e-law

UKELA Making the law work for a better environment

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Editorial

Welcome to the latest edition of e-law and an update on UKELA news and events.

We are very excited as we make final preparations for our very first UK wide link up on 1st December when we beam the Garner lecture to the regions. David Kennedy (the CEO of the Climate Change Committee), has been in the spotlight for holding the Government to account over its carbon emission commitments. The Committee's fourth carbon budget, putting the UK on target for 60% cuts by 2030, almost caused a rift in the cabinet and sparked a national debate about how we meet the targets without compromising economic goals. You will be able to ask the man in the hot seat your questions on 1st December. Do join in – in person in London or by video link – and make this a night to remember! You can book here.

For students we have now opened our competitions – the moots, the Andrew Lees article prize, the Simon Ball prize for outstanding academic achievement and the bursary. Don't miss the deadlines as there are even better prizes this year (including work placements at No5 Chambers) and the chance to show off your skills at the Competitions Day in March!

Thanks as ever to our contributors, this edition we have a report from Carol Day at WWF and an article on the ongoing media storm over the NPPF from William Upton.

Richard Kimblin (UKELA vice-chair) is looking forward to meeting the environmental lawyers and consultants of the future at next week's students careers evening. It's usually a busy but fun evening.

I hope to see you all at the Garner lecture. In the meantime let me be amongst the first to wish you all a merry Christmas and a peaceful New Year.

Best wishes

Catherine Davey, Editor

In this issue

Membership News

Your membership renewal for 2012 is coming your way at the beginning of December. Please look out for the email arriving in your inbox and take a moment to renew to make sure you don't miss out on news, offers and membership benefits in 2012. Membership subscriptions have been frozen at 2011 levels for 2012 meaning we continue to offer fantastic value for money.

Member Reward Scheme

Do you know someone who is thinking of joining UKELA? If you recruit them then both of you will pay a discounted rate for your 2012 membership (9 months for the price of 12). More details are on our website here: http://www.ukela.org/rte.asp?id=44

Calling all Graduates!

Have you recently graduated and become a pupil or other trainee? Your annual subscription is now just £15, in line with the student fee, saving you £18 on the current rate. Look out for details when renewing for 2012 and please pass on this good news to your friends and colleagues.

Direct Debit

Have you considered paying your annual subscription by direct debit? It's quick and easy to set up and means you won't have to worry about whether you have renewed your membership in future years as we take care of everything for you. Paying by direct debit also helps us to save money on administration meaning that we can keep subscription rates as low as possible. Look out for information about how to pay this way with your renewal.

News

UKELA Conference 2011 – hot topics session – call for barristers to present

The UKELA conference (July 6-8th at Solent University) has a hot cases slot on the Sunday morning, which is presented by three barristers. If you're interested in being one of the presenters please send an expression of interest to the e-law editor, Cate Davey Catherine.Davey@stevens-bolton.com. The final decision of who does the presentations is made by the conference organising committee.

All speakers receive a free place at the conference and reasonable travel expenses.

Review of Environmental Law – the members' voice

A big thank you to all those who contributed to the consultation on our project: "The State of UK Environmental Legislation in 2011: Is there a case for reform?". This project is being co-ordinated by UKELA and Kings College London and now BRASS at Cardiff University is on board, helping out with additional research to get the views of industry.

Our thanks also go to Jemma Braid, our intern who helped gather and analyse the views of UKELA members.

If you have industry clients or contacts who might have a useful view to express please contact Alison Boyd, who is assembling a database of people we can talk to: alisonboyd.ukela@ntlbusiness.com.

If all goes according to plan the final report from this phase of the project will be launched next May and all the materials will be available to UKELA members online. This will include the analysis of the consultation with UKELA members and the key findings and recommendations to emerge from this major piece of work.

Brussels: Climate Change Conference

A Conference took place in Brussels on 27th October 2011 organised by the Flemish Bar and entitled 'Will national climate change legislation cool down global warming?' Stephen Hockman QC, Head of Six Pump Court Chambers, and a joint convenor of the Climate Change and Energy Working Party, spoke on behalf of UKELA on 'How to deal with enforcement issues'. The other UK representative Valerie Fogleman, Consultant at Stevens & Bolton LLP, and Professor of Law at Cardiff University, gave a presentation on 'UK and US climate change developments'. Their presentations, along with other speakers from the EU, can be located at the following: http://www.omgevingsrecht.be/climate_congress_20111027/.

UKELA 2011-2012 student competitions – now open

If you're not a student but might know students, trainees or pupils who might be interested please pass this on.

The moots: test your mooting skills in either our student moot (for those on undergraduate or postgraduate degrees or taking the GDL) or the senior moot (for those on vocational courses or those in pupillage or traineeship). Great prizes including cash and a one week pupillage (students) or one month internship (seniors) at No 5 Chambers. Final in London before Lord Justice Carnwath, UKELA's President and the Senior President of Tribunals in England and Wales.

The Andrew Lees prize: write a 1,000 word article: "Is Sustainable Development a key feature of UK Environmental Law?" and get the chance to present your work at the final in London. Win a free place at the UKELA conference in Southampton (July 2012).

The Simon Ball prize for Outstanding Academic Achievement: if your contribution to Environmental Law is outstanding at the student level your tutor can nominate you (or a group) for this prize. Win OUP book vouchers and a free place and presentation at the 2012 Garner Lecture.

The Bursary: apply to have your vocational placement funded – award of up to £1500.

Don't miss the deadlines. Rules and all the details on the student pages at www.ukela.org. The 2012 Competitions Day will be held on March 29th at UCL.

Messages from some of our previous competition winners:

"This moot has it all: a contemporary problem, finely balanced grounds, strong competition and experts judging the final rounds. In common with all UKELA's student activities, it is a brilliant introduction to this fascinating area of law". James Corbet-Burcher (student moot winner 2009), pupil at Landmark Chambers

"It was a great opportunity to appear before Carnwath LJ with lively, cutting-edge environmental moot questions" Ned Westaway (senior moot winner 2010), barrister at Francis Taylor Building

"Entering the Andrew Lees essay competition was a great way to develop my knowledge about environmental law. I was delighted to actually win! It has given me some credibility when talking about environmental law issues and would enable me to demonstrate commitment to environmental law to future employers". Melanie Strickland (Andrew Lees winner 2009), solicitor working in the voluntary sector

"I really enjoyed competing for the Andrew Lees Prize and winning was a valuable addition to my pupillage applications", Oliver Newman (Andrew Lees winner 2011), commencing pupillage October 2012

"The UKELA bursary provided the foundations for the work I have been engaged in for the past eighteen months – working with the DECC Youth Advisory Panel and on research looking into how the model of the Hungarian Commissioner for Future Generations could be applicable in the jurisdiction of England and Wales. I thoroughly recommend applying for the bursary fund to turn your ideas into action!". Kirsty Schneeberger (2010 bursary joint winner), Senior Project Officer Stakeholder Forum

Kirsty Schneeberger - Council Member from July 2011

Born in Zimbabwe where so many people do not have the opportunities I have been blessed with, and being the first person in the family to go to University, I seize every opportunity to offer my services for the public good and to be a valuable member of society.

What is your current role?

I coordinate projects at Stakeholder Forum for a Sustainable Future. Currently I am working in partnership with the new economics foundation (nef) and the New Economics Institute on the Global Transition 2012 – which focusses on building the green economy and developing new economic thinking. I am also very involved in the UNFCCC negotiations and we convene the 'Water and Climate Coalition' which is working towards bringing water issues into the climate negotiations. At the UK level I coordinate the development and environment stakeholder NGO group on national and international environmental policies. Finally, I am working with a range of actors in developing policy submissions for the Rio 2012 Earth Summit.

How did you get into environmental law?

I converted to law from politics and philosophy. Environmental politics really intrigued me and I thought that developing this into a legal practice would be a valuable tool for my eco-warrior tool-belt.

What are the main challenges in your work?

Not enough time; and working out how to engender the shift in social consciousness that is needed to propel us forward into the transition from the brown to the green economy.

What environmental issue keeps you awake at night?

The irresponsibility that is shown in thinking that does not consider the impact that today's actions will have on future generations. I find short-term thinking not only selfish, but morally repugnant.

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

Institutionalising the rights of future generations. As the Brundtland report notes: 'We borrow environmental capital from future generations with no intention or prospect of repaying ... We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.'

If future generations had not only a voice, but a way to hold us to account, then I think we would act in a very different way and we might be able to move beyond profit margins and measuring social progress in terms of GDP. Developing new indicators of social progress and broadening our perspectives will encourage and foster a much healthier relationship between ecology (knowledge of the home) and economics (management of the home) – and will go some way to safeguarding the future for generations to come.

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

Wild Law. The Wild Law way of thinking encapsulates so much more than just environmental issues. It brings a social and ecological dimension to the law that is both necessary and sensible.

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

Learning from experts, discussion forums and developing thinking in new areas of law.

Planning hits the headlines - The controversy over the National Planning Policy Framework

William Upton, Co-convenor of the UKELA Planning and Sustainable Development Working Party, 6 Pump Court. He has specialised in planning, local government and environmental law since being called to the Bar in 1990. He drives a Peugeot.

[This is an updated version of the article previously published in the Trinity Law Association journal, October 2011]

It has not been a quiet time for planning since the coalition government published its draft national planning policy framework for England ("the NPPF") this summer. Whilst the property industry has broadly welcomed the document, it has also led to the campaign spearheaded by the National Trust, as well as the Daily Telegraph's "Hands Off Our Land" series and accusations that it is simply a developer's charter.

The political spat has certainly meant that Planning now has a few colourful phrases to add to the NIMBY. Ministers have accused critics of their national planning policy framework ('NPPF') of being 'semi-hysterical', of peddling "deeply misleading and simply untrue" claims, and memorably of "nihilistic selfishness". The Department for Communities and Local Government have even taken the unusual step of issuing a 'myth-busting' guidance note. Lawyers who have suggested that the NPPF is likely to lead to more appeals, not less, have not escaped criticism. The Communities Secretary has said: "*I don't see a system that allows planning silks to buy a Maserati or spend an extra week at their villa in Tuscany as one that is going to improve the lot of my fellow man.*"

You may wonder why a policy document, and one that is only in draft, should matter so much. Whatever one's views of planning, this NPPF is an important part of the changes being made to the planning system as a whole, together with the Localism Bill and the faster decision making process for major infrastructure (such as nuclear power stations, windfarms, trunk roads and railways etc). The draft NPPF is also a problematic document, and there does appear to have been an element of 'shoot the messenger' in the political responses so far. Although we are still looking for the Maserati-driving planning silk who troubles Eric Pickles so much, the consultation responses sent in from local government express considerable concerns. Even English Heritage has had to be reassured that the NPPF will be redrafted. The UKELA Working Party has submitted some trenchant points.

Part of the problem with the NPPF is that the government has undertaken two rather different tasks. The first task is simplification, and the NPPF reduces over 1,000 pages of planning policy (47 documents) into 52 pages (plus glossary). On the whole, most people welcome the idea of a simpler policy guide than that in the current PPGs and PPSs. However, because this editorial task has removed much of the supporting detail, there will be considerable argument about what precisely has or has not changed and what established concepts can now be re-argued. We should not shy away from acknowledging that there will be some dislocation, even though this is perhaps an inevitable consequence of a change on this scale.

The second task the government has undertaken has been to seek to introduce some radical changes to the substance of existing planning policies. The current draft places its emphasis on economic growth and loosens protection for the general countryside. There have also been some deliberate changes to specific areas of policy, such as increasing the amount of deliverable housing land that should be allocated by 20%, removing maximum limits on parking places, removing restrictions on out-of-town offices, and on re-using buildings in the green belt. Whilst that is the prerogative of any government to do so, the way in which these changes have been expressed are also problematic.

The most obvious change is the introduction of the general 'presumption in favour of sustainable development'. The idea sounds attractive. But everyone appears to be arguing about what the government actually means by it. The Minister in his Foreword has added to the confusion by defining 'development' as 'growth', and by stating that "sustainable development is about positive growth" – an approach not shared by others who deal with sustainable development. The definition of 'sustainable development' contained in the NPPF is stated very simply, and repeats the high-level formulation put forward by the Brundtland Commission that it "means development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (para 9). This does not provide any definite answers to the issue of how to apply this in practice. We are also presented with the dilemma of not having a list of principles and yet are told "*Decision-makers at every level should assume that the default answer to development proposals is "yes", except where this would compromise the key sustainable development principles set out in this Framework*". (para 19)

The House of Commons Environment Audit Committee itself recommended (3rd Report, 16 March 2011) that the five internationally-recognised principles set out in the 2005 Sustainable Development Strategy should be included in the Localism Bill – namely, living within environmental limits, ensuring a strong, healthy and just society, achieving a sustainable economy,

promoting good governance and using sound science responsibly. However, the explanation given in the draft NPPF of what sustainable development means in the planning context does not acknowledge these. Indeed, there is no mention of living within environmental limits – which would necessarily restrict how far needs can be met – or the considerable scientific evidence that already exists as to the extent to which the UK is operating within its ecological limits.
What we do find is the statement (in para 14) that:

> *"14. At the heart of the planning system is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan making and decision taking. Local planning authorities should plan positively for new development, and approve all individual proposals wherever possible. Local planning authorities should:*
>
> • *prepare Local Plans on the basis that objectively assessed development needs should be met, and with sufficient flexibility to respond to rapid shifts in demand or other economic changes*
>
> • *approve development proposals that accord with statutory plans without delay; and*
>
> • *grant permission where the plan is absent, silent, indeterminate or where relevant policies are out of date.*
>
> *All of these policies should apply unless the adverse impacts of allowing development would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."*

As currently framed, the presumption appears to promise an easier ride for developers - indeed it is already seen as such by many commentators. The wording at the end is likely to be a section that is much debated – this is no longer intended to be a planning balance between competing considerations, but one where an adverse impact of a development must be "significant" enough to refuse permission.
The draft NPPF suggests that the decentralisation promised by the Localism Bill will be limited. The regional spatial strategies and targets may be removed by the Bill, but the NPPF wants local people to take the responsibility for meeting the "objectively assessed development needs". This is Localism, so long as the default answer is 'yes'.

But there are also some legal issues. As a matter of law, the presumption does not fit with the basic statutory test that planning decisions should be determined in accordance with the development plan unless material considerations indicate otherwise (established in s.54A of the 1990 Act, and now in section 38(6) of the Planning and Compulsory Purchase Act 2004). Some have argued that the presumption harks back to the language used before 1997, that permission should be granted unless "that development would cause demonstrable harm to interests of acknowledged importance" (PPG 1, 1988, para 15, and earlier versions). But that policy presumption was held to be irreconcilable with the statutory duty and the same conflict will arise here.

The status of the local plans in relation to the 'presumption' is also a major challenge. The NPPF wishes to see development granted permission where a local plan is "*absent, silent, indeterminate or where relevant policies are out of date*". The planning system is used to dealing with policies which are "out of date", and that is probably all that this part of para 14 should have said. Instead, what are we do with the 70% or so of local plans that have yet to be adopted, and are 'absent' ? Many recent local plans will deliberately be 'silent' on important points, as they will have been adopted following the old advice to ensure that they did not repeat national planning guidance. There is a major problem with the idea that the default answer applies when plans are "indeterminate". This would turn the current working of the plan-led system into confusion. Many decisions in planning are made where the development plan policies pull in different directions and are in effect "indeterminate". That is part of the normal judgment made by the planning authorities, as was acknowledged by the House of Lords in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, per Lord Clyde:

> *"There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. [The inspector] will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."*

As for the document as a whole, the country's planning committees and planning inspectors will have no choice but to apply

the policies as they are drafted. They will need to know what they mean, and their definition will ultimately be debated in the courts. The courts will pay due deference to the politicians, and they will only quash a decision based on policy if the decision-maker attaches a meaning to its words which they are not capable of bearing. But this can be taken too far, and the courts will be wary of any approach to interpretation "whereby a decision-maker can live in the planning world of Humpty Dumpty, making a particular planning policy mean whatever the decision-maker decides it should mean." (*Cranage Parish Council v First Secretary of State* [2005] J.P.L. 1176 per Davis J.).

Consultation on the NPPF finished on 17 October 2011. There has been a high rate of response, of about 14,000 responses. I welcome the fact that the government has now signalled that the document will be redrafted to take on board many of the concerns that have been raised, and that they are likely to allow for a transitional period (there being none suggested in the draft). There was a danger that this scale of change was far more of a shove than a 'nudge', and one therefore where the planning system was at risk of stumbling and falling before it found its feet.

So, anyone affected by development must now probably wait until next year to see the adopted version of the NPPF. In the meantime, we will continue to debate the relevance of the draft to current applications. Fortunately, that has become a little clearer. The Planning Inspectorate initially stated in rather bullish form that the draft NPPF "gives a clear indication of the Government's `direction of travel' in planning policy". They withdrew that statement in September, and their guidance now more accurately only states that

> *"It is a consultation document and, therefore, subject to potential amendment. It is capable of being a material consideration, although the weight to be given to it will be a matter for the decision maker in each particular case. The current Planning Policy Statements, Guidance notes and Circulars remain in place until cancelled."*

Tackling barriers to Environmental Justice: Access to Environmental Justice in England and Wales – A decade of leading a horse to water

Carol Day WWF. This is a summary of a paper presented by WWF-UK to *Aarhus and Access Rights: the new landscape* – a conference hosted by the Coalition for Access to Justice for the Environment (CAJE) and the Centre of European Law at King's College, London on 10th October 2011

In June 2011, WWF circulated a questionnaire on access to environmental justice to 60 environmental lawyers, statutory agencies and NGOs representing a broad spectrum of interests. 36 responses were received. While this represents a small sample size (and thus no statistical significance can be drawn from it), it reflects the collective views of some of the most senior and experienced environmental lawyers and environmentalists in England and Wales. The questionnaire sought views on perceived barriers to access to environmental justice including, standing, treatment of environmental issues, costs and interim relief. It also canvassed views on potential solutions in order to ensure compliance with EU law and the Aarhus Convention.

Standing

In general, how satisfied are you with the current rules on standing as applied in the High Court?
very satisfied = 8 quite satisfied = 24 not satisfied = 2 no view = 2

Article 9(3) of the Aarhus Convention requires contracting Parties to ensure that members of the public meeting criteria laid down in national law have standing to challenge acts and omissions by private persons and public authorities contravening provisions of national environmental law. More detailed provisions apply in Article 9(2) of the Convention in relation to standing, to challenge the procedural *and* substantive legality of decisions, acts or omissions subject to the provisions of Article 6 of the Convention (concerning public participation in decisions on specific activities). Here, members of the public having a sufficient interest (determined within the framework of national legislation and with the objective of giving the public concerned wide access to justice) should be granted standing. In this respect, the Convention holds that environmental NGOs shall be deemed to have sufficient interest.

The framework in England and Wales respects the provisions of Article 9(3) of the Convention, even though it was established before the Convention was even contemplated. Section 31(3) of the Supreme Court Act 1981 provides that the High Court will

not give [leave] for an application for judicial review unless the applicant has 'sufficient interest' in the matter to which the application relates. In determining whether a claimant has standing, the High Court considers the merits of the application, the nature of the claimant's interest and the circumstances of the case.

The High Court relaxed its interpretation of the requirements for standing in the early 1990s[1] and in the case of *Dixon*[2], in particular, it was held that a local resident was "*perfectly entitled as a citizen to be concerned about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment*". Unsurprisingly, in 2003 the EJP reported that 59% of respondents were 'quite satisfied' with the position on standing[3]. Respondents in 2011 still do not perceive standing to be an issue, with 66% of respondents 'quite satisfied' and 22% 'very satisfied' with the court's approach. The point was also made by one respondent that the "*reasonably liberal*" standing requirements also render it fairly easy for corporate third parties to challenge decisions.

While one barrister questioned whether the High Court's current approach to standing might be "*too liberal*", one QC observed that "*the liberal rules on standing are domestic public law at its best*". However, concern was raised that standing may become an issue in the future, referring to the case of *Coedbach*[4], in which Mr Justice Williams held that the Coedbach Action Team – a private limited company incorporated in 2008 – was not a 'member of the public concerned' or a person having 'a sufficient interest' for the purpose of challenging the grant of planning permission for a biomass-fuelled power station in the Gwendraeth Valley.

The case of *Coedbach* illustrates what can happen when claimants allow themselves to be lulled into a false sense of security by case-law. It is perfectly possible, as evidenced in 1989 in *Rose Theatre*[5], or in the present case, for the judiciary to return to a more restrictive interpretation of sufficient interest at any time. The view that standing may once again come under the spotlight if the costs regime becomes more favourable to claimants is entirely feasible. After all, there are only two mechanisms through which concerns about 'floodgates' can be ameliorated – either the permission filter becomes more rigorous or standing becomes more restrictive.

Thus, while the vast majority of respondents in 2011 were either 'very satisfied' or 'quite satisfied' with the current situation on standing, it would in my view be preferable for the requirements of Article 9(2) and 9(3) of the Aarhus Convention to be explicitly reproduced in the Civil Procedure Rules to ensure against future inconsistencies.

Treatment of environmental issues

In general, how satisfied are you with the courts' treatment of environmental issues?
very satisfied = 0 quite satisfied = 11 not satisfied = 23 no view = 1

While 31% of respondents were 'quite satisfied' with the courts' treatment of environmental issues, the majority were 'not satisfied' (64%). The main reason cited was not the quality of the judiciary – nor the awareness and interest shown by them in environmental cases – but the lack of technical knowledge of the issues (and science in particular). This was noted to be particularly acute among Circuit judges sitting in the Administrative Court. It was commonly reported that the lack of technical expertise leads to "*inconsistency*" and a "*lack of uniformity*" in relation to both judicial review and statutory nuisance claims. A common concern was that judgment is "*still too dependent on who the judge is".*

The problems arising from a lack of specialist knowledge appear particularly acute in relation to some aspects of EU law, alongside complex and emerging environmental issues. One QC noted that the courts can be "*unwilling to try to understand difficult issues, particularly around climate change*". Another solicitor agreed that "*the court's approach to issues surrounding climate change and the duties set out in UK legislation (as far as they have considered them at all) has been disappointingly conservative*". The point was made that this contrasts markedly with the courts' approach to breaches of human rights/ discrimination law, which appear to be taken "*much more seriously*".

A number of respondents were concerned that a background in planning or commercial law can lead judges to adopt a somewhat narrow, conservative or 'hands off' approach to the subject matter. One QC observed that "*the courts tend to focus on the protection of individual contract and property rights, which have tangible and direct human interests to engage with*", while another QC remarked that "*leaving aside the strong body of EIA case-law, the level of scrutiny is far too weak, being rooted in planning law perspective and* Wednesbury *unreasonableness, notwithstanding the wealth of progressive environmental legislation emanating from the EU*". Yet another QC put it rather more bluntly "*The courts are clearly biased towards economic operators"*. But a fourth remarked that "*some claimants' lawyers may feel the system is biased against them […] but as someone who appears regularly on both sides I think it works reasonably well*".

One thing is clear, however: EU law and the Aarhus Convention will increasingly require a fresh approach to judicial review. While ostensibly a process whereby the procedural and substantive legality of a decision can be challenged, in practice the 'threshold' for irrationality or *Wednesbury* unreasonableness has proven almost impossible to meet in environmental cases. Applications for judicial review have, therefore, become increasingly procedural, with the associated frustrations of trying to "*shoehorn environmental issues within the traditional judicial review framework*".

1 *R v Poole Borough Council, ex parte Beebee* (H.L. 1991) and *R v H.M. Inspectorate of Pollution, ex parte Greenpeace* (D.C. 1994)
2 *R v Somerset County Council and ARC Southern Limited Ex p. Dixon* [1998] Env. L.R. 111
3 *See Environmental Justice* – Report by the Environmental Justice Project (note 3, above), paragraph 46
4 *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change & ors* [2010] EWHC 2312 (Admin)
5 *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co* (1990) 1 QBD 504

However, Article 9(2) of the Aarhus Convention requires contracting Parties to ensure that members of the public concerned have access to a review procedure to challenge the procedural *and* substantive legality of any decision, act or omission subject to the provisions of Article 6 of the Convention – essentially decisions relating to proposals requiring EIA. The Aarhus wording is imported into Article 10a of the EIA Directive via Article 7 of the EC Public Participation Directive (PPD). Article 9(3) of the Convention does not explicitly refer to either substantive or procedural legality, instead referring to "*acts or omissions [...] which contravene its national law relating to the environment*". As such, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision – be it procedural or substantive – in national law relating to the environment.

The findings of the Aarhus Convention Compliance Committee are interesting in this respect[6], concluding that the UK allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Article 9(2) and (3). This includes, for example, material errors of fact, errors of law, regard to irrelevant considerations, failure to have regard to relevant considerations, jurisdictional error and *Wednesbury* unreasonableness. However, the Committee was not convinced that the UK, despite these exceptions, meets the standards for review required by the Convention as regards substantive legality. Reference was made to criticisms by the House of Lords[7] and the European Court of Human Rights[8], concerning the high threshold for review imposed by the *Wednesbury* test, as mentioned earlier. While the Committee did not go as far as to find the UK in non-compliance with Article 9(2) or (3), it did suggest that the application of the 'proportionality principle' by the courts in England and Wales could provide an adequate standard of review in cases within the scope of the Convention.

Costs

In general, how satisfied are you with the current rules and procedures on costs?

very satisfied = 0 quite satisfied = 4 not satisfied = 30 no view = 1

In 2003, 82% of respondents to the EJP were 'not satisfied' and 18% were 'quite satisfied' with the rules on costs. In 2011, 83% of respondents are 'not satisfied' and 11% are 'quite satisfied' with the current costs regime.

One barrister described the system as "*quite broken*", while at least four other practitioners described the rules as "*a complete mess*". A number of respondents were of the view that costs remain the primary barrier to bringing legitimate environmental cases to court. Many respondents cited the costs rules as the primary reason for non-compliance with both Aarhus and EU requirements on 'prohibitive expense'.

Are you aware of any good arguable cases that have not gone ahead because of concerns about costs or exposure to costs?

Yes = 23 No = 9

Over three quarters (76%) of respondents are aware of good, arguable cases that have not proceeded because of concerns about costs or exposure to costs. One solicitor said that he could point to at least 10 cases in his first year of practice where clients were "*too scared of incurring huge costs – even with a PCO*". One barrister reported that he had advised many smaller environmental NGOs who have not litigated for fear of adverse costs or the costs involved in seeking a PCO where it is opposed, including in cases concerning air quality and transport issues. One NGO reported that it always advises that costs can be managed but "*I lose count of the number of community groups who mention to us that they or others thought that they may have grounds for challenge, or were advised they did, but decided not to go ahead because they were put off by the costs risk*".

One NGO pointed out that there is a link between costs and timeliness, particularly in relation to planning cases, which require claimants to move very promptly. Such difficulties can be particularly acute in cases in which a community contribution is required. Another NGO concurred that the Legal Services Commission's reluctance to fund public interest litigation without making time-consuming and unrealistic demands in relation to potential community contributions has caused good, arguable cases to fall through the net.

Protective Costs Orders

In general, how satisfied are you, post Corner House, with the use of Protective Costs Orders (PCOs) as a mechanism for ensuring that costs are not 'prohibitively expensive' for individuals, community groups and/or NGOs?

Very satisfied = 1 Quite satisfied = 6 Not satisfied = 26 No view = 3

While some respondents believe the development of the PCO regime since *Corner House* has improved the situation, 72% of respondents were 'not satisfied' and referred to the process of applying for a PCO as time-consuming, random, complex, inconsistent and unreliable and one which has resulted in "*costly and unhelpful satellite litigation"* which is "*wasteful of litigant, lawyer and court time*".

One barrister pointed out that the process of applying for a PCO invites repeated exchanges of evidence and submissions. In one case alone, 10 witness statements referred to PCOs. This means that the process of applying for a PCO can be costly in itself,

6 See http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/DRF/C33DraftFindings.pdf, paragraphs 121-125

7 For example, Lord Cooke in *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 paragraph 32

8 *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paragraph 138

partly because of the time taken to process the application, but also because the judges seem "*reluctant to deal with applications on paper*". Indeed, the cost of applying for, but being refused, a PCO can amount to £7,000[9]. One QC recommended a system for first stage applications for PCOs, so it is possible to advise claimants that they will be at no risk at that stage.

Many respondents pointed out that while the judiciary deserves credit for devising the PCO system, it was not appropriate that it should have had to have done so on an *ad hoc* basis, and that this has inevitably led to a system which is insufficiently certain and comprehensive. One solicitor remarked that "*the lack of consistency and clarity from the courts means that we are unable to provide our clients with any real comfort that their risk as to costs will be "affordable" – and the huge costs orders sought by defendants cause a real chilling factor amongst individuals, NGOs and campaign groups. As a result, a huge amount of time is spent fighting on these issues rather than on the merits of the cases themselves*". It is also unhelpful that much of the case-law on PCOs emanates from the Court of Appeal and, at times, conflicts with the application of the *Corner House* principles – making it even more difficult for claimants to predict the outcome of an application.

Moreover, the level at which PCOs tend to be set are still too high to ensure adequate access to environmental justice. One solicitor referred to *Eley v Secretary of State*[10], in which the claimant, after argument of both sides, was granted a PCO limiting liability to £10,000. This was too expensive for the claimant and proceedings relating to the EIA Directive were withdrawn as a consequence. Another barrister concurred that the level at which protection is afforded (commonly around £10,000) is still prohibitive, at least for individuals.

Respondents also highlighted that significant problems persist in relation to the principles associated with the granting of PCOs arising from the *Corner House* case. Those of particular concern include the need for the issues to be of general public importance (and that the public interest requires that those issues be resolved) and for the applicant to have no private interest in the outcome of the case. The Court of Appeal case of *Garner* essentially confirmed that there is no justification for the application of the issues of general public importance[11] in cases covered by the EC Public Participation Directive (i.e. EIA and IPPC) and similarly, following the judgment of the CJEU in the 'brown bear case' (Case C-240/09[12]), it is reasonably clear that a PCO will be granted in cases involving directive 92/43/EEC (the Habitats Directive). However, this still leaves all other environmental cases – particularly those concerning small-scale, local public body decisions – at the mercy of the *Corner House* principles. Similarly, while in *England*[13] the Court of Appeal noted that the requirement that the applicant must not have private interest in the matter was not necessarily consistent with Aarhus, there is always an element of uncertainty as to whether it may present a barrier (and indeed, although it was not a environmental case, in *Goodson*[14] the private interest test did prevent an individual from obtaining a PCO).

Clearly, there is also still some confusion (post *Garner*) as to the whether the financial circumstances of the claimant should be subject to an objective or subjective evaluation. One barrister observed that if a matter is "*genuinely one of public interest there is no reason why the availability of a PCO should be assessed against the means of a randomly picked individual. Additionally it must put terrible pressure on that individual*".

While there are clear difficulties in terms of judicial review, respondents report that private law civil claims (especially group actions) are even more challenging. A number of practitioners argued there should be specific provision in the rules for PCOs in ordinary private law (as opposed to public law) cases where these raise Aarhus issues, and some way of ascertaining whether a PCO is available, and if so in what amount *before* claimants start being exposed to the defendant's costs. This seems entirely appropriate, given that Article 9(4) of the Convention requires administrative or judicial procedures to challenge the acts and omissions of public authorities *and* private persons to be not prohibitively expensive. Furthermore, in *Morgan*[15], the Court of Appeal expressly recognised that the Convention is capable of applying to private law claims. One QC observed that "*there are real problems (much greater than in judicial review) in deciding what 'prohibitive expense' is, in the context of claims which to run them properly need very large sums spending on them. Unless this is sorted out, then the death of After The Event (ATE) insurance will be the death of many such group actions*".

On the other hand, one barrister remarked that "*PCOs are now very easily obtained in environmental cases – the only issue is the size of the reciprocal cap*", observing that "*caps provide a discipline that would be absent if QuOCS were introduced and exposing public authorities to an unjustifiable increase in costs expenditure*". However, many respondents noted a serious problem emerging in relation to the imposition of extremely low cross caps on claimants' costs, which means that even when cases are won, the costs recovered are insufficient. In most circumstances these cases are funded on a Conditional Fee Arrangement (CFA) basis and the amount recovered in the successful cases needs to cover the cases where the claimant is unsuccessful. The corollary of this is that claimant solicitors end up having to take environmental cases on a non-commercial basis, which – as one NGO observed – affects the ability of individuals and civil society groups to secure appropriate legal representation.

9 This figure may, in fact, be low. In *Garner*, the judge was persuaded that the amounts in *Corner House* (see paras 78-81) were outdated and should be increased. Hence, where the claimant had expected the an award against him of at most £2,500 in favour of the defendant, this was increased to £3,000

10 [2009] EWHC 660 (Admin)

11 *R (on the application of Garner) (Appellant) v Elmbridge Borough Council (Respondent) & (1) Gladedale Group Ltd (2) Network Rail Infrastructure Ltd (Interested Parties)* [2010] EWCA Civ 1006, para 39

12 *Lesoochranárske zoskupenie VLK v Ministerstvo životého prostedia Slovenskej republiky*

13 *R on the application of England v London Borough of Tower Hamlets and another* [2006] EWCA Civ 1742

14 *Goodson v (1) HM Coroner for Bedfordshire and Luton (2) Luton and Dunstable Hospital NHS Trust* [2005] EWCA Civ 1172

15 *Morgan (1) Baker (2) v Hinton Organics (Wessex Ltd) & CAJE (intervener)*, [2009] EWCA Civ 107, para 44

Another barrister pointed out that attempts by some claimants to "*side-step*" the costs issue by forming a shell company and refusing to pay adverse costs orders (while running up substantial costs bills to which the defendant is exposed) are inequitable. However, it has been observed that the courts are actually much less sympathetic to applications for PCOs in cases where individuals have grouped themselves together. The courts appear to worry that there are an unknown number of people who could individually afford a substantial amount of adverse costs. In one case, the court required the claimant company to be liable for £70,000 as a condition for the grant of a PCO[16]. This may have the perverse result that the greater the public interest, the greater the claimants' exposure is likely to be.

Do you think the criteria established in Corner House could be further modified to achieve access to environmental justice for individuals, community groups and NGOs?

Yes = 26 No = 4 No view = 3

Notwithstanding the above, some 72% of respondents believe the criteria established in *Corner House* are capable of being modified to achieve access to environmental justice. It might not be everyone's first preference as a starting point, but as one barrister remarked "… *given it's what we have and that the courts now use it as a framework […] it's probably the easiest place to start*".

The key would appear to be a simple, clear PCO system which is cheap to access and refines the *Corner House* 'conditions' in the light of the Court of Appeal cases such as *England* and *Garner*. For example, it should be irrelevant for the purpose of the application whether the issues raised are of general public importance (and that the public interest requires that those issues should be resolved) or whether the applicant has any private interest in the outcome of the case.

Second, there should be no distinction between cases covered by the EC Public Participation Directive and those that are not. The Aarhus Convention creates a positive obligation to secure access to justice, and does so in recognition of the public interest in protection of the environment. The courts should exercise their powers consistently with securing those outcomes. That means addressing the costs or other issues that arise: (i) consistently with regard to all environmental cases; (ii) at the earliest practicable opportunity; and (iii) in a way that does not, itself, lead to (or expose a risk of) prohibitive expense for the member(s) of the public involved.

One barrister observed that it might be helpful to have clear guidelines as to the amount claimants could be liable for, as opposed to relying on the discretion of the court – although caution was expressed that this could actually lead to a higher level of costs being payable. Careful consideration would therefore need to be given to what level of costs, on the basis of an objective test, would be 'prohibitively expensive' for an ordinary member of the public, a community group and/or an NGO. Clearly, what might be prohibitively expensive for an individual may not be prohibitively expensive for an established NGO, so some form of banding may be appropriate. The important point is that the limits of exposure need to be clear and the maximum liability for making an application should be modest and known in advance.

However, not all respondents were of the view that the PCO regime is capable of being modified to secure compliance with Aarhus. One NGO remarked that "*PCOs, whether codified or not, and whether subject to an 'objective' or 'subjective' test as regards the definition of prohibitive costs, are inherently uncertain and subject to judicial interpretation. This means they are in breach of the Aarhus Convention*".

Qualified one-way costs shifting

Are you in favour of qualified one-way costs shifting (QuOCS), as recommended by Lord Justice Jackson?

Yes = 20 No = 7 No view = 7

Some 56% respondents are in favour of qualified one-way costs shifting (QuOCS), although many cautioned that the formulation proposed by Lord Justice Jackson did not provide claimants with requisite certainty. One barrister remarked that it "*did not properly deal with or explain the circumstances in which, and the extent to which, costs would be payable. On one view, his proposal simply left in place the current wide discretion to order costs which would not move things forward at all*".

With suitable refinement, those in favour of a shift towards QuOCS believe that it could facilitate access to the courts, with the appropriate advice and representation of specialised lawyers. One barrister believes that it may indeed be fairer to defendants, who have to pay disproportionate costs when faced with a CFA case.

However, one QC in support of QuOCS suspected that costs to the public purse will prevent this being a realistic option, particularly if there is another potentially compliant alternative available. Another barrister was also concerned that "*QuOCS make no provision for reciprocal caps and is simply unaffordable in this fiscal climate*" fearing that it would also result in a "*flood of claims*". However, another questioned whether there was any great injustice where the defendant is a public body or has insurance to cover the costs since the inherent unfairness in the system is ultimately shared out throughout the general population. Moreover, Sullivan II found no evidence for the 'floodgates' argument since whatever the costs principles involved, judicial review is immensely resource-intensive and would not be undertaken lightly. The report recognised that there would be some increase in environmental judicial reviews but that this would be modest compared with the total number of cases handled by the Administrative Court each year[17]. In any event, if a substantial demand for legitimate Aarhus legal challenges were to materialise,

16 *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change & ors* [2010] EWHC 2312 (Admin)

17 In 2005, just under 2,000 applications for judicial review were made (excluding immigration and criminal cases), of which 412 were

that would have to be accommodated in the administrative system of the courts (or new tribunals) in order to ensure compliance with Aarhus, rather than suppress the demand.
Another barrister suggested qualifying the qualified approach. In his view, it is "*sensible in most cases for there to be some potential costs liability towards the other side, but that needs to be controlled in advance and managed*". Another agreed that it is not unfair that a level of costs should be borne by potential claimants, but those costs should be "*proportionate and not act as a barrier to justice*".

Interim relief

How satisfied are you with the general rules as applied on interim relief?
Very satisfied = 1 Quite satisfied = 6 Not satisfied = 20 No view = 9
Although 19% of respondents were either 'very satisfied' or 'quite satisfied' with the present situation regarding interim relief, the majority (56%) were 'not satisfied'.
A number of NGOs raised the point that the threat of cross-undertakings is too much for most private individuals/small NGOs to consider, and expressed concern that the failure to obtain interim relief can result in significant, irreversible environmental damage. In the respect, reference was again made to the 1997 case of *Lappel Bank*, in which the loss of part of the Medway Estuary and Marshes Special Protection Area (SPA) was subsequently declared unlawful[18].
However, it is clear that problems persist. For example, in the private law case of *Thornhill*[19], the High Court refused an interim injunction in respect of noise and vibrations arising from a metal recycling yard primarily on the basis that the claimant was unable to afford a cross-undertaking in damages. Also, one NGO observed: "*we currently have a case where we need to challenge a developer and prevent the destruction of a fishery on the Trent. The developer has indicated that a cross undertaking would be required (an enormous sum beyond the resources of our organisation or our members). It is inevitable that a court would agree. This therefore puts us in a situation where we need to go for a final injunction – and the possibility that the developer will already have completed the work before the case is heard and an injunction awarded*". This view is shared by practitioners at the Bar. One barrister reported that "*the potential need for cross undertakings coupled with a general judicial reluctance to grant interim relief (and the costs risks of even seeking it) means that I would be very wary of promoting a case which required the grant of interim relief*".
On the other hand, one QC remarked that "*while some claimant solicitors may feel the system is against them, interim relief can be used tactically by unmeritorious claimants unless the court is careful*". Another was simply baffled by the suggestion that there is any real issue in terms of Aarhus in this regard, claiming that "*Where there is a challenge to the grant of planning permission or other environmental consent in most cases an injunction is unnecessary as the beneficiary of the permission or consent will await the outcome of the proceedings*". The same barrister pointed out that even where injunctions are necessary the courts have made clear that a cross-undertaking is not essential for the grant of an interim injunction in environmental judicial review cases. In the *Belize*[20] case, for example, the Privy Council recognised that the court had a wide discretion in this regard. Furthermore, reference was made to a number of recent high profile environmental cases where injunctions have been granted despite no cross-undertaking in damages being offered, including *Save Britain's Heritage* cases in Lancaster, Gateshead and Bolton[21] and *R. (Pascoe) v Liverpool City Council*[22], in which another barrister noted that the High Court had moved "*extremely quickly*".
As of February 2010, however, the judiciary no longer enjoys any discretion with regard to a cross-undertaking in damages, as the Civil Procedure Rules were amended to *require* claimants to provide a cross-undertaking in order to secure interim relief[23]. It is now not a question of 'whether' an undertaking will be required, but 'how much will it be?'

Despite the promptness alluded to above, concerns also persist in relation to delay. One solicitor observed that "*the interplay between protective costs orders and interim injunctions is particularly difficult in urgent cases […] the Administrative Court can get very busy and the lack of judges means that it can take longer than hoped for the papers to be placed before a judge. In some circumstances, this can be fatal to the success of a claim*". At least three other practitioners expressed concerns about delay in relation to what might be perceived as low-profile judicial review claims.

Conclusion

In October 2011, the Aarhus Convention will have been in force for a decade. Earlier the same year, the Aarhus Convention

granted

18 *R v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1997] Env L.R. 431
19 *Pamela Thornhill & Ors v Sita Metal Recycling & Ors* [2009] EWHC 2037 (QBD)
20 *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize* [2003] 1 W.L.R. 2839
21 *Save Britain's Heritage v Secretary of State for Communities* [2011] Env. L.R. 6 ([2011] EWCA Civ 334) and *R. (Save Britain's Heritage) v Gateshead MBC* [2010] EWHC 2919 (Admin) [2010] EWCA Civ 1500
22 [2007] EWHC 1024 (Admin)
23 See Practice Direction 25A – Interim Injunctions, paragraph 5.1 available at: www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part25a.htm

Compliance Committee found the UK in breach of Articles 9(4), 9(5) and 3(1) of the Convention, and the European Commission referred the UK to the CJEU for a failure to comply with the 'not prohibitively expensive' requirement of the EC Public Participation Directive.

In 2003, the Environmental Justice Project canvassed 52 environmental practitioners for their views on access to environmental justice in the civil and criminal fields. The results were published in *Environmental Justice* and exposed significant concerns about the rules on costs in judicial review, in particular. Eight years later, a further exercise has been undertaken, concentrating on the rules and procedures relating to judicial review. The results of this survey are summarised in this paper. Unfortunately, the results confirm that, despite judicial effort, practitioners and NGOs perceive that the situation with regard to costs and interim relief has, if anything, deteriorated since 2003.

For example, almost 83% of those sampled are 'not satisfied' with the current rules and procedures on costs. This represents an increase of just 1% in the number recorded by the EJP in 2003, but confirms that the costs regime continues to represent a substantial deterrent to the promulgation of genuine environmental public interest litigation. Paradoxically, it can also be seen that is not always fair to the defendant. It is a sad indictment of the extent to which PCOs have thus far failed to alleviate concerns about costs, despite significant judicial effort. In brief, PCOs are perceived to be uncertain, complex, inconsistent and, ironically, very expensive. Practitioners report that a disproportionate amount of time is spent arguing about them and that the imposition of reciprocal caps is not only causing claimant lawyers considerable difficulty, it is also unlawful.

Similarly, some 56% are 'not satisfied' with the current rules and procedures on interim relief (significantly more than double the 21% recorded in 2003). As of February 2010, Practice Direction 25A on interim relief of the Civil Procedure Rules (CPR) requires an application for an interim injunction to include a cross-undertaking in damages. As such, it seems that the rules were only very recently amended to further frustrate the courts' ability to secure compliance with Aarhus and EU law.

Some 64% of respondents are 'not satisfied' with the courts' treatment of environmental issues (in comparison with 66% in 2003). The main reason cited was not the quality of the judiciary, nor the awareness and interest shown by them in environmental cases, but the lack of technical knowledge of the issues (and science in particular) – particularly among Circuit judges sitting in the Administrative Court. The lack of technical expertise leads to inconsistency and 'judge dependency'. Furthermore, respondents believe that with one or two notable exceptions, the courts have tended to be conservative when dealing with environmental issues and have rarely seized the opportunity to expand the law in this area in a way that would offer a meaningful opportunity to reverse the ongoing degradation of the environment.

It could be a number of years before the CJEU rules on the infraction proceedings and/or the questions referred to it by the Supreme Court in *Edwards*. In the meantime, we appear to have two regimes applying to environmental cases – one for cases covered by the PPD (EIA and IPPC) and another for 'everything else'. Ironically, while *Garner* is unlikely to cut much ice with the Compliance Committee (as it does little for the vast majority of environmental cases), it is also unlikely to buy much time in terms of the infraction proceedings. A similar 'two-tier' system introduced in the Republic of Ireland following the judgment of the CJEU in *Commission v Ireland*[24] has proven unworkable. Ireland has one general rule on costs for judicial reviews concerning EIA, IPPC and Strategic Environmental Assessment (SEA) (each side bears its own costs) and another rule for all other environmental judicial reviews (the loser pays). The result is confusion as to which rule applies in 'mixed' cases (e.g. a case that raises EIA and Habitats or Birds Directive issues), and a stifling of the existing model for most public interest environmental litigation. The impecunious claimant with a lawyer acting on a 'no win, no fee' basis no longer works in EIA, SEA and IPPC cases because the 'loser pays' rule no longer applies. Thus, while the existing model was by no means perfect, it at least resulted in *some* public interest litigation[25].

The overriding view, therefore, is that the government must take the initiative to address the issue in the form of clear rules that provide certainty at the outset. One barrister observed that "*any government with a true green agenda would recognise that enforcement by individuals/groups of the law through courts is an essential part of creating a state where environmental issues are given the weight they deserve in decision making by both public and private bodies".*

Recommendations

The potential development of the First-Tier (Environment) Tribunal

Do you think there are advantages in developing the role of the First-Tier (Environment) Tribunal as a forum for either judicial review and/or statutory appeals?

Yes = 30 No = 2 No view = 2

24 Case C-427/07, *Commission v Ireland*

25 Andrew Jackson, Friends of the Irish Environment, *pers comm*

This study suggests there is an emerging, and overriding, enthusiasm for the development of the current First-Tier (Environment) Tribunal as a potential forum for JR and/or statutory appeals. No fewer than 83% of respondents believe there is merit in pursuing this possibility. As part and parcel of securing compliance with Aarhus and EU law, respondents highlighted two key themes: (1) the development of legal and factual judicial expertise in environmental law, thus enabling complex cases to be dealt with in an cost-effective, fair and timely manner; and (2) the opportunity to devise a set of rules and procedures that recognise the unique nature of environmental law and are properly tailored to address it.

Prerequisites for Aarhus compliance

Respondents in 2011 highlight several issues that require careful consideration in order to achieve both Aarhus compliance and effective case management. First, the present Environmental Tribunal does not have sufficient weight or expertise to deal with Administrative Court matters and, in any event, judicial reviews can only currently be heard in the Upper Tribunal. As such, judicial review powers would either need to be extended to the First-Tier Environment Tribunal or the Environment Tribunal would need to be transferred to one of the four chambers of the Upper Tribunal. The latter would seem to be the most appropriate option, not least to ensure consistency with the current approach within the Tribunal system and the High Court.
Second, it was suggested that there should be a High Court judge acting as president of the Tribunal, preferably appointed for long enough to ensure continuity in decision-making. Complex cases should be heard by sufficiently experienced High Court judges (or Deputy High Court Judge practitioners) with the support of a panel of transparently selected tribunal members, with requisite expertise in a broad range of environmental matters. All decisions must be reported to enable the development and dissemination of jurisprudence.
Third, the Upper Tribunal would benefit from devising and applying tailored rules and procedures that ensure compliance with Aarhus and EU law. The most important areas concern costs, interim relief and standing – although following the findings of the Compliance Committee in Communication C33[26], it may also be an opportunity to reflect on the appropriate scope of review.

(i) Costs
Some 56% respondents were in favour of QuOCS as recommended by Lord Justice Jackson. Some 72% believe that the criteria established in *Corner House* could be further modified to achieve access to environmental justice. Thus, the figures suggest that while some respondents may have a preference, a number appear to believe that both QuOCS or a modified PCO regime are capable of securing compliance with Aarhus and EU law. I therefore find it difficult to be definitive about which regime – QuOCS or PCOs – respondents would prefer to see in place in a strengthened Environmental Tribunal.
CAJE has, however, always maintained that the introduction of QuOCS, as refined in Sullivan II, represents the most simple and elegant mechanism for Aarhus compliance:

Sullivan II qualified one-way costs shifting (QuOCS) formulation supported by CAJE:

> "44.X *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 bringing or conducting the proceedings."*

26 See http://live.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/DRF/C33DraftFindings.pdf, paragraphs 121-125

The basis for the formulation proposed in Sullivan II and supported by CAJE is certainty – both at the outset of the proceedings and with regard to the total liability potentially incurred. First, a prospective claimant must be sure of the extent of his liability at the outset. Second, for the reasons discussed in section 2 (above), the Working Group foresaw difficulties when 'the amount (if any) which is a reasonable one to pay having regard to all the circumstances' was applied beyond those financially eligible for legal aid. CAJE is therefore of the view that the introduction of the Sullivan II formulation is the optimal mechanism in which compliance with EU law and the requirements of the Aarhus Convention can be achieved, on the basis that it is simple, clear and eliminates undue judicial discretion.

However, if – as seems clear – the government remains intent on pursuing the codification of the PCO regime in the CPR, the following safeguards must be encompassed in order to reduce judicial discretion and guarantee access to justice in environmental cases.

The Aarhus Convention creates a positive obligation to secure access to justice, and does so in recognition of the public interest in protection of the environment. The courts should exercise their powers consistently with securing those outcomes. That means addressing the costs or other issues which arise at the earliest practicable opportunity. It also means doing that in a way which does not, itself, lead to (or expose a risk of) prohibitive expense for the member(s) of the public involved.
If a claimant (individual, community group or environmental NGO) bringing an environmental case and acting reasonably in the circumstances would be prohibited by the level of costs or costs risks from bringing the case, then the court must make a PCO to ensure compliance with the Aarhus Convention and EU law. The following conditions apply:

The level of the PCO will be set by the application of an objective test in relation to what is prohibitive for an ordinary citizen, community group or NGO and subject to a maximum limit, e.g. £500-£3,000 for individuals, community groups and small NGOs; and £3,000-£10,000 for larger NGOs;

The claimant will not be subject to a reciprocal cap;

The process of applying for a PCO itself must not expose the claimant to a risk of prohibitively expensive costs. The maximum exposure will be £500 when applying for a PCO at the permission stage;

PCOs will be available for all environmental claims, not just cases covered by the EC Public Participation Directive;
PCOs will be available for environmental judicial reviews, s.288 appeals and civil claims[27];
It will not be necessary to consider public interest/importance, since access to environmental justice is made unconditional by Aarhus and because, by virtue of the Aarhus Convention, protecting the environment is recognised as inherently a matter of public interest/importance;

The claimant's private interest is irrelevant for the purpose of granting a PCO;

The PCO will confirm that there will be no claimant exposure to third party costs; and
It will not be relevant if the claimant's lawyers are acting *pro bono*.

Do you think the rule in tribunals that each party must bear its own costs would address concerns about prohibitive expense in relation to individuals, community groups and/or NGOs?
Yes = 12 No = 16 No view = 3
Respondents were, on the whole, not in favour of an own costs regime. A number of solicitors pointed out that the difficulty with such a rule is that claimant lawyers would be unable to act for clients under a CFA or modified form of CFA. This means that individuals and/or NGOs would have to pay their lawyers privately or rely on solicitors/barristers to act *pro bono*. Most UK lawyers providing *pro bono* representation are large, commercial firms which tend to represent large corporations or very rich individuals. As such, they do not have the appropriate expertise or experience to act for claimants in environmental cases and are unlikely to solve the current difficulties faced by claimants in the courts. To some extent such a regime could work for larger NGOs or campaign groups with wealthy members, but the vast majority of individuals and less well-off groups would find it hard to access appropriate legal representation. Another NGO concurred that having to cover their own costs incurred in taking a case at commercial rates would be prohibitive to most citizens, civil society groups and smaller NGOs – particularly as some cases are very expert-intensive.
Others believed the system could work if legal aid continued to be available. However, one NGO pointed out that, paradoxically, a regime in which the parties bear their own costs will tend to reduce the availability of publicly-funded representation to those of reduced means. This is because legal aid practitioners rely on the commercial rates that can be recovered if *inter partes* costs orders are available. Another barrister was also unclear how a no costs regime could be consistent with Aarhus since, in effect,

27 The latter on the basis that the Aarhus Convention makes no distinction in respect of Article 9(4) between judicial review and private law nuisance claims – a view supported by the Court of Appeal in *Morgan* (paragraph 44)

it means that "*claimants either have to pay above what would ordinarily be 'prohibitive' or the lawyers have to subsidise by charging very low rates – neither of which are consistent with the inherently public interest nature of the challenges*".
However, one QC observed that the Tribunal should retain the discretion to make different orders where, for example, the losing party has behaved crassly or in an obstructive way. Occasionally, it may also be appropriate to order costs out of general public or court funds – which could perhaps be resourced by charging a modest (e.g. maximum £200) application fee.

Other bespoke rules

(ii) Interim relief and case management

In addition to tailored rules on costs, the TPC would need to devise Aarhus-compliant rules on other issues, such as interim relief, case management and standing. Recommendations in respect of injunctive relief and case management were addressed in detail in Sullivan I[28], so I do not address them further here.

Improved case management could increase the efficiency in handling environmental cases, and assist in reducing overall costs for all parties involved – thereby better meeting the need to improve access to justice in line with Aarhus. Sullivan I discussed how this could be achieved in a number of ways including, for example, early disclosure of information.
In line with concerns expressed above regarding the uncertainties of case-law, it would be preferable if the requirements of Article 9(2) and 9(3) of the Aarhus Convention with regard to standing were explicitly reproduced in rules drafted by the Tribunals Procedure Committee to ensure compliance with Aarhus.

Supporting measures to improve access to justice
Respondents suggested a number of supporting measures that could be deployed to improve access to environmental justice, although many (e.g. increasing public funding or the establishment of specialist centres providing information and/or training to individuals and community groups) are probably unrealistic in the current fiscal climate.
Within the art of the possible, some respondents recommended a change in the approach currently adopted by the Legal Services Commission in relation to 'community contributions', which are often perceived to be set at an unrealistic and prohibitively expensive level. Three respondents suggested that the Environment Tribunal could be developed as a forum for a third-party right of appeal in the planning context, as that would remove a number of cases brought by way of judicial review. There were also some suggestions that could be effected at relatively modest and proportionate cost. These include the allocation of sufficiently experienced judges in the Administrative court. Full High Court judges should be used appropriately, while building up the expertise of some non-specialised Circuit Judges through a coherent programme of judicial training. Other respondents also recommended more efficient case management, as recommended in Sullivan I.

28 See paragraphs 73-83 (Injunctions and other remedies) and paragraphs 85-99 (Case management in environmental judicial review of Sullivan I

Aarhus and Access Rights: The New Landscape

A Conference hosted by the Coalition for Access to Justice for the Environment (CAJE) and the Centre of European Law at King's College, London

On 10th October 2011, 130 leading environmental lawyers, politicians, civil servants, statutory agencies, academics, NGOs, civil society representatives and members of the senior judiciary gathered in the Great Hall, King's College, London to debate past progress on, and future challenges for, the Aarhus Convention, which embodies environmental 'access rights' fundamental to the functioning of a democratic society built on the principles of transparency, participation and justice.

Plenary session

After welcoming participants, chair **Natalie Lieven QC** (Landmark Chambers), gave the floor to **Lord Justice Sullivan** for brief opening remarks. Since being asked to chair a small working group on 'something to do with environmental law', Sullivan LJ has become a trailblazer on Aarhus, the reports of his Working group reverberating around the Royal Courts of Justice and the

international community. While wishing the conference well, he also expressed hope that the forthcoming Ministry of Justice consultation paper will extend beyond the narrow approach alluded to in the government's response to Lord Justice Jackson's year-long review of civil litigation costs.

The keynote speech, given by **Sir Francis Jacobs** (Professor and Head of Centre of European Law, KCL), reinforced the importance of environmental access rights and the rule of law to the effective functioning of democratic society. The current position with regard to compliance with the Aarhus Convention in England and Wales was summarised, highlighting – in particular - the failure of the current costs regime to fulfil the Convention's requirements for review procedures to be '*fair, equitable, timely and not prohibitively expensive'*. Hope was expressed that the European Commission's ongoing infraction proceedings against the UK, along with questions referred to the Court of Justice of the European Union by the Supreme Court in *Edwards,* will bring clarity to jurisdictions in which the 'loser pays' rule applies. Attention was also drawn to potential non-compliance on the part of the EC, as a party in its own right, with the Convention on the basis of the CJEU's case-law on standing. While recognising the Lisbon Treaty has removed the requirement for applicants to demonstrate individual concern, there is still a requirement to show direct concern in relation to primary legislation. Notwithstanding the above, Sir Francis surmised that either a change in jurisprudence on the part of the CJEU, or an amendment to Art.263 EC Treaty, is required to prevent the EC falling foul of the Convention.

Shadow Justice Minister, **Andy Slaughter MP**, gave the opposition's view on the position within the UK and the threat posed by the Legal Aid, Punishment of Offenders and Sentencing Bill to those seeking to challenge the malpractice of UK bodies operating overseas. In his view, the current proposals are based on a misunderstanding that environmental claimants are a manifestation of a 'compensation culture' and are designed to discourage meritorious claims. In terms of access to information, Mr Slaughter recommended the establishment of 'community hubs' providing tailored guidance, recognising that while current resources may preclude the formation of Aarhus centres (such as those existing across the UNECE region), better web-based material would be realistic and helpful. On public participation, he noted the Localism Bill and draft National Planning Policy Framework (NPPF) are inherently flawed in being based on a core strategy of economic growth. He concluded by saying that the opposition has little faith in the government's position on access to justice, given cuts in public funding and the removal of Conditional Fee Arrangements and After The Event (ATE) Insurance. Claimant lawyers will now be forced to take on the financial risk in important cases, such as the recent legal action against Trafigura, which will make these cases more challenging to run.

Professor Richard Macrory QC CBE (UCL and Brick Court Chambers) outlined the composition and role of the present First-Tier Environmental Tribunal established to hear appeals against civil sanctions imposed by the Environment Agency and Natural England under the Regulatory & Enforcement Act 2008. There is currently provision for environmental appeals from over 60 pieces of environmental legislation to go to a wide range of different bodies, which lacks common procedure and intelligibility. As such, the existence of the Environmental Tribunal provides an opportunity for consolidating environmental appeals across a wide range of existing laws. Professor Macrory also surmised that where the legislation provides no right of regulatory appeal other than by JR this can increase the inappropriate use of the procedure – perhaps a better solution would be to extend the right of statutory appeal to third parties. While the Environmental Tribunal could not hear JRs without changes to primary legislation, there were considerable attractions associated with the Upper Tribunal as a forum for environmental JR. Finally, Professor Macrory posed the question whether traditional JR in the Administrative Court, whatever costs reforms are made, cope with most cases within the scope of Aarhus?

Carol Day (WWF-UK) presented the results of a questionnaire circulated to over 60 environmental lawyers, statutory agencies and NGOs earlier in 2011 examining perceived barriers and solutions to environmental justice. The study highlighted that problems still remain with regard to the treatment of environmental issues, interim relief and costs, the latter of which remains the primary barrier to compliance with EU law/Aarhus despite the existence of Protective Costs Orders (PCOs) since 2004. In terms of solutions, there is significant enthusiasm (over 80% of those responding) for the development of the First-Tier Environmental Tribunal as a possible forum for environmental JR, on the basis of: (1) the potential development of legal and factual judicial expertise in environmental law, thus enabling complex cases to be dealt with in an cost-effective, fair and timely manner (all important components of the Convention); and (2) the opportunity to devise a set of rules and procedures that recognise the unique nature of environmental law and are properly tailored to address it.

Turning to the international perspective, Secretary General of the EEB **Jeremy Wates**, outlined some of the past achievements of the Convention, including: widespread support from 44 states in Europe and central Asia; the adoption and signature of the Kiev Protocol on Pollutant Release and Transfer Registers (PRTRs); the Almaty Guidelines on Promoting the Principles of the Aarhus Convention in International Forums; an amendment to the Convention on public participation in decisions on the deliberate release of Genetically Modified Organisms (GMOs), alongside unique facets of the procedures associated with the Convention such as the compliance and reporting mechanisms and NGO participation. In terms of future challenges, Mr Wates highlighted

the ongoing need to ensure the Convention is properly implemented – drawing attention to the successful operation of the Aarhus centres in the UNECE region, and now Brussels. There are also proposals to extend the scope of the Convention, firstly to the rest of the UNECE (including Russia and Turkey) but also globally – this could be done be either extending accession to other states or promoting similar regional Conventions. Finally, Mr Wates discussed the need for thematic expansion, highlighting activities covered by Articles 6(1)(b), 7, 8 and 9(3) of the Convention, alongside the potential benefits of extending the access to information provisions to the private sector.

Finally, in the morning session, former Chair of the Aarhus Compliance Committee, **Veit Koester**, outlined the key features of the Compliance mechanism. Communications can be triggered by the Contracting parties themselves, by other parties or by members of the public (all but one Communication has been triggered by the latter mechanism). Mr Koester then explained the functioning, powers and procedures of the Committee and its relationship to the Meeting of the Parties. Particular care is taken to ensure that all members of the Committee are independent – most are academics with no association with the government or NGOs. The Committee operates in a remarkably open and democratic manner, with observers able to make representations and virtually all parts of each meeting open to the public. Mr Koester then highlighted that of the some 60 Communications received by the Committee thus far, some 25% concern UK compliance. Mr Koester urged prospective complainants to focus on the most serious breaches of the Convention as the Committee cannot devote more resources to reviewing compliance (Committee members give their time *pro bono* and cannot meet more than four times a year). Three Communications in respect of the UK and costs (primarily) were then discussed (C23 (Morgan and Baker), C27 (Cultra Residents' Association) and C33 (Client Earth)).

After welcoming everyone back after Lunch, **Robert McCracken QC** (Francis Taylor Building) then directed delegates to one of three workshops:

1. Access to Information hosted by Laura Gyte (Friends of the Earth)

Following a presentation from **Justin Neal** (Solicitor, Fish Legal), the workshop considered the position post *Smartsource*, in which it was held that water companies are not public bodies for the purpose of the Environmental Information Regulations (EIR). It was noted that some water companies disclose information voluntarily, however, the public is reliant on their discretion rather than any certainty of access arising from the EIR. The workshop questioned whether information could be accessed via public regulators, however, the consensus was that this could not work, especially in an era of 'light touch' regulation, in which regulators may well not hold the information.

It was noted that the hearing in *Birkett* is scheduled for November, and will determine the extent to which public authorities can rely on new exemptions introduced late in the process. The current position is that, with a few qualifications, late exemptions can be introduced. The group received a presentation from **Gerry Facenna** (Monckton Chambers) regarding the impact of this on the timescales within with information requests must be answered, and on the requester's ability to mount an effective challenge to a refusal to release information at the earliest possible stage.

2. Public Participation in Decision-Making hosted by Maria Adebowale (Capacity Global)

The workshop provided an opportunity to discuss the reality for most people of public participation. The presenters included **Dr Kieron Stanley** (Environment Agency), **Barbara Willis-Brown** (Director, SCAWDI) and **Naomi Luhde-Thompson** (Planning & Policy Advisor, Friends of the Earth). The Workshop considered current issues such as the Localism Bill, NPPF and Natural Environment White Paper (NEWP) in order to identify successful factors for public participation in decision-making. These included: (i) ensuring civil society is engaged at the earliest opportunity; (ii) keeping participation 'simple'; (iii) providing support for community groups (reference was made to Environmental Centres in Australia); (iv) the benefits of using social media; (v) the importance of being transparent; and (vi) the importance of including policy makers with a track record on environmental issues. The Workshop concluded with a discussion on how public participation can be encouraged in an age of austerity.

3. Access to Justice hosted by Kate Harrison (Harrison Grant Solicitors/Greenpeace)

This workshop examined the current barriers to bringing judicial review proceedings in the UK for environmental matters, with presentations from **Richard Buxton** (Solicitor, Richard Buxton Solicitors), **Frances McCartney** (Solicitor, Patrick Campbell & Co, Scotland) and **Richard Stein** (Solicitor, Leigh Day & Co). Delegates discussed actions in the domestic courts touching on cases such as *Edwards, Austin* and *Garner*, the scope of the European Court in pursuit of environmental challenges and environmental justice within Scotland with its restrictive rules on standing, lack of framework to ensure litigation is not prohibitively expensive and an absence of a rights based culture.

Panel session

Short perspectives on 'what next for Aarhus?' were offered by four leading experts. **Ben Jaffey** (Blackstone Chambers) suggested that for the immediate future we are stuck with PCOs, and judicial discretion as our means of complying with Aarhus. However, in his view, things have improved a great deal in recent years. **David Wolfe** (Matrix Chambers) believes that our domestic JR procedures and costs provisions (adopted as they are from private law litigation) do not sufficiently recognise the inherent public interest in cases within the Aarhus Convention (as to which, see the recitals to the Convention). This is gradually being addressed in domestic cases (e.g. *Garner*) where EU obligations require action and, with references to the

CJEU in the pipeline, we will likely see a yet greater shift in that regard. However, for cases not covered by EU obligations (and simply within the Aarhus Convention) we must look to changes in the domestic rules and the imminent consultation on potential changes. **Kate Cook** (Matrix Chambers) highlighted the implications of Article 3(7) of the Convention, which requires each party to promote the application of its principles in international environmental decision-making processes and contains a solid core of obligations for which parties can be held accountable. If an Aarhus party like the EU took a negative line or even failed proactively to push forward these issues at a negotiation, such conduct could breach Article 3(7). Parties' positions on these issues should be carefully audited by civil society at each negotiating forum. Finally, **Gita Parihar** (Friends of the Earth) remarked that of all the provisions of law relied upon as an NGO lawyer, the Aarhus Convention has probably the widest application, from making a PCO application in an environmental JR, to arguing for increased civil society participation in the international climate negotiations. At the domestic level, the next key Aarhus-related development will be the costs consultation on PCOs and at the European level we will see if the new red-green Danish presidency of the EU will re-ignite proposals for an Access to Justice Directive. At the international level using Article 3(7) of the Aarhus Convention has helped NGOs improve civil society participation in the international climate negotiations. Next year the link between Aarhus and Principle 10 will come to the fore through Rio, there is a need for a global and regional Principle 10 Conventions as well as a set of minimum standards for participation in international processes.
Mr McCracken QC then closed the proceedings thanking, in particular, the Environmental Law Foundation for providing administrative support and King's College for providing the venue.

Thirty Nine Essex Street successes at the Chambers Bar Awards 2011

Thirty Nine Essex Street has picked up an array of accolades at the Chambers Bar Awards 2011. The set once again featured prominently in the list of winners picking up four awards, which included a clean sweep in the 'Environment and Planning' category, at the ceremony held in London.
Thirty Nine Essex Street won 'Set of the Year' for two of its practice areas, 'Professional Discipline' and 'Environmental and Planning', with the 'Environment and Planning group reigning supreme in their category not only picking up 'Set of the Year', for the third time, but also 'Silk of the Year' for Stephen Tromans QC and 'Junior of the Year' for Richard Harwood.
David Barnes, Chief Executive and Director of Clerking at Thirty Nine Essex Street Chambers, said of the win "Chambers are absolutely delighted with the success at the awards. It is fantastic to see the practice and individual barristers being recognised by the industry for their expertise in the respective areas"
Richard Harwood, Head of the Environmental and Planning Group at Thirty Nine Essex Street Chambers commented "Winning all of the Environment/Planning awards reflects a phenomenal year that has seen our barristers doing cases from the nuclear industry through BBC2's *Windfarm Wars,* Wightlink's ferries, SAVE Britain's Heritage's demolition case and the Dale Farm traveller evictions."
www.39essex.com

Wild Law in the South Downs

Simon Boyle – Argyll Environmental and Convenor of the Wild Law Special Interest Group

The last weekend of September is the traditional date for holding the UKELA Wild Law weekend. This time we were at the Sustainability Centre near Petersfield, previously a Royal Navy base under the name of HMS Mercury. (I should make it clear that we were not on some ancient naval vessel but planted firmly on terra firma near the beautiful downland village of East Meon. The S I believe referring here to 'shore establishment' rather than to ship.)
The weekend had been primarily organised by the redoubtable Ned Westaway, ably added by Louise Kulbicki and rather less so by the writer. But although my part in the gestation and organisation had been minor, I still carried the concern that things might not go quite to plan. It might for example rain and a number of us were sleeping in tents or a commodious (and as it turned out smokey) wigwam or tepee.
To those of you who have never been to a Wild Law weekend then I highly recommend them for I can guarantee that it will be a unique experience. The people attending are diverse, the subjects eclectic, and conversation stimulating. Much of it does concern challenging the preconceptions that we all hold on how things should be done and often with a presumption that we cannot or should not be the agents of change.
Of course many of the discussions are theoretical but on all wild law weekends there is a solid practical element. Here it was provided by the renowned woodsman, Ben Law who many UKELA members will have seen on the Channel Four programme 'Grand Designs' and voted by the public as their favourite build.
So it was that we gathered together on Saturday evening in the outdoor classroom that Ben had built, sitting round the log fire.

We learnt how he builds using local materials so the carbon footprint is as low as possible and at the end of its life everything can return back to the ground from whence it came- no hazardous wastes to burden future generations. Ben pointed to the 20 foot round trunks which support the roof- those had been trees growing just a couple of hundred yards from where they now stood. All he needs to build he sources locally. For walls he takes straw from the local farm, for plaster clay from the pit in his wood. Insulation comes as wool from sheep in the nearby fields. To me his buildings are more beautiful, warmer and more resilient than any conventional building. Why should this not represent our future?

In the morning before we had been treated to a brilliant lecture/ discussion with Ted Benton, a recently retired Professor of Sociology at the University of Essex. The lecture was billed as 'Wild Law and the transformation of society.' There was much about rights and how these need to be set in a framework of obligations and justice. Having an inalienable right may be of little practical value if one cannot afford to go to court to uphold such a right. Ted is a man with many strings to his bow and he had for example studied bumble bees for over twenty years. So taking a bee as an example, where would its rights begin and end? At its simplest we could say that the bee had a right to life and no human could kill a bumble bee. But that itself provides little value if its habitat can be destroyed. So we extend the right further to protect habitat. But even this may not be enough- bumble bees can fly considerable distances, up to 2 kilometres from their nests and could be seriously harmed by a field sprayed with insecticide. So again we may need to extend the right if we are serious about providing real meaningful protection to the bees.

A far ranging discussion was generated by Dr Jane Holder following her lecture on commons. Jane reminded us of Garrett Hardin's 'Tragedy of the Commons' where the unrestricted right to take from a natural resource leads inevitably to depletion and ultimately total collapse of that resource. Jane pointed out that the whole of the natural world could be regarded as a common and therefore there is a need for strong governance systems to provide protection against continual commercial pressures.

So this may give you an idea about some of the subjects discussed. To my mind there is nothing more important to discuss- it is about the preservation of the natural world upon which, whether we like it or not or whether we think so or no- all of us are completely dependent.

Editor's note: UKELA is organising a Wild Law weekend in Scotland next May (see below) and the independent group, Wild Law UK, will be arranging the larger scale, September workshop.

Credit: SYHA

Wild law – Cairngorm Lodge 4 to 7 May 2012

Sir Crispin Agnew – Scottish Regional Group convenor and Wild Law Scotland organiser

Anyone interested in Wild Law is invited to join a weekend meeting at the Cairngorm Lodge Scottish Youth Hostel Association hostel on 4 to 7 May 2012. There is shared accommodation in the hostel or camping nearby. The intention is for the party to eat together for the evening meal in the hostel after which to have wild law discussions on topics of mutual interest. Otherwise members attending should make their own arrangements for breakfast and lunch, which can be provided by the hostel for an additional charge, or there is self-catering in the hostel. We've reserved 20 places in the hostel (there will be other groups staying as this is quite a big hostel). Cost for the weekend - £155.

The plan is to ask the RSPB to guide us around the Abernethy Forest reserve, a wonderful Scottish pine woodland area with the *Loch Garten osprey centre* nearby on Saturday and on Sunday to undertake expeditions locally around Loch Morlich or perhaps go up onto the Cairngorms to see the effect of the funicular and ski infra-structure on the wild land of the Cairngorms; for those interested see the *Cairngorm Funicular case* where WWF and RSPB tried to stop the funicular.

A minibus will be available to take up to 16 people from Edinburgh to Cairngorm and back or to pick up members at Aviemore and a member should have a car to transport the balance over the weekend around the area.

Bookings open next week – visit the events page on www.ukela.org.

Working Party News

The **Nature Conservation Working Party** has organised a training course on Wildlife Law on November 15th-17th. We're grateful to the working party and Browne Jacobson for organising and hosting this event. All places are now booked and a waiting list is in operation.

The **Environmental Litigation working party** is currently considering Ministry of Justice proposals for codifying the rules on protective costs orders. Anyone interested in working on the consultation response should contact Rosie Oliver: rosiehopeoliver@gmail.com

The **Planning and Sustainable Development Working Party** has two new co-convenors – Will Upton and Frances Aldson. Our thanks to Anne Harrison for all her hard work over a long period as the convenor for the working party.

The next meeting of the **Waste Working Party** is on January 18th 2012 **4-6pm** at SJ Berwin LLP, 10 Queen Street Place, London EC4R.

Please support our working party events – the convenors go to a lot of trouble to arrange speakers and discussions of interest. Anyone is welcome to attend or join in working party activities – just contact the convenors (all listed on the website).

UKELA Events

15th November **Student careers and social evening in Bristol**

Due to the popularity of our London event (being held the next day) this is an opportunity for students based in the South West of England and Wales to attend their own gathering in Bristol. Thanks to Andy Stone for organising
To book click here.

16th November **Student Careers and Social evening**

The annual careers evening for students takes place at Landmark Chambers in London on 16 November from 6pm. To reserve your place (not many left so please hurry), email alisonboyd.ukela@ntlbusiness.com
Advisers include barristers, solicitors in private practice, the Environment Agency, Defra, NGOs and environmental consultants.

1st December **Annual Garner Lecture**

Don't miss UKELA's keynote lecture and *the* unmissable environmental law social event of the year
The Garner Lecture 2011 will be given by David Kennedy, the CEO of the Committee on Climate Change (which provides independent advice to government on building a low carbon economy) and will once again be held at Clifford Chance in London. Excitingly, for the first time, we're able to provide a videolink to the UKELA regional groups so we can offer a truly UK wide event. The technological challenges are more than we're used to so it could be an interesting evening in many ways!
If you're at Clifford Chance you will end the evening with drinks and canapés, the regions have a varied offering, but there will be plenty of food for thought.
With our thanks to Clifford Chance for hosting the lecture and providing the videolink technology and to Tughans in **Belfast,** Hugh James Solicitors in **Cardiff**, Pinsent Masons in **Leeds** and **Manchester**, Wragge & Co in **Birmingham**, Dundas & Wilson in **Edinburgh** and Guildhall Chambers in **Bristol** for hosting. For more details including how to book go to: http://www.cvent.com/d/wcqjww

December 1st **Scottish Regional Group AGM and Garner Lecture link up**

Bookings on the same link as above.

December 1st **South West Regional Group AGM and Garner Lecture link up**

Bookings on same link as above.

Date tbc **East Regional Group AGM**

February 8th 2012**: London Meeting on Rio Plus 20**

Your chance to find out what's on the agenda for the follow up to the 1992 Rio Summit on Sustainable Development.
Venue: Herbert Smith, Exchange House, Primrose Street, Exchange Square, London EC2A 2HS.

Start time: 5.30 (registration) for speakers at 6pm.
In 1972 nation states and some interested environmental groups and businesses converged in Stockholm, where the first ever international conference was held on environmental issues. Rio '92 was the twentieth anniversary of the Stockholm Conference and Rio 2012 marks the fortieth year since that ground-breaking summit. During these last four decades the most important international commitments that have defined a pathway for sustainability development include the Stockholm Declaration (1972), Agenda 21 (1992), the Rio Declaration on Environment and Development (1992), and the Johannesburg Plan Of Implementation (2002).

The United Nations Conference on Sustainable Development – Rio 2012 - is being jointly convened by the UN Department of Economic and Social Affairs (UN DESA) and the Brazilian Government. The conference will seek to secure meaningful commitments on achieving sustainable development at the highest level, although it has already run into trouble with the preparations for the event marred by disagreement. This summit offers a once in a decade opportunity for States, intergovernmental and non-governmental organisations, as well as civil society to take bold steps towards redefining the relationship that humans have with the natural world and how humans see themselves in the world. The issues of resource exploitation and scarcity, planetary and natural systems boundaries, as well as the negative impacts of irresponsible human activity that are already rippling throughout the world, will pervade the discussions and final negotiations at the conference.
Speakers include Jolyon Thomson from DEFRA.
1.5 CPD points will be available for all attending.
There will be a small contribution to cover costs at £25 for Members and £35 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 thanks to Angela and Herbert Smith for organising and hosting.

February 28th 2012 **Young UKELA: Renewables – Regulating the "third industrial revolution".**

The Young UKELA group is aimed in particular at practitioners up to seven years post qualification, but all are welcome (student places are free but must be booked due to limitations on space).
Early evening seminar to be held at the chambers of Thirty Nine Essex Street, London, WC2R 3AT. Registration at 6pm, speakers from 6.15.
This seminar will cover the incentives for and the obstacles to renewable energy projects in the UK planning system and the courts. Speakers will address the law and economics of renewables, and the merits and shortcomings of Government policy. The seminar will include perspectives from industry, the legal profession and Central Government.
Bookings will open shortly.
1.5 CPD points will be applied for.

March 29th 2012: **UKELA Student Competitions Day**

To be held at the University of London, Faculty of Laws, Bentham House, Endsleigh Gardens, London WC1H 0EG. Likely timings: 11am Andrew Lees prize final; 2pm moots semi-finals; 4.30 moot finals.
Judge of the Moot Final is Lord Justice Carnwath.
If you're interested in attending (you don't need to enter to attend – all are welcome) please email Alison Boyd alisonboyd.ukela@ntlbusiness.com.
Our thanks to No5 Chambers for sponsoring the competitions day.

May 4th – 7th **Wild Law in the Cairngorms**

A long (Bank Holiday) weekend exploring Wild Law issues, based at Cairngorm Lodge Youth Hostel. Organised by Sir Crispin Agnew. Limited places so please book early. Bookings have just opened:
http://www.cvent.com/d/wcq8r7

July 6th-8th - **UKELA Annual Conference 2012, Southampton - Planning for the Energy Challenge**

Bookings will open in December.

Non-UKELA Events

Castle debates

The series of Castle Debates continues with the next one scheduled for the morning of 1st December. Full details including how to book can be found here:
http://www.ukela.org/rte.asp?id=12

The *Journal of Environmental Law* 2011 annual lecture

15th December 6pm at the School of Law, SOAS, London in the Brunei Gallery lecture theatre (http://www.soas.ac.uk/gallery/).

The event is being chaired by Philippe Cullet of SOAS and delivered by Professor Thomas J Schoenbaum, George Washington University, on the topic **'Liability for Damages in Oil Spill Accidents: Evaluating the United States and International Law Regimes'**
The lecture is free to attend but requires registration. Please contact jel-lecture@reading.ac.uk for enquiries and registration. For more information about the event, view the flyer here: http://www.oxfordjournals.org/page/3817/10
Also, visit the *Journal of Environmental Law* online: http://www.oxfordjournals.org/page/3817/12

Offers

Offer to UKELA members

The Practical Law Company (PLC) is offering free access to UKELA members to their online web services. PLC says: "over 20,000 in-house lawyers and 120,000 private practitioners use PLC's subscription-based web services to do their jobs smarter, quicker and more cost effectively. With an unrivalled reputation for providing clear, concise and accurate material that is uniquely practical in its outlook, we are pleased to make PLC's suite of 27 multi-jurisdictional guides available, free of charge, to your members".
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For information about working parties and events, including copies of all recent submissions contact:
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E – LAW

The editorial team wants articles, news and views from you for the next edition due to go out in January 2012. All contributions should be dispatched to Catherine Davey as soon as possible by email at: catherine.davey@stevens-bolton.com by 11 Jauary 2012

Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.
Letters to the editor will be published, space permitting