Member States to adapt their existing legislation first, so as to permit a great degree of publicity for anticipated developments of one sort or another, second, so as to entitle a variety of persons and organisations to have an input into the decision making process before the decision has been made,
third, so as to oblige decision makers to give reasons for their decisions, and
fourth, so as to permit such persons and organisations to examine before the courts whether the decision making process has been lawfully carried out.

This process of greater public involvement in decisions affecting the environment as active, as opposed to merely passive parties, has been evident not merely within the Union but beyond. As is well known, the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, which came into force in 2001, affects not merely the Union and its member states but also various other states. So far as the Union is concerned, the Convention in part consolidated past moves and in part mandated new and more extensive moves to involve the public to a greater degree.

Easy access to justice for those who think they have a just cause sounds manifestly desirable. I shall assume that we are here concerned with access to the law courts by everybody and that what the law courts deliver is justice – justice according to law. A big assumption some might say but a useful one for the purpose of keeping these reflections within the bounds of the supportable.

The concept of Environmental Cases which I was asked to address may cover a whole variety of overlapping matters. For present purposes I shall concentrate primarily on administrative law cases where the issue is whether the appropriate administrative procedures are being or have been followed. While the European Union has also been hugely active in the civil law field enabling individuals to sue in tort for past, or anticipated, damage to some personal interest which one might broadly call environmental I shall not touch on that tonight.

II What has the European Union to do with all this

There is much unease in some circles at the way, what was seen by some as a purely economic European project, has moved to embrace far more than it did in its early days. In this context it is worth pausing a minute to consider **why** European Law (if I can use that phrase to embrace the law of the Union) has moved from being concerned largely with the four freedoms – freedom of movement of persons, goods, services and capital - to embracing also environmental concerns. Is this the result of Empire Building by the European civil service or does it correspond broadly to the desires of Member States as expressed by their governments? The widespread use in this country of the portmanteau word "Brussels" to stand for anything connected with the European Union – be it the Commission, the Council, the Parliament and indeed the European Court of Justice situated in Luxembourg – lacks precision and lends itself to inaccuracies. Since the amending Treaties and secondary legislation with which we are concerned would not have

1 With thanks to Clifford Chance for hosting the 2010 lecture
2 Here used to embrace its predecessor European Communities

been passed without the assent of the governments of Member States it is clear that we are not here talking of some European civil service coup d'état. There are separate questions as to whether the decisions of those governments at the time they were taken reflected the wishes of the majority of their citizens or reflect them now but those questions are not for today.

But why has there been this governmental enthusiasm for including the environment as one of the matters within the purview of the Union? Why do we find Articles 11, and 191-193 of the Treaty on the Functioning of the European Union and Article 37 of the Charter of Fundamental Rights of the European Union?

It is easily explicable. Let me give a few real life examples of the types of situations which governments no doubt felt called for wider than purely national responses.
Living as I do on the Moselle in the tiny grand duchy of Luxembourg, I can see from my bedroom windows the emissions from French atomic and industrial installations.
A couple of years ago, just across the Moselle in Germany, there was a planning application for a major quarry excavation. As a person likely to be affected I was consulted even though I live in a different Member State. The Austrians decided by a referendum some years ago to have no nuclear installations in their country. However, a few kilometers beyond the Austrian frontier the Czech Republic has a nuclear installation[3]. European Law lays down various safety standards in relation to such installations and no doubt Austria is glad that it does and that it has a right to an input into decision making by the Czechs. The Austrians place no high value, one imagines, on any alleged, sovereign right vested in the Czechs to do what pleases them. As you know, the Irish are worried about nuclear and other emissions from England. These sorts of concerns are absolutely typical throughout the Union.

So to a Luxembourger, an Austrian or an Irishman the advantages of having an input into what goes on abroad in the environmental field are obvious. They should be only marginally less obvious to those who live in this sceptered isle – think of Chernobyl. Notwithstanding the existence of several perfectly legible signs round this country stating "This is a nuclear free zone", the results of activities and lax safety practices hundreds of miles away were noticed on the hills of Wales and elsewhere. Member States felt that it was in their mutual interest each to have some input into the decision making process of other Member States. Some people take the view that the **disadvantages** of having other European States involved in our environmental decisions exceed the **advantages** but I don't think that it can seriously be disputed that there **are** undoubted advantages. The most convinced Eurosceptic has no objection to this country having an input into other countries' decision making processes; it is the thought of other countries having an input into our decision making processes which hurts. At any rate, the fact is that it is manifest that European Union law has played a major part in this process of allowing more and more people to participate in the decision making process.

The advantages of increased public participation are of two kinds. First, it should **improve the quality of the end result** because facts and value judgments known to and made by those most nearly concerned, will generally have been brought to the attention of the decision makers **before** they make their own factual findings and value judgments and, moreover, any flaws in the decision making process are more likely to be discovered. Second, it should **reduce individual dissatisfaction with the end result of the decision making process** if those whose view has not prevailed nevertheless feel confident that their opinions have, at any rate, been taken into account by the decision makers and if they have had an indication in the decision letter as to why their views have not prevailed.

III The Cost of Wider Public involvement

Because of these broad considerations, the increased participation by the public is generally regarded as a good thing and I am not to be thought of as dissenting from this view which, at the very least, is seriously tenable. It is however worth noting that **a considerable price is paid** for the benefits of public participation. I mention shortly three aspects of this.

The first is that the decision making process becomes more expensive in time and money terms. The increased expense arises from the involvement of more and more people, for more and more time, in more and more processes at private or public expense. More people, most of whom are paid, examine more paper; inquiries are set up which take a long time; resort to the law courts, which also takes time, has to be paid for. There is a further aspect of expense - the developer is bearing interest charges whilst time is passing. The inevitable result of spending more money on **this process** is that less money is available to spend on **goods and services** which the public also desires.

3 See Case C-343/04 **Land Oberösterreich v ČEZ as**

A second and similar matter is that while civil servants and judges are examining these environmental cases they are available to do other things which the public require of them. Whilst I was engaged as a judge in England in environmental cases I was not trying crime and it is possible that as a result someone was sitting in prison longer than would otherwise have been the case.

A third is that the decision making process, which does not finish until the last opportunity for legal challenge has gone, takes longer. An inevitable result of the delay, is that those who would benefit from the existence of the proposed development, are deprived of those benefits whilst the process of examination is going on.

I must express myself cautiously, but can I think say this. Where the law leaves a certain margin of discretion to a decision taker, be he legislator or administrator, be he layman or judge, then sometimes that decision taker can legitimately weigh the benefit of a particular step against the price which needs to be paid in order to achieve that benefit. The principle of proportionality is often in play in one form or another.

IV PUBLICITY

The involvement of more and more people in the decision making process on environmental matters is notably mandated and facilitated by a number of EU Directives and Regulations. The most significant of these are

1. the Environmental Impact Assessment Directive of 1985[4], which, following the Aarhus Convention of 1998, was significantly amended in 2003[5] and is directed to member states and
2. Regulations 1049/2001 and 1367/2006 which apply the same principles to the Union's institutions.

The Amended Directive provides in Article 2 that Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter* alia of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. It mandates and harmonises the principles of Environmental Impact Assessments throughout the Union by introducing minimum requirements, in particular as regards the types of projects that should be subject to an assessment, the main obligations of the developers, the content of the assessment and the participation of the competent authorities and of the public. The Directive first, mandates *screening* procedures under which applications which may have significant effects on the environment are screened in order to see whether an Environmental Impact Assessment is required and, second, provides for the transposition into national laws of various prescriptions as to how such an EIA is to be carried out and how outcomes may be challenged. The amended directive has been transposed into the laws of Member States. The Regulations give the public rights to reasons for decisions and to the underlying documents. The result of this has been that the public has become more involved in the planning process. It seems to me of significance that the ex-communist member states report that the Directive has contributed to consolidating democratic development by improving public participation and transparency in decision-making.[6] It is sometimes forgotten in this country how much the Union has helped these states to develop into functioning democracies.

Returning to the Directive let me cite the accurate comments of Lord Hoffman in Berkeley v Secretary of State for the Environment [2000] UKHL 36

The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is that what the Regulations call the "environmental statement" by the developer should have been "made available to the public" and that the public should have been "given the opportunity to express an opinion" in accordance with article 6.2 of the Directive. As Advocate-General Elmer said in *Commission of the European Communities v. Federal Republic of Germany* (Case C-431/92) [1995] E.C.R. I-2189, 2208-2209, para. 35 -

> "It must be emphasised that the provisions of the Directive are essentially of a procedural nature. By the inclusion of information on the environment in the consent procedure it is ensured that the environmental impact of the project shall be included in the public debate and that the decision as to whether consent is to be

4 85/337/EEC
5 2003/35/EC
6 Com (2009) 378 Final. The Commission Report §2.2

given shall be adopted on an appropriate basis."

The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues."

The principle that only projects liable to have a **significant** effect on the environment should be subject to the full impact of an EIA is easy to accept. A major problem however has been the difficulty of establishing, **prior** to the carrying out of an EIA whether a project **is** liable to have a significant impact. This is the screening process to which I have referred. The Directive starts by identifying in its first annex certain projects which are of such magnitude that they must in principle be made the subject of an EIA –e.g. oil refineries, nuclear establishments, various large industrial establishments, construction of long roads and rail links etc.. This has given rise to a fair amount of litigation concerned with what happens if a large project is disguised as two smaller projects which escape the Annex, what happens if smaller projects grow so as to reach annex size and so on. Inevitably complex provisions, the result of much haggling during the course of the legislative process, give rise to obscurities from time to time. National and Community Courts deal with these problems as they arise.

More difficult to solve have been problems connected with the second annex which lists projects in respect of which **Member States** can determine whether or no an EIP is to be held. The tension here is between the desire by the Union that Member States have a discretion and the desire that this discretion should be reasonably and foreseeably exercised. In Case C-427/07[7] Commission/Ireland the ECJ pointed out that pursuant to Article 4(2) of Directive 85/337 the Member States are to determine, for projects in the classes listed in Annex II to that amended directive, through a case-by-case examination, or by the use of thresholds or criteria, whether or not those projects are to be made subject to an environmental impact assessment. According to that same provision, the Member States may also decide to apply both procedures.

The ECJ continued however that although the Member States have thus been allowed a measure of discretion in specifying certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) of Directive 85/337 as amended that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment **are** to be subject to an impact assessment. A Member State which establishes criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

V REASONS FOR DECISIONS AND ACCESS TO DOCUMENTS

One of the things which were noticeable by their absence when I started practice in England were provisions requiring the giving of reasons and provisions giving you access to documents before any proceedings had been started. If your neighbour was granted planning permission against all existing expectations and policies there was not much you could do about it. The Planning Authority was not required to give reasons or to produce any documents which had influenced its decision. Access to these are clearly useful tools enabling access to justice. Lack of access to the tools often leads to lack of access to justice.

The Union has always been much firmer in its insistence on the giving of reasons both by its institutions and by those carrying out Union policies. This is well illustrated in the context of EIAs by case C-75/08 : The Queen (Mellor) v Secretary of State for Communities and Local Government. There the Court was asked whether or not it was necessary to give reasons for the determination made by the competent national authority not to proceed to an EIA when

7 Paragraphs 40-42

evaluating a request for development consent to build a project falling within Annex II of the Directive. The Secretary of State stated that he did not consider that the project would have a significant effect on the environment and that was the end of the matter.

The ECJ pointed out that in an earlier case the Court had stated that the determination by which the competent authority takes the view that a project's characteristics do not require it to be subjected to an EIA must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337. In Mellor it referred to this and continued

56. It does not follow … that a determination not to subject a project to an EIA must, itself, contain the reasons for which the competent authority determined that an assessment was unnecessary.

57. It is apparent, however, that 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.

61. In the light of the foregoing, … Article 4 of Directive 85/337 must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an EIA, should **itself** contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.

…

66. … if a determination of a Member State not to subject a project falling within Annex II to Directive 85/337 to an EIA in accordance with Articles 5 to 10 of that directive states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information that the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.

VI WHO HAS STANDING

One can note at the outset that the Commission has no standing problems. It can and does bring infringement actions of which some 20% are environmental cases.
The problem which the rules relating to standing seek to address is that the more people who are entitled to have an input at every stage of the process the slower and more expensive the process is likely to be. It is clear however that the whole drift of the legislation and the case law over the last years has been to give more and more people opportunities to make their contributions both before and after the primary decision is taken. It is perhaps noteworthy

in a wider context that Article 230EC governing access to the Courts by individuals and legal associations, which had been restrictively interpreted by the ECJ, if not by its Advocates General, has been replaced by Article 263 TFEU which is differently phrased. What effect that will have on the approach of the Court to questions of standing remains to be seen.

The question of standing arises both before and after any possible court process. However I shall concentrate on the right to access the Court process itself. The traditions of Member States are widely divergent varying from the very restrictive to the extremely generous. The relevant provision of the 1985 Directive as amended is found in Article 10a whose wording bears witness to the difficulty of reconciling the irreconcilable. I read its presently most relevant provisions

Article 10a
Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
(a) having a sufficient interest, or alternatively,
(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
have access to a review procedure before a court of law … to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

…

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

…

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

…"

This provision, essentially based on part of Article 9 of the Aarhus Convention, has given rise to a fair amount of litigation some currently in progress before my Court.

In C-263/08 Djurgården-Värtans Milöskyddsförening one of the points with which the Court was concerned was the standing to sue of the plaintiff environmental organisation. It is a case which once more illustrates the tension between desire to leave some matters to Member States and yet so to organise matters that Member States are not free to sidestep the very aim of the relevant Union provision. This tension characterises a fair proportion of the cases which arrive before our court. You remember the same tension is evident in what the Court said in the Irish case which I quoted earlier. In Djurgården the Court said this

40. By its third question, the referring court asks essentially whether, in the context of the implementation of Articles 6(4) and 10a of Directive 85/337, Member States may provide that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Article 2(2) of that directive but **no** right of access to a review procedure to challenge the decision adopted at the end of that procedure.

41. It is clear … that the reason for that question is the existence in the relevant national legislation of the rule that only an association with at least 2 000 members may bring an appeal against a decision adopted on an environmental matter.

42. It is clear from Directive 85/337 that it distinguishes between the public concerned by one of the projects falling within its scope in a general manner and, on the other hand, a sub-group of natural or legal persons within the public concerned who, in view of their particular position vis-à-vis the project at issue, are, in accordance with Article 10a, to be entitled to challenge the decision which authorises it.

43. The directive leaves it to national law to determine the conditions for the admissibility of the action. Those conditions may be having 'sufficient interest' or 'impairment of a right', and national laws generally use one or other of those two concepts.

44. As regards non-governmental organisations which promote environmental protection, Article 1(2) of Directive 85/337, read in conjunction with Article 10a thereof, requires that those organisations 'meeting any requirements under national law' are to be regarded either as having 'sufficient interest' or as having a right which is capable of being impaired by projects falling within the scope of that directive.

45. While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a nongovernmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

46. From that point of view, a national law may require that such an association, which intends to challenge a project covered by Directive 85/337 through legal proceedings, has as its object the protection of nature and the environment.

47. Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope.

48. In that connection, it must be stated that, although Directive 85/337 provides that members of the public concerned who have a sufficient interest in challenging projects or have rights which may be impaired by projects are to have the right to challenge the decision which authorises it, that directive in no way permits access to review procedures to be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decisionmaking procedure established by Article 6(4) thereof.

49. Thus, the fact relied on by the Kingdom of Sweden, that the national rules offer extensive opportunities to participate at an early stage in the procedure in drawing up the decision relating to a project is no justification for the fact that judicial remedies against the decision adopted at the end of that procedure are available only under very restrictive conditions.[8]

50. Furthermore, Directive 85/337 does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with … the rule of the Swedish legislation at issue is such as to deprive local associations of any judicial remedy.

51. The Swedish Government, which acknowledges that at present only two associations have at least 2 000 members and thereby satisfy the condition laid down in Paragraph 13 of Chapter 16 of the Environment Act, has in fact submitted that local associations could contact one of those two associations and ask them to bring an appeal. However, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 as, first, the

8 The argument here was that you could **not** have access to the Courts because you had already had a shout at an earlier stage of the proceedings. It is the converse of the argument in many English cases that precisely because you had played a part in the earlier proceedings you must have a right of access to the courts.

associations entitled to bring an appeal might not have the same interest in projects of limited size and, second, they would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review. Finally, such a system would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the directive which, as stated in paragraph 33 of this judgment, is intended to implement the Aarhus Convention.

52. Accordingly, the answer to the third question is[9] that Article 10a of Directive 85/337 precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2 000 members.

There is a case before the Court at the moment in which there has been a hearing and the opinion of the Advocate General is awaited. It is concerned with the standing of an environmental association which seeks to argue a case on behalf of the environment at large rather than in respect of the rights of various individuals living in that environment. The issue there concerns a preliminary decision and partial permit in respect of a coal fired power station in Germany. It is case C-115/09 Bund für Umwelt and Naturschutz. The Germans, as you may know, have a rather restrictive approach to standing. In general in Germany you can challenge an administrative decision if you can show that your personal rights are at risk of being affected. This restrictive approach is balanced, as they maintain, by a particularly intensive scrutiny by the court in the judicial review procedings brought by those who **do** satisfy the tests as to standing. By contrast, we in England have a more generous approach to standing but perhaps, at any event in some contexts, a less intense scrutiny of the underlying merits by the Court.

Further cases concerning the rights of NGOs of access to the Courts and also various other questions concerning the interpretation of Directive 85/337 are also before the ECJ[10].

VII Clarity and Costs.

Before closing let me draw attention to the Directive's provisions relating to the need for clarity in national legal provisions and also to costs. You may have noticed this sentence of Article 10 a of the directive which I read out a few minutes ago

"Any such procedure shall be fair, equitable, timely and not prohibitively expensive."

In the Irish Case 427/07 the Court held that

> The provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights.
>
> In that regard, it is clear from Article 10a of Directive 85/337 … that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement. A national practice under which the courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party is merely a discretionary practice on the part of the courts. Such a practice on the part of the court which cannot, by definition, be certain, cannot be regarded as valid implementation of the obligations arising from those articles.
>
> In addition, the sixth paragraph of Article 10a of Directive 85/337 and the sixth paragraph of Article 15a

9 It might interest the cognoscenti that the Court in the English version of its judgments is increasingly using the phrase "the answer to the question is" rather than "the answer to the question must be" which is the way the French version of the judgments are usually framed.

10 C-128/09 Boxus v Région Walonne; C-240/09 Lesoochranárske zoskupenie ; C-240/09

> of Directive 96/61 lay down an obligation to obtain a precise result which the Member States must ensure is achieved, which consists in making available to the public practical information on access to administrative and judicial review procedures. In the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.

These comments are potentially very significant not least in this common law country where much of the law is contained in judicial decisions and where, from the point of view of most member states legal costs are extraordinarily high.

I leave you with that thought.

Contributions - Neil Cameron QC

ENVIRONMENTAL IMPACT ASSESSMENT and THE HABITATS DIRECTIVE: RECENT DEVELOPMENTS

Neil Cameron QC

Landmark Chambers

1. The EIA Directive (85/337 as amended) and the Habitats Directive (92/43) have provided ample opportunities for those seeking to challenge decisions to grant planning permission.

2. In this paper I do not attempt to set out a comprehensive assessment of the relevant law. I seek to draw attention to recent developments.

Environmental Impact Assessment

3. Despite the fact that all practitioners are very familiar with the prohibition on granting planning permission or subsequent consent without considering environmental information[1], challenges based on a failure to comply with the requirements of the EIA Directive[2] are still commonplace.

4. I will first consider the screening stage, second the adequacy of the environmental, then strategic environmen-

1 Regulation 3(2) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 EIA Regulations"). A similar provision is to be found in the regulations which implement the EIA Directive in other fields.

2 85/337/EEC as amended by 97/11/EC and 2003/35/EC

tal assessment[3].

The Screening Stage

5. The decision to be taken at the screening stage is likely to involve two issues, is the development proposed Schedule 1 or Schedule 2 development? and/or is the development Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size, or location[4]? It is the second issue which appears to cause the greater number of problems.

6. In Chetwynd v. South Norfolk DC [2010] EWHC 1070 (Admin) Collins J held that a liberal approach should be adopted to ensure where possible that developments which would be likely to have a negative impact on the surrounding environment are properly investigated[5]. In that case, which concerned a development of four fishing lakes, the Court appeared to be prepared to stretch the meaning of the words in Schedule 2 when the judge held "And it seems to me that ' infrastructure' can cover a development which changes the characteristic of a piece of land by providing something enabling a particular use to be carried out in that land." The only conclusion to be drawn is, that if in doubt as to whether a project falls within schedule 1 or 2, consider screening.

7. In R (Co-operative Group Limited) v Northumberland County Council [2010] EWHC 373 (Admin) the court held that the local planning authority had insufficient information available to enable it to adopt a negative screening opinion. That case is a reminder to those who request that a local planning authority adopt a screening opinion should provide sufficient information as to the possible effects of the proposed development on the environment[6].

8. In Morge v. Hampshire County Council [2010] PTSR 1882 the claimant challenged a negative screening opinion adopted by a county council in respect of a 4.7km long bus route. The Council was both developer and planning authority. The Court of Appeal held that the question of whether the development proposed was likely to have significant effects on the environment by virtue of its size nature or location was a matter of planning judgment or opinion involving consideration of the chance of any effect occurring and also the consequences were it to occur[7]. Despite the weight of the evidence the Court held that the decision was not irrational and therefore the challenge failed on this ground. The challenge was based on other grounds including an alleged breach of regulation 3(4) of the Conservation (Natural Habitats &c) Regulations 1994 ("the 1994 Habitats Regulations") (now regulation 9(5) of the Conservation of Habitats and Species Regulations 2010 ("the 2010 Habitats Regulations") and Article 12(1)(b) of the Habitats Directive. Although permission to appeal was granted on the Article 12(1)(b) point it was not granted on the EIA screening point.

9. In R (Save Britain's Heritage) v. Secretary of State [2010] EWHC 979 (Admin) the court rejected the contention that demolition (not being demolition as part of a wider scheme) came within the scope of the EIA Directive. This question of whether demolition falls within the scope of the directive is also a question raised by the Commission in the proceedings in the CJEU in Commission v. Ireland c-50/09 : that case has yet to be determined by the court.

10. R (Mageean) v Secretary of State [2010] EWHC 2652 (Admin) opens up the possibility of a new series of challenges. That case concerned the issue of circumstances in which a decision maker is required to reconsider a screening opinion. The question to be considered is whether the change in circumstances could rather than would affect the screening decision[8]. If the planning application has been appealed and is to be determined by an inspector he or she will have to consider whether to refer the question of screening back to the Secretary of State, as only he has the power to cancel or vary a screening direction[9].

11. In R (Birch) v. Barnsley MBC [2010] EWCA Civ 1180 the Court of Appeal dismissed an appeal against the

3 As required by Directive 2001/42/EC
4 See the definition of "EIA development" in regulation 2(1) of the 1999 EIA Regulations
5 At paragraph 21
6 See regulation 5(2)(b) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999
7 Ward LJ at paragraph 80
8 Paragraph 38
9 Paragraph 39

judge's decision to quash a planning permission on the ground that the development proposed was EIA development and that the negative screening opinion was flawed. The approach taken in the screening opinion which stated that impacts should be controllable was held to be inadequate, and contrary to the underlying purpose of the regulations[10]. The conclusion to be drawn from Birch is that the likely effects of the development must be considered at the screening stage.

12. Although the Court of Appeal has re-affirmed that a decision on screening is an exercise of planning judgment which will only be quashed on Wednesbury grounds, it is clear that the courts will still intervene, particularly when a decision is based upon inadequate information.

13. In R (Friends of Basildon Golf Course) v. Basildon DC[11] a screening opinion issued by a LPA officer was held to be "legally inadequate". The proposal was to deposit waste to form bunds on a golf course. The screening opinion did not mention the impact on the environment of the deposit of large quantities of waste to form massive ad extensive bunds. The approach to consideration of effects on ecology was also found to be inadequate[12]. The conclusion to be drawn from Basildon is that a local planning authority adopting a screening opinion must consider the matter with care and must base their decision on information which is both sufficient and accurate. The opinion must demonstrate that the issues have been understood and considered.

14. I anticipate that those opposed to planning applications will seek to identify changes in circumstances which could affect the decision on screening, and ask inspectors to refer negative screening decisions back to the Secretary of State for reconsideration.

15. Those promoting development local planning authorities and the Planning Inspectorate too often fail to provide or require a sufficient degree of information at the screening stage. Use of the European Commission Guidance on EIA Screening (June 2001) and the associated checklist could avoid many of the problems which have been encountered.

The Assessment

16. In R (Brown) v. Carlisle City Council [2010] EWCA Civ 523 the Court of Appeal considered a challenge to a grant of planning permission based upon the contention that the ES was inadequate. The development proposed was a freight distribution centre adjacent to Carlisle airport. The developer entered into a section 106 agreement which provided that the freight distribution centre could not be built and occupied without works being carried out to repair or renew the main runway at the airport. The ES did not include an assessment of the effects of the works to the airport. It was held that the ES was deficient and as a result the grant of planning permission was unlawful.

17. It is essential that a developer preparing an ES, or a local planning authority considering whether an ES is adequate, pays careful attention to the requirement to assess the likely significant effects including secondary indirect and cumulative effects of the project. The European Commission publication 'Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions' (May 1999) continues to provide very useful guidance.

Strategic Environmental Assessment

18. In Cala Homes v. Secretary of State [2010] EWHC 2866 (Admin) Sales J held that revocation of a regional strategy amounts to a significant change and so will qualify as a modification of the relevant development plan, and as such will be subject to the requirements of the SEA Directive.

19. Clause 89(3) of the Localism Bill provides that the regional strategies under Part 5 of the Local Democracy, Economic Development and Construction Act 2009 are revoked. For the purposes of the Directive, 'plans and programmes' includes those which are subject to preparation and/or adoption by an authority at national or regional level through a legislative procedure by Parliament[13]. It will be of interest to see whether the Government decide to consider

10 Paragraph 22
11 [2010] EWCA Civ 1432, see in particular paragraph 55
12 [2010] EWCA Civ 1432, paragraph 59
13 See Article 2(a) of Directive 2001/42/EC.

whether to conduct an environmental assessment of the decision to revoke the Regional Strategies before the relevant clause in the Localism Bill can be enacted. This may have an impact on the time required to bring the legislation into force.

Enforcement

20. Section 172 TCPA 1990 empowers a local planning authority to issue an enforcement notice when it appears to them that it is expedient to do so having regard to the provisions of the development plan and other material considerations.

21. The limits to the local planning authority's discretion were considered in R (Ardagh Glass) v. Chester City Council [2010] EWCA Civ 172. The facts of the case were somewhat unusual. The developer constructed what was designed to be the largest glass container factory in Europe without first obtaining planning permission. Work began in October 2003 and the first glass was produced on 2nd May 2005. Planning permission was applied for in July 2004 when the plant was under construction. The applications were called in by the Secretary of State and permission was refused in January 2007. It was common ground that the development was EIA development.

22. The Claimant submitted that as the EIA Directive[14] requires that before consent is granted projects likely to have significant effects on the environment must be subject to environmental assessment the court and the local planning authorities were required to take enforcement action[15]. At first instance HH Judge Mole QC made a mandatory order that the local planning authorities issue an enforcement notice, and gave guidance as to the form of that notice. The judge held that retrospective planning permission could be granted, as long as the competent authorities pay careful regard to the need to protect the objectives of the directive[16]. The judge observed that a failure to take action, thereby permitting the glass works to achieve immunity from enforcement action would amount to a breach of the UK's obligations under the directive[17].

23. In the Court of Appeal the Claimant contended that the judge had erred in holding that planning permission could be granted retrospectively for EIA development and that the local planning authorities were not required to issue a stop notice in respect of the unauthorised EIA development[18]. The Court of Appeal affirmed the judge's decision that retrospective permission can be granted for EIA development. Given that conclusion, the court held that there was no substance in the submission that a stop notice must be issued[19].

24. The conclusions to be drawn from the Ardagh Glass case are that:

a. A local planning authority is likely to be held to have acted unlawfully if it decides not to take enforcement action against unlawful EIA development and thereby allows that development to achieve immunity from enforcement action.

b. There is no prohibition on granting retrospective planning permission for EIA development.

25. The relationship between the prohibition on granting permission for EIA development without first taking into account the environmental information and the immunity provisions in the TCPA add a significant limitation to a local authority's discretion as to whether or not to take enforcement action.

26. The judgment in Ardagh Glass has the following significant consequences:

a. If development takes place without the benefit of planning permission a LPA will have to consider whether it is EIA development.

b. If the unauthorised development is EIA development the LPA must take action to prevent the EIA development

14 85/337/EEC as amended, article 2(1)
15 [2009] EWHC 745 (Admin) at paragraphs 37-38
16 [2009] EWHC 745 (Admin) at paragraph 111
17 [2009] EWHC 745 (Admin) at paragraph 110
18 [2010] EWCA Civ 172 at paragraph 12
19 [2010] EWCA Civ 172 at paragraph 22

achieving immunity from enforcement action.

Kobler Liability

27. In Cooper v. HM Attorney General [2010] EWCA Civ 464 the Court of Appeal considered an appeal against a preliminary ruling on a claim based on Kobler liability[20]. Three conditions have to be satisfied in order to establish Kobler liability namely:

> *i) The alleged breach of Community law must be of a rule conferring rights on individuals.*
>
> *ii) The breach must be " sufficiently serious" .*
>
> *iii) There must be a direct causal link between the breach and the loss or damage sustained by the claimant.*

28. The preliminary issue considered was whether breaches of Community law were sufficiently serious[21]. The breaches complained of arose as a result of decisions of the Court of Appeal on a renewed application or permission to bring judicial review proceedings and on an application for permission to appeal. The breaches of Community law relied upon related to decision made in judicial review proceedings challenging planning permissions for the White City development in west London. The error complained of was a finding that only outline planning permission could constitute development consent and therefore the obligation to undertake EIA could not arise at a later time (paragraph 90).

29. The Court held that in order to determine whether an error was sufficiently serious it must consider whether it was manifest (paragraph 67). The court held that the error was not sufficiently serious.

30. A high hurdle lies in the path of those seeking to establish Kobler liability.

The Habitats Directive

Appropriate Assessment

31. It is the local planning authority or inspector (or Secretary of State) on appeal which is the competent authority within the meaning of regulation 61(1) of the 2010 Habitats Regulations. The first question for the competent authority to consider is whether the plan or project is likely to have a significant effect on a European site either alone or in combination with other plans or projects (the screening stage).

32. The approach to be followed is that set out in Waddenzee[22] at paragraph 45 of the judgment:

> *45 In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.*

33. If appropriate assessment is required the approach to be followed is to be derived from paragraphs 56 and 57 of the judgment in Waddenzee

> *56 It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.*

20 In case C-224/01 Kobler v. Republik Osterreich [2003] ECR 1 -10239 the CJEU created a new form of member state liability for violations of Community law.

21 [2010] EWCA Civ 464 at paragraph 6

22 Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij [2005] Env. L.R. 14

57 So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

34. It was established in R (Hart DC) v. Secretary of State[23] that mitigation can be taken into account at the screening stage; however the judgment in R (Helford Village Company) v. Kerrier DC [2009] EWHC 400 (Admin)[24] is a reminder that it is not enough to rely on mere hope and trust. The mitigation measures must be secured by an enforceable mechanism.

35. The prudent approach for developers and local planning authorities is to consult Natural England at an early stage, and to obtain their views on screening. If Natural England conclude that a significant effect on a European site can be excluded, then the developer can have some confidence that appropriate assessment is not required. If Natural England do not so conclude the prudent course is for the developer to provide the competent authority with sufficient information to allow an appropriate assessment to be conducted. If mitigation is relied upon, such as the provision of SANGS in the Thames Basin Heaths, the provision of that mitigation should be secured by condition or planning obligation.

European Protected Species

36. Regulation 9(5) of the 2010 Habitats Regulations imposes the following duty:

(5) Without prejudice to the preceding provisions, a competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.

37. Until the judgment in R (Woolley) v. East Cheshire Borough Council [2010] Env LR 5 it would be fair to say that the degree of attention paid to European Protected Species ("EPS") at the planning application stage was somewhat limited. Before the judgment in Woolley many had assumed that sufficient protection could be afforded to EPS by imposing a condition on a planning permission that no development take place until a licence had been obtained under the provisions of what is now regulation 53 of the 2010 Habitats Regulations.

38. In Woolley the submission that it was sufficient for a planning authority making a decision on a planning application to note the existence of the directive and the regulations and to note the existence of the EPS was rejected. The judge held that as LPA has to "engage" with the provisions of the directive. Judge Waksman QC held[25]:

"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. On the other hand if it seems that the requirements are likely to be

met, then the authority will have discharged its duty to have regard to the requirements

and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the directive."

39. The approach taken in Woolley to the duty imposed by regulation 9(5) of the 2010 Habitats Regulations was

23 [2008] 2 P. & C.R. 16, at paragraph 76
24 At paragraphs 39 and 40
25 At paragraph 27

followed by the Court of Appeal in Morge v. Hampshire County Council[26]. In R (Hulme) v. Secretary of State [2010] EWHC 2386 (Admin) Frances Patterson QC held that there was no specific requirement to refer to the Directive and that a general reference to the effect on the EPS as sufficient to amount to engagement with the Directive[27].

40. The extent of the engagement required at the planning application stage is likely to be clarified by the Supreme Court when it delivers judgment in Morge.

41. The meaning and effect of Article 12(1)(b) and Article 12(1)(d) of the Habitats Directive was also considered in Morge. Permission to appeal to the Supreme Court was limited to the Article 12(1)(b) point, and in particular the meaning of "disturbance". The current position is that taken by the Court of Appeal, namely that in order to fall within the prohibition imposed by Article 12(1)(b) the disturbance must have a detrimental impact so as to affect the conservation status of the species at population level[28]. That approach may not stand following the decision of the Supreme Court or following a possible reference to the CJEU.

42. The practical approach to be followed by developers and local planning authorities is to ensure that any effect on EPS is considered at the planning application stage, and that a view is taken as to whether any of the prohibitions imposed by Article 12 apply, and if they do whether it is probable that Natural England will grant a licence under regulation 53 of the 2010 Habitats Regulations.

Enforcement

43. The Ardagh Glass case was not concerned with the Habitats Directive. However if the reasoning in Ardagh Glass is applied the following consequences would arise:

a. If development takes place without the benefit of planning permission the LPA will have to consider whether that development (the plan or project) is likely to have a significant effect on a European site or a European offshore marine site (either alone or combination with other plans or projects) and is not directly connected with or necessary to the management of the site[29].

b. The approach indicated by the ECJ in Waddenzee[30] at paragraph 45 of the judgment is to be followed (see above).

c. If it cannot be excluded, on the basis of objective information that the plan or project will have a significant effect on a European site or a European offshore marine site, an appropriate assessment must be made.

d. If the Ardagh Glass approach is followed it is likely to be said that the obligation imposed by the Habitats Directive would not be complied with if a LPA allowed a development to achieve immunity from enforcement action.

e. As a result if an unauthorised development is likely to have a significant effect on a European site or European offshore marine site, the LPA is in the same position as the LPA in Ardagh Glass. If no planning application is made the LPA must issue an enforcement notice.

44. The effect of the provisions of the Habitats Directive is likely to cover a wider range of projects than those affected by the EIA Directive.

45. LPA's who have SPA's and SAC's in their areas should be particularly vigilant when considering whether to take enforcement action in relation to development carried out without the benefit of planning permission.

46. Those who are aggrieved by a LPA's failure to take enforcement action against unauthorised development should bear in mind the obligations imposed by European law. The duty under the Habitats Directive may prove a use-

26 [2010] PTSR 1882 at paragraphs 60 and 61
27 [2010] PTSR 1882 at paragraph 83
28 Ward LJ at paragraph 37
29 Regulation 61(1) of the Conservation of Habitats and Species Regulations 2010
30 Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij [2005] Env. L.R. 14, at paragraph 45

ful weapon to use to persuade a reluctant LPA that it should take enforcement action or might found an application for judicial review of a decision not to take enforcement action.

Discretion

47. The leading case on the exercise of discretion by the courts in EIA cases is still Berkeley v Secretary of State for the Environment [2001] 2 AC[31]. The obligation on national courts to ensure that Community rights are protected has led the courts to hold that any discretion not to quash a decision in cases where there is a breach of a requirement of Community law is very narrow.

48. Discretion in relation to an appropriate assessment case was considered in Boggis, Eason Bavents Conservation v Natural England [2009] EWCA Civ 1061. Sullivan LJ[32] expressed doubt that the approach taken to discretion in EIA cases should apply to cases concerned with appropriate assessment, as the Habitats Directive does not require public involvement to the same way as is required under the EIA Directive.

49. The distinction between the exercise of discretion in a case founded on breach of the EIA regime and one based upon breach of the Habitats Regulations was considered in R (Hulme) v. Secretary of State for Communities and Local Government [2010] EWHC 2386 (Admin). Frances Patterson QC held:

> *97. The inspector had then substantially complied with the requirements of the regulations, albeit he did not attribute his conclusions to the letter of the regulations for the reasons I have set out earlier. The circumstances here are very different from an EIA case where the provision of an environmental statement is the cornerstone of that regime. There, the ES, including mitigation measures, is the basis of public consultation prior to a decision being made. Here there is a different statutory regime. The decision maker is not under a comparable consultation requirement based upon a single accessible compilation of the relevant information provided by the applicant at the start of the application process. He has to satisfy himself on the considerations set down in the regulations. Reading the decision letter as a whole, the inspector here did so.*
> *98. In those circumstances, I do not have to go on to consider the issue of discretion but, for the sake of completeness, I deal with that matter and make it clear that, if I had had to consider it, I would have exercised it in favour of the defendants and upheld the planning permission.*
> *99. In Berkeley v Secretary of State for the Environment [2001] 2 AC 63, Lord Bingham emphasised that the discretion of the court to quash a decision, even in the domestic context, was very narrow. In Bown v Secretary of State for Transport [2003] EWCA Civ 1170 Carnwath LJ emphasised that the speeches in Berkeley needed to be read in context. In Edwards v Environment Agency [2008] EKHL 22 Lord Hoffman agreed with that observation and considered that both the nature of the flaw in the decision and the ground for the exercise of discretion had to be considered. In the circumstances of Edwards when he carried out that exercise, Lord Hoffman agreed with the Court of Appeal and the judge below that it would be pointless to quash the pollution permit granted under the Pollution Prevention and Control Regulations 2000. Applying those principles here, the flaw in the decision would be one of form but not of substance. It would thus be another occasion where it would be pointless to quash the planning permission granted.*

50. The issue of discretion was raised in Morge in the Supreme Court and further guidance may become available once the judgment/s are delivered.

Conclusions

51. Those opposed to development have achieved considerable success in the courts by placing reliance on breaches of European law when challenging decisions to grant planning permission.

52. The approach taken by decision makers when considering screening for the purposes of both EIA and appropri-

31 See Lord Bingham at page 608 and Lord Hoffman at pages 613-616
32 At paragraphs 39 and 40

ate assessment merits very careful scrutiny. Those promoting development should seek to provide sufficient information to allow an informed decision to be made. All parties should keep a negative screening opinion under review.

53. The UK has introduced a series of regulations to transpose the requirements of Article 12 of the Habitats Directive. The criminal law and associated licensing regimes bring the prohibition into effect. The requirement to have regard to the Habitats Directive when making decisions including those on planning applications introduces an additional layer of regulation – the extent of the duty at that stage will be clarified once the Supreme Court have made their decision in Morge.

54. At the planning application stage those promoting development must be careful to ensure that all the necessary information is provided to allow the environmental effects to be assessed. They must also ensure that decision makers have sufficient information to allow them to conduct an appropriate assessment if required, and to address the prohibitions imposed by Article 12 of the Habitats Directive and the prospects of derogation under Article 16.

55. The EIA Directive was designed to improve the quality of decision making and to ensure that environmental effects are taken into account. The aim of the Habitats Directive, as identified in Article 2, is to contribute to ensuring biodiversity through the conservation of natural habitats of wild fauna and flora. There is a danger that the Directives could provide to be more effective in encouraging litigation and favouring lawyers than maintaining or restoring to favourable conservation status natural habitats and species.

COSTS IN PLANNING AND ENVIRONMENTAL CASES

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1. This paper is intended to provide a short overview of the recent legal developments in this field, together with a review of how we got to the present position. Whilst costs are always a "hot topic" for the fee paying client, it is also a hot topic in the recent jurisprudence. Further, it needs to be seen in the context of wider developments of changes to the public funding of civil litigation.

2. The rules relating to the costs of public law litigation are of practical and theoretical significance. In practical terms, they affect the decision of claimants to bring judicial review proceedings and the decision of defendant public authorities to resist proceedings.

3. In more theoretical terms, there is a burning question as to whether costs in public law should operate differently from costs in private law. Can the costs rules for private law simply be transposed to public law cases?[1] Does the public interest in (meritorious) public law challenges mean that those who seek to question the legality of governmental conduct should be immune from the normal risks associated with civil litigation? Do the procedural safeguards such as the requirement for standing, and the "arguability" threshold at the permission stage in the case of judicial review, provide an adequate filter on those cases which should not be allowed to proceed, such that the justification for the "loser pays" principle falls away?

1 See for example R (Davey) v Aylesbury Vale DC [2008] 1 WLR 878, where the application of private law rules to public law disputes was doubted by Sedley LJ at [18].

4. It is against this background[2] that we consider the specific context of costs in planning and environmental cases. Firstly, we consider recent developments in the protective costs order following the seminal case of Garner. We then consider wider issues about the compliance of the English costs regime with the Aarhus Convention. In doing so we hope we will provide an update as to the latest proposals for reform.

5. Before we launch into that discussion however, we thought it would be helpful to provide a single reference point for some of the key emerging threads which we discuss below. A chronology of recent changes might be a useful reference tool.

Summary of recent events

Feb 2005	Aarhus convention ratified by UK[3] government and also by EC
1 March 2005	Court of Appeal's judgment in R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600 (CA)
May 2008	Report of the Working Group on Access to Environmental Justice published (the Sullivan report)
16 July 2009	Judgment of ECJ in Commission v Ireland [2010] ELR 8
14 January 2010	Lord Justice Jackson publishes review of Civil Litigation Costs (recommending "qualified one way costs shifting in all judicial reviews (i.e. environmental and non-environmental)
18 March 2010	European Commission issue warning to UK about unfair costs of challenging environmental decisions
29 July 2010	Judgment of the Court of Appeal in R (Garner) v Elbridge Borough Council [2010] EWCA Civ 1006
6 September 2010	Update report published by the Working Group on Access to Environmental Justice (Sullivan update report) – backs (modified version of) qualified one way costs shifting in all JR cases
15 November 2010	Ministry of Justice publish (for consultation) its proposals for the Implementation of Lord Justice Jackson's recommendations [4]
15 December 2010	Supreme Court judgment in R(Edwards and Pallikaropoulos) v The Environment Agency

6. I address matters in the following order:-

a. Protective Cost Orders (PCOs): The position prior to Garner

b. Aarhus Convention– basic principles and framework

c. Proposals for reform (of costs regime in UK)

d. Judicial treatment of Aarhus (domestically)

e. The Court of Appeal decision in Garner

f. Aarhus Convention Compliance Committee (based in Geneva)

g. Post Garner judicial developments

h. Summary and conclusions

2 For further discussion of the principles relating to costs in judicial review proceedings, see: *Rethinking Costs in Judicial Review*, Fordham & Boyd, [2009] JR 306 and *Rethinking Costs in Judicial Review – A Response*, James Maurici, [2009] JR 388.

3 In line with the Convention's procedures the UK became a full party to the Convention in May 2005, 90 days after ratification

4 The Ministry of Justice also published (for consultation) on 24 November 2010 its proposals in respect of cross-undertakings in damages in environmental judicial reviews

i. Where are we now?

ii. Where are we going?

iii. Key issues along the way.

Part 1: Protective Cost Orders (PCOs): The position prior to *Garner*

7. The pre-conditions for a PCO were set out in R (Corner House) v Secretary of State for Trade and Industry [2005] 1 WLR 2600. At [74] onwards the Court of Appeal held:

> *74 We would therefore restate the governing principles in these terms.*
>
> *(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.*
>
> *(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.*
>
> *(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.*
>
> *75 A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted: (i) a case where the claimant's lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1296); (ii) a case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost (R (Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2712 (Admin)); (iii) a case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (R v Lord Chancellor, Ex p Child Poverty Action Group [1999] 1 WLR 347); and (iv) the present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii).*
>
> *76 There is of course room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise. It is likely that a cost capping order for the claimants' costs will be required in all cases other than (i) above, and the principles underlying the court's judgment in King v Telegraph Group Ltd (Practice Note) [2005] 1 WLR 2282 , paras 101-102*

> *will always be applicable. We would rephrase that guidance in these terms in the present context. (i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. (ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest. (iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.*

8. The particular element of Corner House which has been the subject of some change relates to the requisite public interest in the litigation. This has been clarified in R (Compton) v Wiltshire PCT [2009] 1 WLR 1436 as not requiring an overly restrictive approach to the extent of the public interest at stake.

9. The courts have also grappled with a number of difficult issues around the terms of any PCO. For example, there are important issues regarding reciprocity: should the defendant's liability to the claimant should the claim succeed be limited? If so, at what level should it be limited? In R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp [2009] CP Rep 8, the Court of Appeal held the terms of any conditional fee agreement should be disclosed by the Claimant in their application for a PCO. The Court held (at [27]) that "[t]he agreed success fee is relevant to the likely amount of the liability of the defendant to the claimant if the claimant wins. It is therefore relevant to the amount of any cap on that liability. In our opinion the court should know the true position when deciding what the cap should be".

10. There is, of course, a cost associated with applying for and resisting PCOs. The Court of Appeal in Corner House (at [78]) recognised that protection may be granted for the making of the application, at a cost of up to £1,000. In practical terms, if the principle of a PCO cannot be disputed, parties may be best placed to negotiate the terms of the PCO in correspondence. This can lead to a satisfactory outcome for both claimants and defendant public authorities, not least because of the certainty in terms of the expense of litigation that a reciprocal PCO can provide.

Part 2: Aarhus – basic principles and framework

11. The UN Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters is better known as the Aarhus Convention. It is an international treaty which does not have immediate legal effect in English law. However, by virtue of the amendment of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive") to give effect to elements of the Aarhus Convention, certain provisions of that Convention do have direct effect in English law. Article 9 of the Aarhus Convention is incorporated in Article 10a of the EIA Directive, which provides:

> *Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*

a. *having a sufficient interest, or alternatively,*

b. *maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,*

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provision of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

Part 3: Proposals for reform

12. In May 2008, the "Sullivan Committee" produced its first report, Ensuring access to environmental justice in England and Wales.[5] The report found that the application of the Corner House principles in practice appeared to be inconsistent with the Aarhus Convention. In particular, the report found that the need for the claim to raise issues of "general public importance" and for the claimant to have "no private interest" would be likely to lead to non-compliance with Aarhus. The report proposed an "Aarhus PCO regime" with the following features:[6]

• No additional public interest/importance requirement, since access to environmental justice is made unconditional by Aarhus and because, by virtue of the Aarhus Convention, protecting the environment

5 http://www.unece.org/env/pp/compliance/C2008-23/Amicus%20brief/AnnexNjusticereport08.pdf

6 Appendix 4

is recognised as inherently a matter of public interest/importance.

• The claimant is entitled to a PCO (level to be set according to criteria below) where otherwise, and acting reasonably in the circumstances, the claimant would be prohibited by the level of costs or cost risks from bringing the case.

• For the proper conduct of the case a PCO should be sought with the application for permission for JR and should wherever possible be decided at the same time as permission.

• Provided that the PCO application is made at the same time as the application for permission for JR, the costs of the claim including any injunction or other interim relief application will be limited to Mount Cook costs until permission and PCO applications have been finally determined.

• Wherever a claimant would be prevented from commencing proceedings by the exposure to Mount Cook costs/costs of applying for a PCO, they will be able to seek an interim PCO limiting their costs exposure (including to zero) pending the determination of permission/PCO.

• The process of applying for a PCO itself must not expose the claimant to a "prohibitively expensive" risk of costs. The Corner House figures for costs exposure at this stage will not therefore apply and instead we consider a maximum figure of £500 to be consistent with these principles.

• Applying the Bolton guidelines, the claimant is still at risk of being liable for third party costs. However small the risk, it exposes the claimant to a "prohibitively expensive" risk of costs which provides a serious deterrent to environmental litigation. Save in exceptional circumstances, the order should make clear that there will be no claimant exposure to third party costs.

• The claimant's private (pecuniary) interest will not be a bar to making a PCO, but may be a factor to be taken into account in determining the level at which the PCO will be set in the circumstances of the case.

• The level of PCO must not make litigating "prohibitively expensive" for the member of the public or non-governmental organisation such as reasonably to deter such a person from embarking on the challenge in question.

• The court may impose a cap on the claimant's costs at the request of the defendant/third party in order to ensure that the defendant does not face an unreasonable costs exposure and that the defendant has some degree of certainty about its exposure from an early stage.

• It will not be relevant if the claimant's lawyers are acting pro bono.

• The claimant will submit a summary of its costs to date and anticipated costs to trial as part of its PCO application, to allow the court reasonably to assess the appropriate level of any cap to be imposed on the defendant's potential liability to the claimant.

• It will be assumed by the claimant that all relevant/significant material has been disclosed by the defendant/interested party, to allow the claimant to prepare a schedule of work to be done for the assessment of the costs cap. In the event that subsequent disclosure is made by the defendant/interested party, resulting in an application for an increased cap in the light of unforeseeable additional work being required, the defendant/interested party will be required to pay the cost of the further application, unless the earlier non-disclosure can be justified.

• The evaluation of any cap on the defendant's potential liability to the claimant will reflect the normal principles embodied in the Civil Procedure Rules (CPR) and developed by the Supreme Court Costs Office that the costs to be recovered are those reasonably incurred in prosecuting the action. This will include choice of solicitors and use of leading counsel, which will be considered on the normal basis.

• The level of the base costs included within the capped figure will not be reduced to take account of the fact that the claimant's lawyers are acting under a CFA, and the capped figure will include a notional 100% success fee.

• The PCO may take the form of a 'walk away' or 'no order for costs' order.

13. The Review of Civil Litigation Costs (the Jackson Review)[7] was published in January 2010. The final report stated:

Having considered the competing arguments advanced during Phase 2 as well as the factors set out in PR chapters 35 and 36, I am quite satisfied that qualified one way costs shifting is the right way forward. There are six principal reasons for this conclusion:

(i) This is the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases.

(ii) For the reasons stated by the Court of Appeal on several occasions, it is undesirable to have different costs rules for (a) environmental judicial review

and (b) other judicial review cases.

(iii) The permission requirement is an effective filter to weed out unmeritorious cases. Therefore two way costs shifting is not generally necessary to deter frivolous claims.

7 http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

(iv) It is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved.

(v) One way costs shifting in judicial review cases has proved satisfactory in Canada: see PR paragraphs 35.3.8 and 35.3.9.

(vi) The PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value.

14. Jackson LJ therefore proposed a new Civil Procedure Rule in the following terms:

"Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

(a) the financial resources of all the parties to the proceedings, and

(b) their conduct in connection with the dispute to which the proceedings relate."

15. Jackson LJ's proposals have since been endorsed by the Sullivan Committee (in its updated report dated 6 September 2010), which has called for urgent amendments to the CPR to give effect to Jackson LJ's recommendations.[8] The Sullivan Committee strongly endorsed the big idea of Jackson LJ to shift to a position of qualified one-way costs shifting. It also endorsed the Jackson LJ approach that the changes should not be limited to environmental judicial reviews but should apply to all judicial review (subject to special cases). The Sullivan LJ committee considered that this approach would be Aarhus compliant and he much simpler and more satisfactory than reliance on judicial discretion. The rule proposed in the updated Sullivan LJ committee report is:

"An unsuccessful Claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the Claimant has acted unreasonably in brining or conducting the proceedings".

16. November 2010 saw the publication of consultation proposals from the Ministry of Justice:-

a. It is consulting on the Jackson LJ proposal of qualified one way cost shifting but concerns about extending qualified one-way costs shifting to judicial review claims. The consultation response indicates that if extended, it will only apply to individuals and will contain rules to limit liability rather than exclude liability.

b. A separate consultation exercise has been launched in respect of the requirements for cross-undertakings as to damages to be provided in respect of injunctions sought in environmental cases.

8 http://www.unece.org/env/pp/compliance/C2008-33/correspondence/FrCAJE_updatedSullivanReport_2010.09.14.pdf

c. The consultation response in respect of Jackson LJ's proposals notes (at paragraph 168) that:

> **"the Government is working to amend the Civil Procedural Rules in order to codify the current case law on PCOs for environmental judicial review proceedings. These new rules will make the law and procedure more certain and transparent for those who may wish to consider applying for a PCO and will more clearly meet concerns expressed by respondents to the Review in relation to costs in such cases. The rules will encourage applications early in proceedings to be considered alongside permission for a hearing and will limit the claimant's liability for the costs of the PCO application. These rule changes are expected to come into effect by April 2011".**

Part 4: Judicial treatment of Aarhus

17. In Morgan & Baker v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107, Carnwath LJ made the following observations:

> **47. It may be helpful at this point to draw together some of the threads of the discussion, without attempting definitive conclusions:**
>
> **i) The requirement of the Convention that costs should not be 'prohibitively expensive' should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.**
>
> **ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.**
>
> **iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary 'loser pays' rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion.**
>
> **iv) This court has not encouraged the development of separate principles for 'environmental' cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The Corner House statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied 'flexibly'. Further development or refinement is a matter for legislation or the Rules Committee.**

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

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

18. In Commission of the European Communities v Ireland, Case C-427 07 (16th July 2009), the European Court of Justice considered the effect of directives implementing the Aarhus Convention. The Court held that procedural rules must be sufficiently certain in their operation, in order to avoid prohibitive expense. The fact that the Irish courts had discretion not to order the unsuccessful party to pay the other party's costs was not sufficient to achieve compliance: see paragraphs 92 to 94.

Part 5: Garner

19. In R (Garner) v Elmbridge BC [2010] EWCA Civ 1006, the Court of Appeal considered the conditions for the grant of a PCO in environmental cases. In particular, the Court considered the effect of the Aarhus Convention on such orders. That Convention has direct effect by virtue of its incorporation into the EIA Directive (Directive 85/337/EC). Where a claimant can be considered to be the "public concerned" for the purposes of Article 10a of the EIA Directive, the provisions of the Aarhus Convention will come into play. In brief summary, Garner establishes that in such a case:

a. It is not necessary to show that the case is one of "general public importance" or that there is a "public interest requiring resolution of those issues" (Garner, [39]);

b. In respect of the means of the claimant, "Even if it is either permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of "the public concerned"" (Garner, [46]). The Court imposed a test which is partly objective: would the proceedings be prohibitively expensive for an ordinary member of the public (i.e. one earning the average national wage)? This makes it much easier for a JR claimant to obtain a PCO. (But see the discussion below about R (Coedbach Action Team Ltd) v Secretary of State for Energy and Climate Change).

c. The imposition of some form of reciprocal limit upon a respondent's liability for costs is not necessarily inconsistent with Article 10a (Garner, [54]);

Part 6: Aarhus Convention Compliance Committee

20. Following Garner, the Aarhus Convention Compliance Committee in respect of complaint ACCC/C/2008/33.[9] The Committee found that the UK system is likely to be "prohibitively expensive" absent, among other things, changes to the approach taken to PCOs:[10]

> **Costs - prohibitively expensive (article 9, paragraphs 4 and 5)**
>
> **126. When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner.**
>
> **127. The Committee considers that the "costs follow the event rule", contained in rule 44.3(2) of the Civil Procedure Rules, is not inherently objectionable under the Convention, although the compatibility of this rule with the Convention depends on the outcome in each specific case and the existence of a clear rule that prevents prohibitively expensive procedures. In this context, the Committee considers whether the effects of "costs follow the event rule" can be softened by legal aid, CFAs and PCOs as well as by the considerable discretionary powers that the courts have in interpreting and applying the relevant law. At this stage, however, at least four potential problems emerge with regard to the legal system of E&W. First, the "general public importance", "no private interest" and "in exceptional circumstances" criteria applied when considering the granting of PCOs. Second, the limiting effects of (i) the costs for a claimant if a PCO is applied for and not granted and (ii) PCOs that cap the costs of both parties. Third, the potential effect of cross-undertakings in damages on the costs incurred by a claimant. Fourth, the fact that in determining the allocation of costs in a given case, the public interest nature of the environmental claims under consideration is not in and of itself given sufficient consideration.**
>
> **128. While the courts in E&W have applied a flexible approach to Corner House criteria when considering the granting of PCOs, including the "general public importance", "no private interest" and "exceptional circumstances" criteria, they have also indicated that, given the ruling in Corner House, there are limits to this flexible approach. The Committee notes the numerous calls by judges suggesting that the Civil Procedure Rules Committee take legislative action in respect of PCOs, also in view of the Convention (see paragraph 22 above). These calls have to date not resulted in amendment of the Civil Procedure Rules so as to ensure that all cases within the scope of article 9 of the Aarhus Convention are accorded the standards set by the Convention. The Convention, amongst other things, requires its Parties to 'provide adequate and effective remedies' which shall be 'fair, equitable [...] and not prohibitively expensive'. The Committee endorses the calls by the judiciary and suggests that the Party concerned amend the Civil Procedure Rules in the light of the standards set by the Convention.**
>
> **129. Within such considerations the Committee finds that the Party concerned should also consider the cost that may be incurred by a claimant in those cases where a PCO is applied for but not granted, as suggested in Appendix 3 to the Sullivan Report. The Committee endorses this recommendation.**

9 http://www.unece.org/env/pp/compliance/C2008-33/DRF/C33DraftFindings.pdf

10 Emphasis added

130. The Committee also notes the limiting effect of reciprocal cost caps which, as noted in Corner House, in practice entail that "when their lawyers are not willing to act pro bono" successful claimants are entitled to recover only solicitor fees and fees for one junior counsel "that are no more than modest". The Committee in this respect finds that it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured, entailing that claimants should in practice not have to rely on pro bono or junior legal counsel.

131. A particular issue before the Committee are the costs associated with requests for injunctive relief. Under the law of E&W, courts may, and usually do, require claimants to give cross-undertakings in damages. As shown, for example, by the Sullivan Report, this may entail potential liabilities of several thousands, if not several hundreds of thousands of pounds. This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4.

132. Moreover, in accordance with its findings in ACCC/C/2008/23 (UK) and ACCC/C/2008/27 (UK), the Committee considers that in legal proceedings within the scope of article 9 of the Convention, the public interest nature of the environmental claims under consideration does not seem to be given sufficient consideration in the apportioning of costs by the courts.

133. The Committee concludes that despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention. At this stage, the Committee considers that the considerable discretion of the courts of E&W in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest. The Committee also notes the Court of Appeal's judgment in Morgan v. Hinton Organics, which held that the principles of the Convention are "at most" a factor which it "may" (not must) take into account, "along with a number of other factors, such as fairness to the defendant". The Committee in this respect notes that 'fairness' in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.

134. In the light of the above, the Committee concludes that the Party concerned has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as "to remove or reduce financial […] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider.

21. In addition recent findings of the Aarhus Compliance Committee's which give some guidance as to what size of adverse costs liability will be "prohibitively expensive". In the Cultra Residents' Association complaint (ACCC/C/2008/27) in relation to the expansion of Belfast City Airport, the Committee found that an order for the claimant to pay £39,454 following the dismissal of its claim for judicial review was prohibitively expensive. However, in the Morgon complaint (ACCC/2008/23) the Committee held that an adverse costs order of £5,130 was not prohibitively expensive.

Part 7: Post Garner Judicial Developments

(a) R (Coedbach Action Team Ltd) v Secretary of State[11]

22. In between Nicol J's and the Court of Appeal's judgments in Garner, the issue of whether a PCO should be granted in an environmental case again arose in CAT.

23. In that case, the SoS granted consent under s 36 Electricity Act 1989 for construction and operation of 100Mw biomass generating station at Avonmouth in Bristol to Helius Energy Plc. Planning permission under section 90(2) Town and Country Planning Act 1990 was also deemed to be granted. There had been no objections to the development. Consequently, on 26 March 2010 the section 36 consent was granted without any Public Inquiry being held.

24. At the end of the 3 month period for judicial review, a claim challenging the SoS's decision was lodged. The claimant, CAT, was a private limited company set up to object to 2 biomass generating stations proposed to be built in Swansea and Coedbach in Wales. It had 26 members. The 2 Welsh schemes it had objected to were unrelated to the Avonmouth scheme. Planning permission for those schemes had been refused and appealed with the appeals to be determined at Public Inquiries. CAT was concerned that certain paragraphs in the Avonmouth decision letter would be relied on by the developers of the Welsh schemes to prevent CAT from presenting evidence at those Inquiries on the sustainability of the biomass fuel to be used to fire the power stations. CAT had not objected to or otherwise participated in the section 36 consent process for the Avonmouth scheme.

25. CAT also sought a Protective Costs Order (PCO) limiting its liability for costs to the SoS and Interested Parties to £2,500. It sought to justify the claim on the basis that it was a public interest case; that it wanted certainty as to the potential cost outcome; and that the claim was an environmental claim to which the EIA Directive and Aarhus Convention applied. It did not disclose any financial information nor indicate what the consequences for the legal proceedings would be if it was not given costs protection.

26. The Secretary of State and Helius both filed AoSs and Summary Grounds. Both submitted that permission to apply for judicial review should be refused because, inter alia, CAT lacked standing. Both relied on Corner House and on Nicol J's judgment in Garner, in particular CAT's failure to disclose any financial information.

27. In July 2010, Beatson J refused CAT's PCO on the basis that it had not furnished sufficient information about (a) its resources; and (b) the consequences for the proceedings if no PCO was made.

28. In August 2010, CAT renewed its application for a PCO relying on the CA's Judgment in Garner. Shortly before the hearing, CAT served a Witness Statement stating that the individual members of the company did not wish to disclose their personal financial circumstances and that if a PCO was not granted it could not afford to continue with the litigation and would withdraw from the proceedings.

29. CAT argued that whether costs were prohibitively expensive had to be assessed objectively and that the failure to disclose its financial circumstances was not therefore a reason to refuse the PCO.

11 Our thanks to John Litton QC, Counsel for the Interested Party on whose thoughts we have drawn in preparing this section of the paper.

30. Wyn Williams J dismissed CAT's application with the reasoned Judgment being handed down on 16 September 2010. He held:

a. the EIA Directive did not proceed on the basis that every member of the public should have wide access to justice, only those who had a sufficient interest or maintained an impairment of a right [12];

b. on the facts of the case CAT did not have a sufficient interest [29] and the EIA Directive was not therefore material to his decision whether to grant a PCO [33];

c. there was a dearth of reliable information about the state of the CAT and those who directed its activities [20];

d. in any event, the proceedings were not prohibitively expensive. In particular he concluded that the likely total costs of approximately £70,000 would not be prohibitively expensive for either a limited company and/or that if one looked to the membership of the company (about 25 people) a costs liability of approximately £3,000 per member would not be prohibitively expensive [36] & [37];

e. the Claimant was a private limited company and, therefore, a PCO was unnecessary because as a company it could limit or extinguish its potential costs liability [39] & [40]; and

f. it would be unjust to make a PCO on the facts of the case [42].

31. In concluding that CAT did not have a sufficient interest, Wyn Williams J took into account the fact that (a) CAT had neither objected to, nor participated in, the Avonmouth consent procedure; (b) the aims and objects of CAT were to protect its particular local environment (i.e. the Gwendraeth Valley); (c) CAT's sole purpose in challenging the Avonmouth decision was to prevent that decision being a material consideration in the determination of the Welsh schemes which CAT had objected to; and (d) CAT would be able to challenge those decisions under section 288 Town and Country Planning Act 1990 if legally flawed [29], [30] & [31].

32. An appeal in respect of the CAT case was considered by Carnwath LJ in the Court of Appeal on 29 November 2010. The Court of Appeal dismissed the appeal and upheld Wyn Williams J's approach as a legitimate exercise of his discretion.

(b) R (oao Edwards and Pallikaropoulos) v The Environment Agency

33. The Pallikaropoulos case concerned an appeal to the Supreme Court from a decision of the Supreme Court Costs Officers in the case of the same name. The underlying litigation concerned the Rugby cement works: a complex claim which was finally disposed of by the House of Lords in 2007 ([2008] 1 WLR 1587). Following the defeat in the House of Lords, the claimant was ordered to pay the respondents' costs to be certified if not agreed. Following a hearing on 4 December 2009, Registrar Di Mambro and Master O'Hare handed down their decision on 15 January 2010 on 2 preliminary issues which arose during the detailed assessment of the costs to be paid by Mrs Pallikaropoulos and

concerned the application of Articles 10a and 15a of the EIA and IPPC Directives. The preliminary issues were identified as being:

a. Whether the Costs Officers assessing the costs of the litigation had any discretion to consider and implement the IPPC and EIA directives where the principle of costs had been settled; and

b. If so, whether in the particular circumstances of the case, the Costs Officers should implement the Directives.

34. On the first issue the Cost Officers held that compliance with the Directives was a relevant factor for them to take into account on the detailed assessment of costs to which those Directives applied unless the Court making the costs order had already taken them into account when making the order. Thus in deciding what costs it was reasonable for a party to pay it was appropriate to disallow any costs that the Costs Officers considered were "prohibitively expensive". In the absence of any authority on what was "prohibitively expensive", they adopted the test proposed in the Sullivan Report before saying:

> **That seems to us to require us to start by making an objective assessment of what costs are reasonable costs. However, any allowance or disallowance of costs we make must be made in the light of all the circumstances. We presently take the view that we should also have regard to the following:-**
>
> **i) The financial resources of both parties.**
>
> **ii) Their conduct in connection with the appeal.**
>
> **iii) The fact that the threat of an adverse costs order did not in fact prohibit the appeal.**
>
> **iv) The fact that a request to waive security money was refused and security was in fact provided.**
>
> **v) The amount raised and paid for the Appellant's own costs.**

35. The second issue concerned whether Mrs Pallikaropoulos was prevented by issue estoppel from relying on the Aarhus Convention given that she had raised the issue on two occasions in the House of Lords and on both occasions had had her arguments rejected. However, the Costs Officers took the view that in refusing to waive security and the PCO and in making the costs order against Mrs Pallikaropoulos, the House of Lords had not reached any decision on the implications of the Directives [23] – [25] & [27].

36. With the agreement of the parties the Costs Officers deferred any assessment of what costs Mrs Pallikaropoulos should reasonably pay taking account of the Aarhus Convention pending any appeal.

37. An appeal against the Cost Officers' decision was heard by the Supreme Court on 11 November 2010. In a judgment given by Lord Hope, handed down on 15th December 2010, the Supreme Court held that:

a. The cost officers' ruling that they had jurisdiction to implement the Directives should be set aside.

b. A reference should be made to the ECJ for a preliminary ruling to ascertain the correct test to be applied when determining whether the proceedings in question are 'prohibitively expensive'. (Precise terms of the reference are yet to be formulated).

c. The order for costs dated 18th July 2008 should be stayed pending the resolution of the reference to the ECJ.

38. The Supreme Court concluded that the proper function of the cost officers is to carry out the detailed assessment of costs and that the question of whether the review procedure is prohibitively expensive is a matter that should be addressed by the Court itself. In an appeal, an application for a protective costs order on the basis that without one the proceedings would be prohibitively expensive should be made when permission to appeal is being sought, or at the earliest opportunity thereafter. The refusal of a protective costs order at this stage does not prevent further consideration by the Court at the end of the proceedings. For example, the Court could set a limit on the paying party's liability.

39. The Supreme Court also found that there is no clear and simple answer to the question of which test should be applied in order to determine whether proceedings are prohibitively expensive. In particular, whether the test is a 'subjective' one, which looks to the means of the particular claimant (as was argued by the EA), or an 'objective' one, which looks to the ability of an 'ordinary' member of the public to meet the potential liability for costs (as argued by Mrs Pallikaropoulos). Whilst Lord Hope suggested that the balance appeared to lie in favour of an 'objective' test, he reasoned that this had yet to be finally determined. The Court also concluded that it was unclear whether a different approach is permissible at the second appeal from that which is required to be taken at first instance.

40. Therefore a reference will be made to the ECJ for a preliminary ruling on these issues under article 267 TFEU (ex article 234 EC). As a result of the Supreme Court's decision, it will be at least 18 months to 2 years before any definitive ruling is given by the ECJ.

Part 8 Summary and Conclusions

(A) Where are we now?

Categories of PCO cases

41. We would suggest that as the law stands today (and pending changes to the CPR which are said to be in pipeline), there are 3 categories of approach for PCOs in domestic law.

a. First, where the case is within article 10A of the EIA directive then the modifications to the Corner House principles set out by the Court of Appeal in Garner apply.

b. Secondly, in cases which are within the scope of Aarhus (but not within article 10A of the EIA directive) then the position is that Corner House applies subject only to the observation of Carnwath LJ in paragraph 47(iii) of Morgan that "The principles of the [Aarhus] Convention are at most a matter to which the court may have regard in exercising its discretion".

c. Thirdly, ordinary judicial review cases to which the Corner House principles apply.

(B) Where are we going?

Bigger changes on the horizon?

42. In the Jackson Report[12] on the funding of civil litigation, a proposal has been made for "qualified one-way costs shifting" to ensure that claimants are not put off bringing meritorious claims by the costs risks of doing so. He considered that that would ensure compliance with Aarhus Convention, as considered by the Sullivan Report.[13] These issues merit a seminar in themselves, but represent potentially significant changes to the future of costs rules in judicial review. The Government appears minded to at least partially accept Jackson's proposals[14] albeit that there are indications that the proposals will be watered down.

43. Expect more movement in this area in the coming months. In particular we note that we can expect developments through:

a. The Ministry of Justice consultations on cross-undertakings in damages in environmental judicial review claims[15] and the Jackson report.

b. Proposals to amend the CPR rules to codify PCO application process (as indicated in paragraph 168 of MofJ proposals on the implementation of the Jackson report. These rules changes are "expected to come into effect by April 2011".

(C) Key issues along the way

44. What remains to be seen is:-

a. Whether PCO will be workable in practice or simply a source of satellite litigation.

b. Whether the ECJ and Aarhus Compliance committee's will be satisfied with the various attempts to tin-

12 http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf
13 http://www.ukela.org/content/page/1017/Justice%20report.pdf
14 http://www.justice.gov.uk/consultations/jackson-review-151110.htm
15 http://www.justice.gov.uk/consultations/cross-undertaking-cp241110.htm

ker with the existing system to make it Aarhus compliant (and the speed of change).

c. Whether environmental justice will be hived off as a special category to which special rules apply or the Aarhus convention will be a catalyst for a wider reform of costs in judicial review cases.

d. If environment justice is a special category, where the boundary between environmental justice and land use planning will be drawn and if a perceptible boundary can be maintained.

e. How procedures for PCOs can be integrated into the procedure for statutory planning appeals and whether this may lead to the introduction of a permission stage in s.288 challenges (as advocated by Sullivan LJ in his report but for which amendments to primary legislation (rather than rule changes) would be necessary).

"PROHIBITIVELY": PROHIBITIF; НЕДОСТУПНО; ΑΠΑΓΟΡΕΥΤΙΚΟ; ÜBERMASSIG TEUER; ECCESSIVAMENTE ONEROSA; EXCESIVAMENTE ONEROSOS - MORE ON WHAT ARTICLE 9 OF THE AARHUS CONVENTION MIGHT MEAN

Richard Kimblin[1]

Protective costs orders and access to justice in environmental claims featured in both the October and November editions of e law[2]. Such is the flux and uncertainty associated with the costs jurisdiction, it is necessary to return to it to flag the judgements of the Supreme Court in R (on the application of Edwards and another) v Environment Agency and others [2010] UKSC 57 and CAT v DECC & Another [2010] EWHC 2312 and EWCA Civ 1494.

Edwards is an appeal against the decision of the Supreme Court costs masters to assess the successful respondents costs in a manner which was informed by Art 9 of the Aarhus Convention[3]. The claim originated in 2003 as a claim for judicial review of the Environment Agency's grant of a permit to burn waste tyres at the Rugby Cement works. By the time that the claim was heard by House of Lords[4], a protective costs order had already been refused by the judicial office of the House of Lords. The respondents obtained an order for their costs and lodged bills in the sums of £55,810 and £32,290[5]. The Supreme Court costs masters took the view that compliance with EU Directives is a relevant factor

1 Barrister, No5 Chambers: Chair, UKELA Environmental Litigation Working Party; rk@no5.com

2 *Richard Kimblin - Costs in Environmental Judicial Review - Significant Recent Developments on Aarhus. Issue 59, Oct 2010, p27, ; Thea Osmund-Smith Updates on Costs in Environmental Judicial Review Issue 60, Nov 2010, p 25*

3 The point at issue in Art 9 is the effect of the requirement that *Any such procedure shall be fair, equitable, timely and not prohibitively expensive.* The equivalent provision is found in the amended EIA directive as Art 10a, hence, in that regard is an EU obligation.

4 The case then being transferred from the House of Lords to the Supreme Court by operation of s40 Constitutional Reform Act 2005

5 Being the costs bills lodged by the Environment Agency and DEFRA respectively

to take into account on the detailed assessment of costs. They considered that they should disallow any costs which they considered to be 'prohibitively expensive'.

The respondents appealed the costs masters' decision to the Supreme Court. In the interim, the Court of Appeal gave judgment in R (Garner) v Elmbridge Borough Council [2010] EWCA Civ 1006. In Edwards, Lord Hope took account of that important judgement in this way[6]:

> Sullivan LJ observed that in an ideal world he would have preferred to defer taking a decision on such an important issue of principle until after the findings of the Aarhus Convention Compliance Committee as to whether our domestic costs rules are Aarhus compliant, and until after it was known whether the European Commission will accept or reject the United Kingdom's response to the Commission's reasoned opinion, announced in a press release dated 18 March 2010, in which the Commission was contending that the United Kingdom is failing to comply with the EIA Directive because challenges to the legality of environmental decisions are prohibitively expensive: para 43. But as the court had to reach a decision as to whether the judge was wrong to refuse to grant a protective costs order, he went on to say this in para 46:
>
> > "Whether or not the proper approach to the 'not prohibitively expensive' requirement under article 10a should be a wholly objective one, I am satisfied that a purely subjective approach, as was applied by Nicol J, is not consistent with the objectives underlying the directive. Even if it is either permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of 'the public concerned'."
>
> The importance that is to be attached to Sullivan LJ's observations in R
>
> (Garner) v Elmbridge Borough Council gathers strength when they are viewed in the light of the proposal in para 4.5 of Chapter 30 of the Jackson Review of Civil Litigation Costs (December 2009) as to environmental judicial review cases that the costs ordered against the claimant should not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, and the entirely different proposal in para 30 of the Update Report of the Sullivan Working Group (August 2010) that an unsuccessful claimant in a claim for judicial review should not be ordered to pay the costs of any other party other than where the claimant has acted unreasonably in bringing or conducting the proceedings. They have to be viewed too in the light of the conclusion of the Aarhus Convention Compliance Committee which was communicated by letter dated 18 October 2010that, in legal proceedings in the UK within the scope of article 9 of the Convention, the public interest nature of the environmental claims under consideration does not seem to have been given sufficient consideration in the apportioning of costs by the courts and that despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements of the Convention: see paras 134-135. It is clear that the test which the court must apply to ensure that the proceedings are not prohibitively expensive remains in a state of uncertainty. The balance seems to lie in favour of the objective approach, but this has yet to be finally determined.(emphasis added).

6 Paras 30 and 31 of the judgment

The Court was, therefore, mindful of the findings of both the Working Group and the Aarhus Convention Compliance Committee in deciding to refer the issues to the ECJ for a preliminary ruling under article 267 TFEU.

The Supreme Court was of the view that a protective costs order does not preclude further consideration of the matter by the Court at the end of the proceedings, relying on the authenticated translations[7]:

> The Aarhus Convention has been authenticated in three languages: English, French and Russian. The English word "prohibitively" in the English version of article 9 suggests that the question is for consideration at the outset, as the act of prohibiting must always anticipate what is prohibited. The French language version uses the word prohibitif. The Russian text uses the word недоступно, indicating that the costs must not be inaccessibly high. The words "prohibitively" and "prohibitif" are carried forward into the English and French language versions of the EU directives and the adjective απαγορευτικό in the Greek version carries the same meaning. But the words used in the translations of the directives into German (übermassig teuer), Italian (eccessivamente onerosa) and Spanish (excesivamente onerosos) indicate that, so far as the directives are concerned, the question of expense is not exclusively for consideration at the outset.

So, one draws from the judgment a further indication of the difficulties which the costs rules in environmental litigation cause for all parties, and the courts. Lord Hope summarised the position succinctly: it is clear that application of the 'prohibitively expensive test' is in a state of uncertainty.

An illustration of that 'clear uncertainty' is R (oao) CAT v DECC. On the papers, Beatson J refused a PCO without the benefit of Sullivan LJ's decision in Garner and observed that CAT, a residents' group opposing two biomass power stations, had supplied insufficient evidence of its means. The PCO application was renewed on the principal basis that an objective and not a subjective approach should be taken, per Garner in the Court of Appeal. Wyn Williams J refused a PCO and on appeal from that decision, Carnwath LJ ordered that permission to appeal be heard on notice. He summarised the background thus:

> CAT are concerned by the implications of these various plants for the use of natural resources and for their effects on CO2 levels. Mr Cammish, who is the chairman of their association, in his statement before the judge talks about the "huge quantities of biomass in the form of wood" required by biomass power stations. He speaks graphically of:
>
> "...total deforestation of Wales in seven years with a regrowth life cycle of 40 to 70 years".
>
> Those issues are not of course before me, but I apprehend were the subject of evidence and debate at the Kings Dock inquiry. The complaint is that they were not taken into account or grappled with by the Secretary of State in connection with the Avonmouth decision. There is a passage in the decision letter (paragraph 8.4ff), where the Secretary of State explains why he does not think it necessary, at least in connection with that decision, to go into the matter. He notes that the Government is reviewing what actions it can take to introduce sustainability standards for biomass in the light of a recent report of the European Commission. The letter concludes (para 8.6):

7 Para 24

> "In view of the above, the Secretary of State is satisfied that further information on the sustainability of biomass fuel to be used in the operation of a generating station is not required before determining the application. He is content that what is proposed by the Company is in line with current government policy and that mechanisms beyond the planning system would ensure the station is operating in a way that conforms with any new Government policy in this area. The Secretary of State therefore considers biomass sustainability is not a ground for refusing consent and has decided that it would not be appropriate to include conditions limiting the use of biomass to certain biomass certification schemes."

CAT's concern is that this will be treated as in effect a statement of policy by the responsible Secretary of State, who is responsible for energy policy in both England and Wales, and that it would be taken into account as a very material - possibly conclusive - factor in the consideration by planning inspectors at the inquiries with which they are directly concerned. They do not claim to be directly concerned with the impact of the Avonmouth plant itself.

Wyn-Williams J had held that a limited company with 25 members could afford a costs liablity of £70,000 and further that CAT had did not have a sufficient interest in the Avonmouth decision. He accepted that CAT had a further remedy in that any adverse decision in the Kings Dock inquiry could be subject to challenge under s288 Town and Country Planning Act 1990 and that the costs of re-running the inquiry would not make such an alternative illusiory. Carnwath LJ held that Wyn-Williams J's refusal of a PCO was a matter of judicial discretion and declined to interfere with it.

The objective/subjective question does require clarification. Until clarified, the courts remain in difficulty in dealing with costs issues in EIA and other environmental cases. The standing issue will also continue to evolve in respect of groups which take an interest in environmental issues but do not fall clearly into a classification of 'NGO'. In CAT the court of appeal was invited to apply Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd (15th October 2009; Case C-263-08) in which the ECJ had to address an issue of standing under-Article 10A of the EIA Directive[8]. It will be interesting to see what approach is taken domestically, both as to costs and substantively, to cases in which the claimant took no part in the decision making process but takes a valid point, subsequently, as to the lawfulness of the decision.

8 At paragraph 39 the ECJ held: "*Accordingly, the answer to the second question is that the members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.*"

Further News

Invitation from Ibex Earth - Join the Adventure of a Lifetime and help save Arthur Conan Doyle's 'Lost World'

The Lost World Project is a not-for-profit conservation initiative that looks to safeguard the long-term future of Mount Roraima, which is the South American plateau that inspired Sir Arthur Conan Doyle to write his famous adventure novel 'The Lost World' and has most recently been the major influence behind Disney Pixar's animated blockbuster 'UP'. Sadly Mount Roraima is now under threat from unregulated/unsustainable tourism, illegal goldmining and the introduction of non-endemic species of flora and fauna. The Lost World Project looks to raise funds to address these issues via the making of a broadcast quality documentary, which will be premiered at the Royal Geographical Society on 30th June 2010 and then on national television in late 2011/early 2012.

The filming aspect of The Lost World Project was completed last Autumn when Ibex Earth sent a critically acclaimed film crew to Mount Roraima to shoot the spectacular scenery and wildlife. The project has already donated US $11,000 to the conservation effort of Mount Roraima and has seen in excess of US $4,000 given to local tour guides and porters. This aspect of the project has already won a number of awards, including the 2010 Captain Scott 'Spirit of Adventure' Award and has also been endorsed by both the Royal Geographical Society and the Zoological Society of London. Some footage taken during the expedition featured on BBC 2's 'Decade of Discovery', which aired on 14th December 2010.

In April 2011 Ibex Earth is going back to Mount Roraima and are looking for ten people to complete the expedition team. The expedition will be led by the 'star' of BBC 2's 'Decade of Discovery, Stewart McPherson who is the world's leading expert on Mount Roraiama. It is a once in a lifetime opportunity to see one of the world's most spectacular natural wonders and a copy of the itinerary can be found on the following link.

If you would like any additional information about the project please email chris.livemore@ibexearth.com

Students

We're delighted that Kathleen Wainwright has joined Claire Collis as a student advisor to UKELA's Council. Kathleen is currently studying on the GDL in London, having graduated from UCL with a MA in English last year.

If you are thinking of entering one of UKELA's student competitions **NOW IS THE TIME**. Deadlines for both the Andrew Lees Prize and the Moots are at the end of January. So delay no longer, get writing.

Please join us for our student competitions' day on March 30th at UCL. In the morning there will be the finals of the Andrew Lees Prize with the Moot semi-finals and finals in the afternoon. It's a great opportunity to learn more about Environmental Law, mooting and meet both fellow students, academics and practitioners. If you would like to attend please email Alison Boyd - alisonboyd.ukela@ntlbusiness.com.

The details for the competitions are included in this edition of e-law at the end.

You can read more about our events programme on our events webpage.
These are just a couple of our forthcoming events. We've also include the conference programme with the latest updates on speakers.

UKELA London Meeting

Protecting the Deep Sea Environment: Science, Law and Policy
Wednesday February 9th 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 the protection of the deep sea environment in areas beyond national jurisdiction.

The speakers will cover different aspects of this topical subject. **Dr David Billett** will explain why it is necessary to protect the deep sea environment. **Daniel Owen** will summarise the legal framework that enables and requires environmental protection in areas beyond national jurisdiction. **Professor David Johnson** and **Dr Luisa Rodriguez Lucas** will describe some recent relevant initiatives of the OSPAR Commission (www.ospar.org) including the recent establishment by OSPAR of Marine Protected Areas Beyond National Jurisdiction in the north-east Atlantic.

Speakers:

Dr David Billett - National Oceanography Centre

Dr David Billett is a biologist with over 34 years experience of working in the deep-sea environment. He has a particular interest in the potential effects of climate change on the deep-sea environment and distinguishing between natural and man-made change. His current projects include Hotspot Ecosystem Research and Man's Impacts on European Seas (HERMIONE), Ecosystems of the Mid-Atlantic Ridge (ECOMAR), and climate change on the deep-sea floor (Oceans 2025).

Professor David Johnson and Dr Luisa Rodriguez Lucas – OSPAR Commission

Professor David Johnson is Executive Secretary to the OSPAR Commission based in London. His career has included work in practical conservation, environmental consultancy, and higher education as well as intergovernmental marine environmental protection. During his time with OSPAR, David has helped refocus the work of the Commission, through production of the Quality Status Report 2010, taking into account the EC Marine Strategy Framework Directive, climate change impacts and the challenge of Marine Protected Areas.

Dr Luisa Rodriguez Lucas is a Deputy Secretary of the OSPAR Commission. During her time at the Commission, she has been involved in the negotiations which led to the establishment of the world's first network of Marine Protected Areas. In previous roles she has provided advice on the implementation of the OSPAR Convention.

Daniel Owen – Fenners Chambers

Daniel Owen is a barrister at Fenners Chambers in Cambridge. For the past ten years he has specialised in UK, EU and international law regulating the use of the marine environment. His practice covers both environmental protection and the conduct of marine activities more generally. Over the years, Daniel has advised clients on the legal aspects of many sea uses – whether static, like offshore windfarms, or mobile, like many fishing activities. Daniel's new book on the EU's common fisheries policy, co-authored with Robin Churchill, was published by

Oxford University Press in March 2010.

The Meeting will be chaired by **Mothiur Rahman of Bircham Dyson Bell LLP.**

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 the 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 payment has been received. If you book but don't let us know you can't attend before the event we will chase you for payment as every booking incurs costs.

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)

Our Environmental Challenges and how the Coalition Government plans to address them

An evening discussion for UKELA members with the Parliamentary Under-Secretary in DEFRA, Lord Henley, chaired by Lord Justice Carnwath

Date: Tuesday 15 February 2011
Time: 5.30pm registration for 6pm start. Drinks and nibbles to follow. Event ends by 8pm

Lord Henley is the Parliamentary Under-Secretary of State at DEFRA with a wide environmental brief of great relevance to the interests of UKELA members. He has kindly agreed to speak to us and answer questions on a range of topics. This seminar follows on from our event last September where a range of speakers set out what they see as their challenges for the new Government.

Lord Henley's brief includes: environmental regulation; air quality; local environmental quality, including noise; GMOs and nanotechnology; chemicals and pesticides (inc CBRN); Local and regional government; Localism and third sector; climate change adaptation; climate change mitigation and overall carbon budgets lead; Sustainable Development; sustainable consumption and production; biofuels; welfare of wild animals; waste and recycling; global monitoring of environmental security.

Lord Henley was called to the Bar in 1977, when he also entered the Lords. He has served on the front benches under Margaret Thatcher and John Major and in Opposition.

UKELA is grateful to Stephenson Harwood for hosting this event. All places must be booked and the fee for attending is £15. This event is only open to UKELA members and there are limited free student places (subject to a £5 booking deposit which will be returned at registration). Please click here to book. We encourage you to book quickly as spaces are limited. You will be able to table a question in advance with your booking, but the chair has the final say over which questions are asked.

UKELA Annual Conference – programme latest

Annual Conference University of East Anglia, Norwich
Friday 24th – Sunday 26th June 2011

"Sustainable Development in an Age of Austerity"

Friday 24th June

5.30pm **Welcome by**: Peter Kellett, UKELA's Chair

Chair: Lord Justice Carnwath, UKELA's President

Speaker: Prof Tim O'Riordan, University of East Anglia, on the theme of sustainable development in an age of austerity

Followed by welcome reception and dinner

After dinner: Quiz run by Stephen Tromans QC
Or
Meeting for working party convenors

Saturday 25th June

Morning session

Localism and Impacts on Regulation

Speakers:
What does Localism (and the budgetary environment) mean for Regulation? - Prof Robert Lee, Cardiff University

Aarhus access to Justice & Civil Sanctions update - James Maurici, Landmark Chambers

Contaminated Land - Andrew Wiseman, Stephenson Harwood

Decision Making and Climate Change in an Age of Austerity

Speakers:
Green Investment Bank, Carbon Targets and the Challenge for Financing (TBC)

How global trends will force governments to radically change the way they regulate in the 21st century - Terry A'Hearn, WSP

Balancing Biodiversity – Kate Cook, Matrix Chambers

Lunch and Optional Working Party Sessions Round 1

Afternoon tours:

UKELA Meetings

Blue Badge walking tour of Norwich City
Lotus Car Factory Tour
Broads and Walking Tour of Whitlingham Country Park

Evening: **Drinks Reception** in the Refectory, Norwich Cathedral

Gala Dinner – Marquee, Norwich Cathedral Close with guest speaker TBC and raffle

Sunday 26th June
Morning session:

Working Party Sessions Round 2
AGM

The Year's Hottest Cases Reviewed

Update from: Stephen Hockman QC, Garrett Byrne, John Pugh-Smith, Ned Westaway

Packed lunch and close

7 CPD points to be confirmed

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Jobs

INTERN REQUIRED

The Environmental Regulation and Information Centre (Eric) Ltd www.eric-group.co.uk is looking for a French-English bilingual intern to carry out occasional translations from English into French. The translations will pertain to work we do for UNEP on the Convention of Migratory Species, so an interest and understanding of international environmental law and institutions is desirable.

To apply please email begonia@eric-group.co.uk.

Student Competitions 2010/2011 - Rules

THE MOOTS - RULES

Deadline January 31st 2011

1. The United Kingdom Environmental Law Association is pleased to announce the opening of entries for the 2011 Mooting Competitions.

2. Further information about UKELA may be found at www.ukela.org.uk.

3. There are two mooting competitions:

   a. The Lord Slynn of Hadley Mooting Trophy Competition (the senior competition) is open to all those who as of 31st October 2010 are in pupillage, a trainee solicitor, on the bar vocational course or legal practice course, or who are on taking the CPE. In essence this competition is for those on vocational courses

   b. The UKELA Student Prize Moot (the junior competition) is open to those who as of 31st October 2010 do not qualify for the Lord Slynn Trophy Competition but who are studying for a degree (including graduate degrees, e.g. LLM's or non law degrees). In essence this competition is for those who are students not yet on vocational courses.

4. Teams consist of two members. An institution may enter more than one team. Teams may comprise of competitors from different institutions.

5. Each team should submit two skeleton arguments, one on behalf of Nimby Ltd (the Appellant) and one on behalf of the Secretary of State (Respondent). No more than four authorities may be cited in each skeleton in addition to those referred to in the Moot problem. Each skeleton argument should be no more than six pages of A4 paper. The font should be Times New Roman, size 12, with 1.5 line spacing. Paragraphs and pages should be numbered. The skeleton arguments should not include any contact name or name of an institute to which you belong. The purpose of this rule is to ensure that judges can assess the skeletons without associating the skeleton with a particular person or institution.

6. A copy of the skeleton argument and the student competitons entry form sheet (available on ww.ukela.org) should be forwarded by email to Alison Boyd <alisonboyd.ukela@ntlbusiness.com> no later than 4pm on Monday 31st January 2011.

7. The semi-finalists will be selected on the basis of the skeleton arguments. All competitors will be notified of the outcome. The semi-finals and finals will be held in London on a single date in March 2011.

8. The Master of the Moot reserves the right to change the rules of the competition without notice as he thinks fit and his decision is final.

9. The winners of both competitions will receive a cash prize from No5 Chambers, memberships of UKELA and an annual subscription to Environmental Law and Management. The winners of the Senior competition will receive the Lord Slynn of Hadley Mooting Trophy and the Junior competition winners will receive the Junior Trophy.

UKELA is grateful to the sponsors of the moot.

Richard Kimblin
Master of the Moots
No5 Chambers
76 Shoe Lane
London
EC4A 3JB
(DX449 Chancery Lane)

rk@no5.com

Moot Problem

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

NIMBY

Appellant

-and-

THE COUNCIL

Respondent

APPROVED JUDGMENT

---

1. The facts of this case are simple, but, like snails in bottles of ginger beer, its resolution raises important issues of law.

2. Nimby lives in Small Town. Some 30 m from Nimby's house on Quiet Street, there is a factory. It manufactured furniture. There was no history of complaint in respect of that industrial use. In the autumn of 2009 an application was made to the Council to change the use of the factory to a composting site for the treatment of organic wastes.

3. The Council decided that the proposal was not one which required an environmental impact assessment. It is common ground that this was an error on the Council's part. The Council did advertise the planning application, but did not notify Nimby as they ought to have done in accordance with the relevant Order under the planning Acts. In any event, the Council received no objections to the proposal and granted permission on 24 December 2009.

4. Nothing happened until 1 May 2010 when the use of the site for composting commenced. Nimby noticed this immediately because of the traffic, the noise, the smell and the flies from the composting activity. Nimby raised the matter with the operator and the Council and was shocked to learn that planning permission had been granted. She knew nothing about the application, nor the grant of permission until the site commenced operations.

5. After consulting a very helpful web-site about 'law and your environment', she very quickly realised that

her only option was to apply for judicial review of the grant of planning permission. This she did on 29 July 2010, almost three months after she knew that planning permission had been granted without an EIA.

6. It is apparent from the evidence filed in this case that the operator of the composting plant has invested some £6M in the site and that the site is crucial to the Council's obligations in meeting targets for the recycling of wastes.

7. The Council raised the issue of delay in opposing the grant of any relief in this case.

8. The judge granted permission to apply for judicial review but refused any relief on the basis that the claim had not been made promptly. She now appeals to this court.

9. The reference to 'promptly' is to CPR r.54.5(1) , which governs claims for judicial review. It provides:

> "The claim form must be filed –
>
> (a) promptly; and
>
> (b) in any event, not later than 3 months after the grounds to make the claim first arose."

10. As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in para.(a) and (b) of that rule are separate and independent of each other, and it is not to be assumed that filing within three months necessarily amounts to filing promptly: see R. v Independent Television Commission Ex p. TV Northern Ireland Ltd [1996] J.R. 60, [1991] T.L.R. 606 and R. v Cotswold DC Ex p. Barrington Parish Council [1998] 75 P. & C.R. 515 . The need for a claimant seeking judicial review to act promptly arises in part from the fact that a public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker. For example in Hardy v Pembrokeshire CC (Permission to appeal) [2006] EWCA Civ 240 at [10] it was held:

> "It is important that those parties, and indeed the public generally, should be able to proceed on the basis that the decision is valid and can be relied on, and that they can plan their lives and make personal and business decisions accordingly."

11. In that same case this court rejected a submission that the requirement in CPR r.54.5(1) for an application for judicial review to be made "promptly" offended against the principle of "legal certainty" in European law.

12. The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission. In R. v Exeter City Council Ex p. JL Thomas & Co Ltd [1991] 1 Q.B. 471 at 484G, Simon Brown J. (as he then was) emphasised the need to proceed "with greatest possible celerity", as he did also in R. v Swale BC Ex p. Royal Society for the Protection of Birds [1991] 1 P.L.R. 6 . Once a planning permission has been granted, a developer is entitled to proceed to carry out the development and since there are time limits on the validity of a permission they will normally wish to proceed to implement it without delay. In the Exeter case, Simon Brown J. referred to the fact that a statutory challenge under what is now s.288 of the Town and Country Planning Act 1990 to a ministerial decision must be brought within six weeks of the decision. Thus if a planning permission is granted by the Secretary of State on an

appeal or a called-in application, the objector seeking to question the validity of that decision must act within six weeks, without there being any power in the court to extend that period of time.

13. That factor led Laws J. (as he then was) to conclude in R. v Ceredigion CC Ex p. McKeown [1997] C.O.D. 463, [1998] 2 P.L.R. 1 that it was nearly impossible to conceive of a case in which leave to move for judicial review would be granted to attack a planning permission when the application was lodged more than six weeks after the planning permission had been granted. That was perhaps a somewhat extreme statement of the position, and certainly it was rejected by the House of Lords in R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1) [2002] UKHL 23, [2002] 1 W.L.R. 1593 , where Lord Steyn (with whom the rest of the Appellate Committee generally agreed) said at [53] that from the McKeown case

> "the inference has sometimes been drawn that the three months limit has by judicial decision been replaced by a 'six weeks rule'. This is a misconception. The legislative three months limit cannot be contracted by a judicial policy decision."

14. I would respectfully agree that, where the CPR has expressly provided for a three-month time limit, the courts cannot adopt a policy that in judicial review challenges to the grant of a planning permission a time limit of six weeks will in practice apply. However, that does not seem to me to rob the point made by Simon Brown J. and others of all of its force. It may often be of some relevance, when a court is applying the separate test of promptness, that Parliament has prescribed a six-weeks time limit in cases where the permission is granted by the Secretary of State rather than by a local planning authority, if only because it indicates a recognition by Parliament of the necessity of bringing challenges to planning permissions quickly. There are differences between the two situations: for example, where the Secretary of State grants a permission, an objector is entitled to be notified of the decision, which is not the case where a local planning authority grants the permission. Thus where in the latter case an objector is for some time unaware of the local authority decision, the analogy is less applicable.

15. Against these considerations, we have had our attention drawn to recent authority of the ECJ. In summary where breach of European law is in issue, time runs from the date on which the Claimant knew or ought to have known of the breach (Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08)). In Sita UK Ltd v Greater Manchester Waste Disposal Authority [2010] EWHC 680 Ch, the court held that the appropriate course was to extend time to three months from the date of knowledge of the breach.

16. I am grateful for the careful researches of Counsel amongst the Scottish cases. In succinct and tempting arguments it was suggested that the more flexible approach which is found the plea in bar, Mora, is to be preferred: Inner House in Somerville v Scottish Minister [2007] SC 140; United Coop Ltd v National Appeal Panel for Entry to the Pharmaceutical Lists [2007] SLT 831.

17. For my part I would hold that the Claimant (now Appellant)has applied within three months of her knowledge of the breach, but has not acted promptly. No good reason has been advanced to explain what is almost three months of delay. I appreciate that there is a need for some certainty in these matters, but I do not think that there is a need to make a fetish of it. I consider that the court retains a discretion even where issues of European law are in play. Tempting though the Scottish approach is, such a change is for others to consider.

18. I dismiss the appeal but certify two questions of public importance upon which I would encourage Nimby

to pursue in the Supreme Court:

(i) Is it lawful to refuse relief on the basis that the Claimant has not acted promptly in respect of a breach of European law, albeit that the claim was brought within 3 months?;

(ii) Is it lawful to refuse relief on the basis that the Claimant has not acted promptly in respect of a breach of domestic law, albeit that the claim was brought within 3 months?

ANDREW LEES PRIZE

Deadline January 31st 2011

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

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

A shortlist of no more than four entries will be invited to present their paper to a panel of judges in London in March. The presentation may be accompanied by AV or other material and will take no more than 15 minutes. It will subject to Q&A from the audience invited from UKELA's membership and entrants' supporters.

- The winner will receive a free place (including travel expenses from within the UK) to the 2010 UKELA conference which is being held at Norwich University on June 24th - 26th.

The winner will also have their article published in UKELA's journal e-law.

The title of the article is:

Is access to justice under Art 9 Aarhus Convention a necessity or a luxury the UK cannot afford?

All articles should be typed in 12pt script and 1.5 line spacing. The number of words should appear at the end of the article. The word count should relate only to the text of the article and does not include the title. However, if the article text exceeds 1000 words your entry will be disqualified. The judges have been appointed by UKELA Council and their decision on all matters relating to the competition is final.

Please do not put your name or institution on your essay - your contact details should go on the sheet which is provided for that purpose. **Your essay and the entry form** should be forwarded by email to Alison Boyd <alisonboyd.ukela@ntlbusiness.com> no later than 4pm on Monday 31st January 2011.

THE UKELA SIMON BALL ACADEMIC PRIZE FOR OUTSTANDING STUDENT ACHIEVEMENT SPONSORED BY OUP

Deadline: April 29th 2011

Simon Ball

Simon Ball taught law at Sheffield University from 1979 until his death, aged 39, in 1996. He was a founder member of UKELA and actively involved in the Association. Simon was one of the first to teach environmental law as a subject and in 1991, with Stuart Bell, authored one of the first texts on Environmental Law. He was very highly regarded as a teacher, and his textbook writing set the standard for work that was both academically rigorous and considered but

also accessible to students.

The UKELA Simon Ball Prize was first awarded in 2010 and will be awarded annually to recognise and celebrate student achievement in the field of environmental law.

The award is open to undergraduate and postgraduate students at a UK higher education institution from any academic discipline so long as the basis of the contribution has relevance to the advancement of environmental law or otherwise to the charitable objects of UKELA. The basis of the award is not limited to academic achievement and may extend to any achievement attained by, or contribution made by, the student.

Criteria and Rules

1. The UKELA Simon Ball Prize for Student Achievement (the Prize) is awarded annually to recognise and celebrate student achievement in the field of environmental law. The winning entry will receive £250 of books from OUP and a subscription to the Journal of Environmental Law. The winner (if a group entry a maximum of four memberships will be available) will also be offered free UKELA student membership for one year (current members qualify for the following year free provided they are still students).

2. The Prize is open to undergraduate and postgraduate students (the student) at a UK higher education institution from any academic discipline so long as the basis of the achievement or contribution has relevance to the advancement of environmental law or otherwise to the charitable objects of UKELA (see below).

3. Joint nominations may be made (in which case, student includes the plural).

4. Academic achievement may be demonstrated on the basis of work submitted as part of a degree programme or to any other demonstrable achievement.

5. The basis of the Prize is not limited to academic achievement and may extend to any achievement attained by, or contribution made by, the student. This may include, but is not limited to, charitable work, university or community involvement, clinical legal education or support or the like where the contribution has relevance to the advancement of environmental law or otherwise to the charitable objects of UKELA (see below).

6. Achievement in any other UKELA competition may not form the basis of any nomination.

7. Up to four nominees will be chosen on the basis of submissions made on their behalf by a teacher at their institution. Students may be nominated in more than one year.

8. Submissions should not exceed 500 words and should identify clearly the achievement or contribution made by the student. A form will be available at www.ukela.org to accompany submissions.

9. Submissions should be sent to Alison Boyd (alisonboyd.ukela@ntlbusiness.com) and received no later than **April 29th 2011**.

10. Where appropriate, submissions should be accompanied by any relevant supporting material (e.g. a copy of an essay or dissertation which should be made available electronically).

11. The winner will be chosen by the judges, whose decision is final and will be announced by May 31st 2011.

12. The competition will be reported in UKELA's journal, e-law, and on the UKELA website, and the winner will be asked to provide a photo for this purpose.

Entry Forms

You will need an entry form for all the competitions this year – please visit http://www.ukela.org/rte.asp?id=20 for further information.

The Centre of European Law - 35th Annual Lecture

Who has the last word? National and Transnational Courts - Conflict and Cooperation

Speaker- Professor Gertrude Lübbe-Wolff, Judge at the Bundesverfassungsgericht (Federal Constitutional Court), Karlsruhe ;Professor Sir Francis Jacobs QC in the Chair

18.30-19.30 on Wednesday 2 February 2011
Great Hall, Strand Campus, King's College London

The lecture will be followed by a drinks reception

Free of charge, all welcome, CPD accredited. To reserve your place please register online or contact Andrea Cordwell James, Centre of European Law, King's College London, Strand, London, WC2R 2LS, UK tel +44 (0) 20 7848 1768 fax +44 (0) 20 7848 2443 email andrea.cordwell_james@kcl.ac.uk
Centre website www.kcl.ac.uk/cel

The Castle Debates 2011

UKELA members may be interested in a new series of debates to be held in London starting early in 2011. The purpose of the Castle Debates on 'Environmental Aspects: science, law and policy' is to be factual and objective with three experts to address the scientific, legal and policy aspects of specific topics. The debates are being organised in association with the Law Society and Sykes Environmental. The dates and topics are below. The debates are free to attend, start at 8.45am and finish at 10.15am. More details and booking information can be found here http://services.lawsociety.org.uk/events/event/53099/events_multi_results

15th February, Athenaeum Club, The future for Renewable Energy and Heat
Science: Matthew Spencer, Director, Green Alliance
Law: Robert Lane CBE, Energy Partner, CMS CameronMcKenna
Policy: Andrej Miller, Policy Manager, Renewable Heat Incentive Team, DECC

29th March, Law Society, Sustainable Buildings
Science: Jon Lovell, Director, Head of Sustainability, Drivers Jonas Deloitte
Law: Professor Bob Lee, Cardiff University
Policy: Andrew Stunell MP, Parliamentary under Secretary of State, CLG

19th April, Athenaeum Club, UK Water Security
Science: Professor Alan Jenkins, Director, Centre for Ecology and Hydrology
Law: Professor Stuart Bell, University of York
Policy: John Bourne, Deputy Director, Water Availability and Quality Programme, DEFRA

24th May, Law Society, Sustainable Transport
Science: Professor Julia King CBE, Vice-Chancellor, Aston University
Law: Robert McCracken QC
Policy: Norman Baker MP, Parliamentary Under Secretary of State, DfT

21st June, Athenaeum Club, Farming and food security
Science: Professor Tim Lang, Centre for Food Policy, City University, London
Law: Stephen Tromans QC
Policy: James Paice MP, Minister of State, DEFRA (to be confirmed)

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

Any memberships not renewed by the beginning of April 2011will lapse. Don't miss out on all the benefits of membership by not acting now. Many thanks to all those who have renewed already - your continued support of UKELA is much appreciated. Contact alisonboyd.ukela@ntlbusiness.com if you need further assistance.

E - LAW

The editorial team wants articles, news and views from you for the next edition due to go out in March 2011. All contributions should be dispatched to **Catherine Davey** as soon as possible by email at:
catherine.davey@stevens-bolton.co.uk by **7 March 2011**
Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.
Letters to the editor will be published, space permitting
