We’re delighted that so many UKELA members are finding our autumn events programme useful. We had an almost record turnout for the London meeting on hydrocarbon fracking and good events in Scotland, Wales and Northern Ireland. A big thank you to all the incredibly supportive volunteers who help organise these events behind the scenes – we really couldn’t do it without you.

Thanks to Thirtynine Essex Street for permission to publish recent lectures on Nuisance by William Norris QC, Justine Thornton and James Burton.

We’re looking forward to the Garner lecture on November 29th. If you haven’t booked please do so now – it’s not just a chance to get stuck into the currently hot political potato of European regulation but to meet old friends and link up with other regions of the UK and the Flemish Environmental Law Association, joining us by videolink.

We welcome the new members who have joined recently. Current members should look out for your membership renewal invitation, coming out in early December. You will also receive the 2012 conference papers around that time and an invitation to attend next year’s 25th anniversary conference at Cambridge University. We’ve got a great programme lined up, considering the future for Environmental Law.

Best wishes

Mark Brumwell
Young UKELA

Young UKELA is looking for convenors to lead this active group and organise events through 2013. Young UKELA is for practitioners up to seven years’ post qualified although it also attracts along other members, including students. It has an excellent track record of organising two informative seminars a year, with speakers on a range of topics pitched at the level required. There is also scope for more informal social events, pub outings etc.

The group has worked well with a small team to come up with ideas and share out the work. Convenors should be in practice, and ideally no more than 7 years call. Anyone who needs more information about the role or to express an interest should contact James Burton james.burton@39essex.com

The group next meets in London on December 5th so do come along and talk to James there if that would help.

Working Party Star Member

There are two winners of the Working Party star member accolade for November/December.

The Waste Working Party has nominated Eleanor Reeves of SNR Denton for her work in preparing and submitting important consultation responses, recently presenting an insightful seminar and hosting meetings at SNR’s offices.

The Climate Change and Energy Working Party has nominated Teresa Hitchcock of DLA Piper UK LLP for helping pull together the CCEWP’s response on Defra’s consultation on the Greenhouse Gas reporting regulations. The convenors say: “she did a really good job of coordinating the thoughts of a sub-group of CCEWP members even though she was also very busy in the day-job!”

UKELA is very grateful to these hard working volunteers.
Ten things you should know about environmental enforcement and sanctions

Dispatches from the UCL/UKELA conference on ‘The New System of Environmental Enforcement and Sanctions: from Principle into Practice’, 8 November

Rosie Oliver, UKELA working party support officer

1. **A tariff-based approach to sentencing environmental crime is on the cards.** Michelle Crotty, Chief Executive of the Sentencing Council, explained that in Spring 2013 the Council will consult on sentencing guidelines for waste and environmental permitting offences that will include detailed tables with starting point figures for fines, depending on culpability, harm and business turnover. The Council intends the new approach both to promote consistency and increase fines across the board, which it regards as generally too low.

2. **Future orders making civil sanctions available to deal with offences that are not yet covered will restrict the use of fixed and variable monetary penalties and restoration notices to businesses with more than 250 employees.** This surprise announcement by Department of Business Innovation and Skills Minister Michael Fallon was issued on 8 November, the day of the conference. Cabinet Office Minister Oliver Letwin’s keynote address explained the background: essentially a fear that regulators might otherwise unfairly target sanctions on ‘the small guys’ who cannot call on an ‘army of lawyers’ to challenge them in the environmental tribunal. He saw this as a problem particular to civil sanctions because, unlike criminal fines that are imposed by the courts, regulators can issue sanctions directly on businesses. Somewhat regrettably, Letwin’s brief 30 minute appearance at the conference meant he did not hear the preceding speech by Judge Nick Warren, President of the General Regulatory Chamber: a comforting vision of the tribunal as a non-intimidating, user-friendly place where individuals are enabled to represent themselves, without fear of costs orders. Nor was the Minister around to hear the exasperated bafflement that followed his address. Floor and panel members commented that limiting monetary penalties and restoration notices to businesses with over 250 employees would massively restrict their use, nudging regulators back towards prosecutions. Representatives from various environmental regulators present palpably bristled when Letwin insinuated they had a tendency to be overzealous.

3. **Defra still intends to introduce civil sanctions for Environmental Permitting Regulation offences, but has held this up pending the Home Affairs Committee Review of Civil Sanctions.** This was confirmed by Defra official Steven Gleave in a comment from the floor. Although this seems like a significant extension in scope of civil sanctions, the move will be subject to the new policy in the Ministerial statement (point 2 above). In other words, fixed and variable monetary penalties and restoration notices would not be available to deal with environmental permitting offences committed by businesses with up to 250 employees.

4. **So far, the vast majority of the Environment Agency’s civil sanctioning activity has been dealing with offers of enforcement undertakings for packaging waste offences.** Dan Wiley, Environment Agency Legal Adviser, reported that in the eighteen months since their introduction in January 2011 the Agency received 109 valid enforcement undertakings of which 99 were for packaging waste offences. 59 were formally accepted and 36 were fulfilled and subject to completion certificates.
5. Packaging waste enforcement undertakings have generated donations to environmental charities totalling hundreds of thousands of pounds. We were not shown precise figures at the conference but details of enforcement undertakings are available on the Agency’s website. Dan Wiley explained that enforcement undertakings in these cases are unusual (‘almost a freak feature’ of the regime) in that there is no identifiable environmental harm that businesses can pledge action to deal with; hence there is ‘nothing else to do’ apart from make donations. Comments from the floor indicated concerns about a lack of transparency in the process for agreeing undertakings and deciding which charities would benefit.

6. Packaging waste enforcement undertaking donations are calculated according to consistency guidelines. The sums represent the costs avoided by failing to comply with the Packaging Regulations (primarily the cost of the packaging recovery notes due during the period of non-compliance) plus 10% if the business pro-actively self-reported the breach, or 30% if the Environment Agency made the first approach. The lower 10% figure is intended to give non-compliant businesses an incentive to self-report. Andrew Bryce, Solicitor, pointed out limitations to the incentive effect: some businesses may prefer not to come forward for fear of self-incrimination, and instead take the risk of a prosecution. In some cases, the extra legal costs associated with a prosecution might be less than the extra 10% they would have to pay under an undertaking. Guidance on self-incrimination would be helpful.

7. Apart from four fixed monetary penalties issued for water abstraction reporting offences under the Water Resources Act 1991, the Environment Agency has not issued any other civil sanctions. Dan Wiley and Anne Brosnan of the Environment Agency suggested that this was because we are still only in ‘the foothills’ of the new regime. As it beds down and sanctions become available for more offences (in particular environmental permitting offences) we can expect more civil sanctions to be issued. This suggestion was tempered by the Ministerial announcement later in the day limiting the sanctions that would be made available to deal with offending by businesses with less than 250 employees. Further, Andrew Bryce suggested that in the case of variable monetary penalties, the high degree of regulatory effort required meant regulators would be reluctant to impose them, preferring to prosecute instead.

8. The Scottish Government is planning to introduce ‘variable penalties and enforceable undertaking’, a similar scheme of sanctions to those under the Regulatory Enforcement and Sanctions Act. Bridget Marshall, Head of Legal at the Scottish Environmental Protection Agency (SEPA), explained that the powers would be part of a new integrated framework of environmental regulation, with a new outcome-focused approach to enforcement by SEPA. A consultation earlier this year proposed that variable monetary penalties should be capped at £40,000, signalling their use for less significant cases than those that would be prosecuted. The proposal that there should be a right of appeal to the Minister was generally considered by consultees to fall short of requirements under Article 6 of the European Convention of Human Rights (right to a fair hearing).

9. Legal aid might need to be made available for civil sanctions appeals to the environmental tribunal, if civil sanctions were deemed to be criminal in nature. James Maurici of Landmark Chambers went through some of the lead cases on whether civil sanctions are criminal for the purposes of Article 6 of the European Convention of Human Rights. The case law is inconclusive, but it is possible that variable monetary penalties in particular might be criminal, in which case the protections under Article 6(3) would apply.

10. For some offences, the availability of civil sanctions might fall foul of the Environmental Crime Directive 2008/99EC. Claire Dupont and Josephine Armstrong of Milieu Ltd Law & Policy Consulting reported that they are reviewing UK legislation for conformity with the Directive. They had not yet reached a view on whether the legislation complies. Ludwig Kramer, Visiting Professor, UCL Law Faculty, rejected the suggestion that it would be enough to have criminal sanctions ‘available’ for relevant crimes, alongside civil sanctions. However, he also commented that he could not see the Commission taking a case against a member state on the basis that its sanctions are not effective, dissuasive or proportionate.
Our President, Lord Carnwath, thought members might be interested in this judgment.


Environment – strategic environmental assessments – road construction projects

Walton v Scottish Ministers

The decision of the Scottish Ministers to amend a scheme for the construction of a bypass road near Aberdeen in Scotland so as to include an additional section of new road constituted a modification of a “project” within the meaning of Directive 85/337/EC (the EIA Directive), rather than of a “plan” or “programme” within the meaning of Directive 2001/42/EC (the SEA Directive). Accordingly, it had not been necessary for the Scottish Ministers to undertake a strategic environmental assessment prior to adopting the proposal. In relation to standing, it was not necessary for a person bringing a challenge to a road construction project under the relevant Scottish legislation to establish that his private interests have been or will be affected. It was sufficient if he had participated in the consultation process or had a genuine interest in and sufficient knowledge of the issues. The quality of the natural environment is of legitimate concern to everyone. However, even if the decision to amend the scheme had been found to be unlawful because of a breach of the requirements of the SEA Directive, the court would not have been bound to quash the decision, but would have been able to balance the practical effects of non-compliance against other factors, including the public interest in the scheme. That approach was consistent with the principle of effectiveness as explained in cases such as R(Wells) v Secretary of State (C-201/02) [2004] ECR I-723.

A full version of the judgment can be found here http://www.supremecourt.gov.uk/decided-cases/index.html

Lord Carnwath also gave a speech on the Planning Act 2008 to the inaugural dinner of the National Infrastructure Planning Association. You can read it here: http://www.supremecourt.gov.uk/docs/speech-121017.pdf
Lee McBride is convenor of UKELA’s West Midland Regional Group. He lived in Australia for twenty years before returning to the sunnier climes of the UK in 1990 where I met my wife Heledd. He says: “I have two beautiful young daughters aged three and five (yes – from my wife’s gene pool) who can speak fluent English and Welsh and who are currently learning Spanish, French and Italian. In my younger days I was a very keen long distance cyclist (having ridden to Barcelona, Marseille and Basel as well as John O’Groats to Southampton) but am now confined to rowing and golf. I am in my 17th year at Wragge & Co.

The questions:

What is your current role?
I head up the Environment team at Wragge and Co but in my spare time (!) get heavily involved in the property aspects of Corporate transactions as well as Health and Energy projects.

How did you get into environmental law?
Around 1990 I made a conscious decision to devote time in gaining expertise in this area (this was at a time when Environmental Law as a “new” discipline was being recognised and was moving up the political agenda) as an add-on to my property practice. Little did I realise that it would become a major part of what I do now.

What are the main challenges in your work?
Keeping up to date with new and proposed changes in the law – but more importantly really understanding the effect of legislative changes on a particular client’s operations from both a technical and a practical point of view.

What environmental issue keeps you awake at night?
None – I have two very young daughters.

What’s the biggest single thing that would make a difference to environmental protection and well-being?
More individual (as well as collective) consciousness and responsibility. I don’t hug trees but I find, for example, the litter on the average British street appalling.

What’s your UKELA working party of choice and why?
None in particular

What’s the biggest benefit to you of UKELA membership?
Meeting like minded people (not just lawyers) who have a real interest in this area.
Introduction

1. The foundations of the modern law of private nuisance are firmly set in the law of the 19th Century and earlier. However, the protean nature of this common law cause of action is such that some issues of apparently elementary principle are still controversial as objectors to various forms of activity and development look for legal remedies beyond the planning process and action by local authorities seeking to establish a statutory nuisance.

2. The aim of this talk is not to provide an extensive analysis of the jurisprudence but to concentrate on some of those issues of principle in the light (particularly) of the following cases:

- **Barr v Biffa Waste Services** [2012] EWCA Civ 312 (permission to appeal at the Supreme Court having been refused).
- **Coventry v Lawrence** [2012] EWCA Civ 26 (permission to appeal to the SC having been granted).
- **Berent v Family Mosaic Housing** [2012] EWCA Civ 961.
- **Pusey v Somerset County Council** [2012] EWCA Civ 988.
- **Davis v Tinsley** – Autumn 2011 – settled (on confidential terms): a case about alleged noise nuisance attributable to a wind farm.

3. The search for a single test begins with the words of Lord Millett in *Southwark LBC v Mills* [2001] 1 AC 1 (at p20):

> “The law of nuisance is concerned with balancing the conflicting interests of adjoining owners… in practice, the law seeks to protect the competing interests of both parties as far as it can. For this purpose, it employs the control mechanism described by Lord Goff… in Cambridge Water v Eastern Counties Leather Plc [1994] 2 AC 264 at p299 as ‘the principle of reasonable user… the principle of give and take’…”

4. In **Barr v Biffa**, Carnwath LJ identified the following six rules in the context of a case where the nuisance complained of was smell from a waste-tipping site.

(i) There is no such thing as an absolute standard: everything is a matter of fact and degree.
(ii) The interference complained of with the convenience and / or comfort of the neighbours’ enjoyment must be judged according to the standards of the average man.
(iii) The character of the neighbourhood is a relevant consideration.
(iv) The duration of an interference is relevant but not decisive in assessing whether it is actionable.
(v) Statutory authority, properly understood, may be a defence to an action in nuisance if, but only if, the statutory provision expressly or implicitly authorises that nuisance – see *Allen v Gulf Oil Refining* [1981] AC 1001.
(vi) The public value / utility of the activity in question is no defence.

5. So much for the general and uncontroversial principles many of which are also discussed in the useful case of *Hirose Electrical v Peak Ingredients* [2011] EWCA Civ 987: let me instead concentrate on some of those individual components of the modern law of nuisance after restating another elementary component.
Reasonable Foreseeability

6. In nuisance, as in negligence, the Defendant will not be liable unless it was reasonably foreseeable that his activities would give rise to harm of the kind complained of – this we know from the old as from the new cases. It is important to emphasise the word “reasonably” in this analysis.

7. In Bolton v Stone [1951] AC 850, it was certainly foreseeable that a passerby might be struck by the cricket ball. Indeed, it had actually happened before. But the chance that that would happen, coupled with the further risk of significant injury in that event, was statistically very remote. So although the risk was literally foreseeable, therefore, it was not reasonably foreseeable at least in the sense that the reasonable man would think it acceptable to take the risk. It follows that question of reasonableness is not defined simply by reference to statistical probability and/or the severity of injury (though both are relevant considerations). What is also important is the nature of the activity being undertaken. In Bolton v Stone, and in Tomlinson v Congleton BC [2004] 1 AC 46, for example, the activities of the Defendant had some obvious public utility. But that was absolutely not the case in Jolley v Sutton LBC [2000] 1 WLR 1082 where the upturned and abandoned boat served no useful purpose whatsoever, nor was it in The Wagon Mound (2) [1967] 1 AC 617. In that case, the activity in question (carelessly discharging bunker fuel into the harbour) may have carried only an extremely remote risk of causing the conflagration that did all the damage, but the existence of that risk, coupled with the fact that the activity in question was unlawful and careless were important considerations.

8. Otherwise, reasonable foreseeability can be applied as a conventional and familiar test exemplified by the decisions of the House of Lords in Delaware Mansions v Westminster CC [2002] AC 321 and by the Court of Appeal in Network Rail Infrastructure Limited v Morris [2004] Env LR 861. Similar issues of reasonable foreseeability can also arise in wind farm cases. In Davis v Tinsley, for example, it would have been open to the Defendants to say that at the time that they designed, constructed and even began to operate the wind farm it may well not have been reasonably foreseeable that Mr and Mrs Davis would be adversely affected, given where and how far away they lived from the turbines and the levels (and type) of noise that was expected. But once it became apparent that Mr and Mrs Davis were indeed affected, the Defendants would not have been able to say that the interference was not reasonably foreseeable.

The Relevance of an Activity Being in the “Public Interest”

9. I do not think that arguments as to the relevance (or irrelevance) of the public interest in or public benefit of the activity have been exhausted – though recent caselaw might seem to suggest otherwise. Perhaps I really mean that I think they have not so far been analysed as I believe they should have been.

10. I have no difficulty with the proposition that, in the absence of direct statutory authority or statutory exclusion, it is no defence for the Defendant to say that what he is doing is reasonable simply because it is in the public interest – see, for example, Miller v Jackson [1977] QB 966, Dennis v Ministry of Defence [2003] EWHC 793 and Barr v Biffa. Indeed, this can fairly be regarded as trite law – see also Pusey v Somerset County Council.

11. I also accept that attempts in Barr v Biffa to argue the public interest point were dealt with clearly and conclusively in the Judgment of Carnwath LJ in that case, particularly at paragraph 46. But there are two interrelated dimensions of the public interest argument which may not yet be seen as fully resolved.

12. The first may yet arise for consideration in a wind farm case. On the authority of Barr v Biffa, it will be no defence to say in general terms that a neighbour should tolerate the presence of a wind farm simply because it is promoted pursuant to a public interest. But that is not to say that the hypothetical ‘reasonable man’ would and should not take some account of the public interest in deciding whether his neighbour’s activity is truly objectionable.
13. It can, I suggest, properly, be argued that, in the light of our international obligations and UK policy and guidance in national, regional and local planning (promoting and supporting, amongst other things, onshore wind development), the hypothetical reasonable resident of the British countryside can now be expected to tolerate some change (which he may characterise as interference with amenity) in that which he could previously see and hear. After all, a wind farm development is bound to cause some noise and is bound to have some effect on the landscape. That is the inevitable product of a planning system which applies UK planning policy.

14. So, whilst the ‘public interest’ may not be a freestanding defence, it should, I argue, be relevant to the attitude of the hypothetical reasonable person: such a person, viewing things objectively, is of course the touchstone for what constitutes unreasonable behaviour and as such is decisive of the issue of nuisance.

15. The second, related, issue concerns how far such planning considerations and, indeed, the actual grant of planning permission may change the character of a neighbourhood so that someone who objects both to the sight and sound of wind turbines may not be able to complain of their presence simply because they were not there previously.

16. This question of planning permission and change of character remains controversial and is an issue which is likely to be revisited when Coventry v Lawrence is heard by the Supreme Court.

17. In Watson v Croft Promo-Sport [2009] EWCA Civ 15, the Court of Appeal addressed the relevance of the grant of planning permission to the nuisance issue following an analysis of earlier authorities, including Gillingham Council v Medway Dock [1993] QB 343; Hunter v Canary Wharf [1997] AC 655 and so forth. These same issues came to be considered again in Barr v Biffa where the Court had to decide what, if any, significance should be attached to a planning permission which was “strategic in nature”10. However, the Court went on to say (at paragraphs 81 and 82) that the scope of the Gillingham Docks exception remained unsettled and certainly did not arise in the instant case as there was no ‘strategic’ dimension to the permission. But there is a far stronger argument that renewable energy development at any level is indeed ‘strategic’ in the sense used in the nuisance cases11 in that it is a response to national policy in the light of international obligations, the Renewables Energy Directive 2009 and national, regional and local planning policies.

18. The relevance of planning permission arose again in Coventry v Lawrence where the Court held that motor racing activities, carried on for more than a decade under a Certificate of Lawful Use and then a planning permission subject to detailed conditions, had indeed become part of the “character of the neighbourhood” against which the reasonableness of the defendant’s use of the land (and so the alleged nuisance) had to be judged.

19. Jackson LJ, in the Coventry case reviewed the relevant authorities and (at paragraph 65 of his Judgment) gave four propositions:

   (i) A Planning Authority cannot, by the grant of planning permission, authorise the commission of a nuisance;
   (ii) Nevertheless, the grant and implementation of such permission may change the character of a locality;
   (iii) Whether it has that effect will vary on the facts of individual cases; and, if so,
   (iv) The Court has still to decide whether a nuisance exists notwithstanding that change to character.

20. In the view of the Court of Appeal in Coventry v Lawrence, that analysis is consistent with Watson v Promo-Sport. In the context of wind farm planning, for example, this same issue is of considerable relevance. Assume that the Development Plan establishes a particular area as suitable for wind farm development. Assume further that one or more projects have been consented and built in that area12. In that case, it may be argued, it ought to be very difficult for a resident to object to the presence of any new level of noise (or visual intrusion) just on the basis that previously he could not hear or see this particular feature.
21. On the other hand, how far that point may also be an answer to a resident who objects to the very first development in an area, particularly where (for example) the development has taken place outside an area designated at a local or national level as suitable for wind farm development, and brings a private nuisance claim, remains to be seen. In any case, it would be an unwise commentator to firm a view on any of these issues until Coventry v Lawrence has been heard and decided in the Supreme Court.

The Threshold / Baseline Argument

22. At least in a context of wind farm planning, the public interest and/or character of the neighbourhood issue ties in with one analysis of the “threshold” test that the Court of Appeal in Barr v Biffa regarded as unsound. But whether some variation on the test has no place at all in analysis of private nuisance is far from clear.

23. The threshold test itself – at least in the formulation adopted by Coulson J in Barr v Biffa at first instance – is now regarded as legally disreputable – see also Pusey v Somerset County Council. As the Trial Judge had used it, a “threshold” of a certain number of days beyond which the continuance of the smell was reasonably intolerable was a valuable – indeed, a necessary – test of what was or was not a reasonable user.

24. According to Coulson J, it was a refinement of the “control mechanism” for deciding “reasonable user” identified by Lord Goff in Cambridge Water. But the Court of Appeal in Barr v Biffa did not like it one bit. Indeed, it was evidently regarded as an illegitimate attempt to impose artificial constraints on the broader judgement of the merits which a proper analysis of the law requires13.

25. So far, perhaps, so uncontroversial: but this commentator (at least) can see some utility in identifying some sort of threshold in order to guide the Court’s determination of what is reasonable and what is not. Whilst facts and circumstances vary infinitely, the test of what is or is not reasonable is supposed to be an objective one. I accept that there may be instances where there are no measures of that which is objectively objectionable and that which is not. But in the context of noise, for example, there are some objective measures, capable of scientific application, which are available.

26. Nevertheless, what remains legally controversial is how far, if at all, they can and should be deployed in such cases. Their value seems – to me – obvious. When a Court has to decide what is unacceptable, it may have to decide, first, whether any (let us say) noise – or it could be smell – should be tolerable. If the answer to that is in the negative, then there is no need for any objective measure of that which should be tolerable. But what if it is judged that some noise or smell should be deemed acceptable? How can one distinguish between the acceptable and the unacceptable, especially in the context of the interests of developers and objectors alike in having some sort of certainty and continuity in planning and decision making?

27. This was an issue which would have arisen in the Davis v Tinsley case and is the subject of an article, Wind Farm Noise & Private Nuisance Issues in [2012] JPEL 230.

28. If we assume (for the sake of argument) that a wind farm has been built in an area designated as appropriate for wind farm development in local or regional guidance, in accordance with planning permission and is compliant with any conditions imposed, then it may be argued that the reasonable neighbour cannot object to the mere fact that he now hears a sound that was absent before the wind farm was built, any more than that he can object to the presence of something new in the landscape. His objections will be – or should have been – taken into account at the time of the grant of planning permission. That is the process which ought to have addressed the public interest in balancing the commercial interests of developers with the amenity of private residents and (in this example) the public need for onshore renewable energy development.

29. If that is correct, what measure – or threshold or baseline – should there be to distinguish between the level or kind of noise that ought to be tolerated by the reasonable resident/landowner and that which is intolerable?
30. Given that it is obviously preferable that there should be some consistent and objective criterion, especially if it is capable of scientific assessment, it may be thought that there is nothing better – at least as a starting point – as a measure of acceptability than compliance with recognised guidance in the form of ETSU-R-97. This been applied for many years in countless planning inquiries and has found (and still finds) consistent support in planning guidance and case law.

31. My contention, therefore, is that a good – though, I recognise, not decisive – measure of what is acceptable and what is not would be compliance with ETSU: it is, after all, that guidance which is typically applied in the planning process. It is also to be recognised that ETSU-R-97 expressly states that its object is to help strike the balance between the need for renewable energy and the legitimate commercial interests of developers on the one hand, and the protection of residential amenity on the other.

32. If one simply follows the strict Barr v Biffa line one is left with absolutely no objective measure of acceptability. Such a situation is, at least in my view, wholly unsatisfactory from the point of view of planners, developers and objectors alike. It, therefore, seems to me that the concept of establishing some sort of baseline (as I prefer to call it) or threshold (as it was termed in Barr v Biffa) is necessary. But an advocate of such an approach will need to distinguish Barr v Biffa and to overcome what was at least the manifest lack of enthusiasm for the contention that was apparent even at first instance in Tegni Cymru Cyf v Welsh Ministers both at first instance and in the Court of Appeal.

Give & Take

33. One formulation (or a key feature) of the test of reasonableness / reasonable user is the requirement of "give and take, live and let live" between neighbours. As Lord Millett explained in Southwark LBC v Mills, that has been a consistent theme of the English law of nuisance for at least 150 years.

34. That being so, it is necessary to decide not only whether the noise, smell or activity complained of is inherently objectionable but also whether the fact that it persists translates such objectionable behaviour into an actionable nuisance. Consider this simple illustration: it may be objectionable if I play loud music even on a single night, but if my reaction to my neighbours’ complaints is to accommodate them, I can hardly be at risk of being sued in nuisance. In part, this is because the law of nuisance depends upon the concept of reasonable foreseeability, but it is also an expression of the "give and take" principle.

35. This issue might have arisen in a different form in the Davis v Tinsley case. If one accepts that the noises Mr and Mrs Davis heard were objectionable according to the standards of the reasonable neighbour that did not necessarily mean that they were actionable: they would only be actionable if the wind farm operator had reacted unreasonably in response. The issue of fact which would have arisen for determination there was whether the Claimants had made and pursued their complaints reasonably and whether the wind farm operator had acted reasonably in addressing them.

36. So Mr and Mrs Davis’s argument was that the wind farm operator was acting unreasonably not just because of the noise from the turbines but also because the operator (and landowners) failed properly to respond to their complaints about the levels of noise. On the other hand, the defence asserted that Mr and Mrs Davis had obstructed the proper investigation by the operator of the noises of which they complained (and had exaggerated that which they could hear). The argument went that, until such investigations had been completed, the Defendants’ use of the land could not be characterised as unreasonable. The Davises in response rejected that version of the facts and said that the issue of conduct was irrelevant because it was unreasonable to have continued to operate the wind farm without taking any practical steps to deal with the noises of which they had complained.

37. Since the case was compromised both the facts and the legal issues remain unresolved. A point for determination at some stage in the future is how far the factual relationship and behaviour of the parties is a relevant component of the analysis of reasonable user upon which any issue of negligence depends.
Footnotes

1 william.norris@39essex.com
2 In the words of Lord Steyn in R v Secretary of State ex p Daly: “In law, context is everything”.
3 As Thesiger LJ put it in Sturges v Bridgman (1879) 11 Ch D 852: “What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey...”.
4 Some of the concessions made by the Defendant in the appeal make this an authority of indeterminate jurisprudential value.
5 In that case, the railway had no reason to foresee that at the time its track circuits were installed, Mr Morris would be likely to suffer interference in his musical activities, given how far away it was.
6 Although the parties were very much at odds as to the nature and extent of that effect.
7 Ditto the Defendants in Morris, but by the time Mr Morris began to complain, he had sold his business and hence would not have been able to establish any continuing loss and would certainly not have been entitled to injunctive relief.
8 Such as arises under Section 158 of the Planning Act 2008 in respect of nationally significant infrastructure projects.
10 See paragraphs 77-78 of the Judgment of Carnwath LJ.
11 See paragraph 78: this may be wider than the sense in which the term is used in the planning process and extend beyond the definition of nationally significant infrastructure projects as defined in ss, 14 and 15 of the Planning Act 2008
12 Bear in mind also that in some of the landscape guidance we find express recognition that the presence of turbines changes the relevant landscape character designation – e.g to ‘Upland with turbines’.
13 Such as in Hirose Electrical where an important issue was what constituted reasonable user and what kind of smell might the ordinary and reasonable occupier on the light industrial estate have been expected to tolerate.
14 With very few exceptions indeed.
15 See paragraph 1 of the Executive Summary and page (viii), paragraph 25.
16 All of these issues, I emphasise, remain unresolved in the instant case which was compromised on confidential terms.
Private Nuisance Actions: Procedural pitfalls and opportunities within the regulatory backdrop

James Burton

Introduction

1. At the centre of this evening’s discussion are common law claims for private nuisance brought by individuals seeking compensation and/or an injunction, and in particular those brought by way of group action for alleged nuisance caused by activity on nearby land (Barr v Biffa being a typical example). We are concerned only with domestic, not international, claims. The focus of other papers is on the tests that apply to such claims and the awards a court is likely to make in the event that they succeed. The decision of the Court of Appeal in Barr v Biffa has disposed of the (short-lived) heresy that an operator’s compliance with his environmental permit will of itself defeat a claim in private nuisance. A manifestly correct result, given the permitting regime was neither intended nor designed to supplant the common law.

2. However, despite Barr v Biffa the statutory frameworks that seek to regulate activities apt to give rise to nuisance remain an important, sometimes vital, backdrop to these private actions. To take the most straightforward example, successful enforcement action taken by a regulator against an emitting plant the subject of neighbour complaint due to alleged nuisance may provide would-be claimants (and their lawyers) with the encouragement they need to take the risk of bringing proceedings. Unsuccessful enforcement action may dissuade them. The private action may be “queued up” behind regulatory action for tactical reasons, and the time taken to resolve the regulatory action may give advantage to either side in the private action; it may give claimants the opportunity to drum up interest and increase the size of the group, it may give defendants the chance to put things right/better and so dissuade the waverers. Or the regulatory proceedings may simply shape the issues for any private claim.

3. This paper seeks to make a very modest contribution to the evening’s debate through introduction of some of the more important elements of the regulatory backdrop and exploration of certain pitfalls and opportunities within it, as part of the broader tactical battle that is an increasingly important consideration in group nuisance litigation.

4. For some in the audience this will be entirely trite, for others it will be largely unfamiliar territory. Apologies to the former.

The key regimes

5. Most land likely to give rise to widespread nuisance complaint does so because of human activity carried out upon it. As noted, this paper is not concerned with claims for such as tree root nuisance (nor, indeed, natural deterioration cases such as the landslip in Leakey v National Trust).

6. Where there is human activity there is likely to be a regulatory regime applicable to it. Or more than one. In the case of a typical facility there are likely to be two; the development control regime under which the development is permitted in the first place, and the environmental permitting regime by which its day-to-day activities are regulated (the existence of which regime may be taken into account by the planning decision-maker).
7. The relevant regulatory regimes with which we are concerned are likely to be:

(1) the development control regime (where the key legislation is the Town and Country Planning Act 1990);
(2) the statutory nuisance regime (where the key legislation is Part III of the Environmental Protection Act 1990 (“EPA 1990”)); and
(3) the environmental permitting regime (where the key legislation is the Pollution Prevention and Control Act 1999 and, most importantly, the Environmental Permitting (England and Wales) Regulations 2010 (“Permitting Regs 2010”)).

8. Each throws up tactical opportunities relevant to private nuisance.

9. The contaminated land regime (where the key legislation is Part IIA of the Environmental Protection Act 1990 (“EPA 1990”)) may also be relevant to nuisance cases arising from historic activities with ongoing consequences.

Permission and conditions

10. The first “legal” stage for a relevant facility is likely to be a grant of planning permission and/or the issue of an environmental permit. Inevitably, conditions will be attached. These conditions will not only be crucial to any future regulatory enforcement, they may also play a major role in “setting the scene” for a future nuisance action.

11. Wind farms have been discussed already, but they provide a neat illustration (and, perhaps unusually amongst potential generators of nuisance complaints, fall outside the Permitting Regs 2010). We will assume, for the sake of argument, that the conditions attached are lawful.

12. Consider:

(1) conditions attached to a wind farm planning permission may set noise limits that are more or less onerous (though the ETSU-R-97 noise limits are generally applied they are not invariably applied, and there is no reason to think that that will change given its endorsement by EN-3, for Nationally Significant Infrastructure Projects (“NSIPs”), and, indirectly, the National Planning Policy Framework for smaller schemes);
(2) noise conditions may require the wind farm operator to produce more or less noise data more or less frequently;
(3) for an installation that is tiptoeing around the noise limits, steady confirmation of that through data submissions could fan the flames of a private nuisance claim;
(4) particularly where the noise measurement locations are sited at or near the properties of vociferous objectors;
(5) though compliance or otherwise with those noise limits will not be determinative of statutory nuisance under Part III of the EPA 1990, still less private nuisance, they will tend to shape the debate, and in practice first-instance courts/tribunals will pay them great heed.

13. As to the latter, consider how the district judge approached Nichols, Albion and Lainson v Powergen Renewables Limited and Wind Prospect Limited (South Lakeland Magistrates’ Court, 20th January 2004), statutory (noise) nuisance proceedings brought against the operators of a 7-turbine wind farm near Barrow-in-Furness. The wind farm operated under a planning permission with conditions set by reference to the ETSU-R-97 limits (later backed up by a s.106 planning obligation to reflect micro-siting adjustments). Noise complaints began almost immediately after construction, relating to a “whooshing” and “thudding” noise under certain wind conditions. The operators’ attempts to address residents’ concerns included a noise reduction management system, which automatically depow ered turbines under wind conditions associated with the complaints. However, that failed to satisfy residents. The local authority declined to take action because in its view there was no nuisance. Neighbours then brought summary proceedings themselves, pursuant to s.82 EPA 1990.
14. Counsel for the defendants reports that at the substantive hearing it was agreed that the standard of proof under section 82 was criminal, but the district judge commented however that he would have come to the same conclusion by applying the civil standard of proof. More tellingly, that the district judge accepted that the planning conditions set to protect noise sensitive properties were of “considerable importance” and that “common sense” argued against such levels being set so as to constitute a nuisance. The expert evidence, which was accepted, was that with the noise reduction management system in operation the wind farm was compliant with those conditions. He dismissed the informations against both defendants.

15. In my view, nothing in the approach taken by the magistrates’ court in the Nichols case offends the decision of the Court of Appeal Barr v Biffa. Which is perhaps as it should be, given that in both cases the tribunal accepted submissions from the same counsel.

16. The above applies equally to conditions attached to an environmental permit.

17. Once one begins to consider the importance of such as the locations at which readings/assessments will be taken, relative to particular potential claimants, it is possible to see just how significant this stage of the process may be.

18. Nor can it or should it be assumed by developers/operators that at the condition-setting stage possible future-complainants will be acting without legal advice, and that their legal “competition” is the local authority/regulator.

19. Local objectors are ever better informed and information-sharing between objector groups is a fact of life, whether the development be wind turbines or anaerobic digestion. Simply because residents do not appear to be represented does not mean that they do not have lawyers waiting in the wings giving advice off stage. This applies equally to consultations and inquiries into planning permission and consultations upon environmental permit conditions.

20. Conditions, then, even if lawful, are the first important skirmish of what may eventually become a drawn out private nuisance campaign.

NSIPs

21. Note that the unique development consent process for NSIPs means that they will enjoy statutory authority pursuant to s.158(1)-(2) of the Planning Act 2008, providing a defence to any civil or criminal claim in nuisance, where the nuisance arises inevitably from what has been authorised, unless the decision-maker decides to make any contrary provision in the order giving development consent (which may include disapplication of s.158(1)-(2)).

Enforcement

22. Whilst the setting of conditions to permissions allows obvious scope for strategic manoeuvring, the true tactical game often does not begin in earnest until enforcement is under consideration. Particularly so where it is only when the particular facility/activity is up and running that neighbours begin to realise there may be a nuisance issue.

23. Each enforcement regime is different, and gives rise to different pitfalls for the enforcing body. It is worthwhile précising the key provisions.

Development control

24. The planning regime allows for issue of either an enforcement notice (s.172) or the service of a breach of condition notice (s.187A). In practice, LPAs tend to shy away from the latter because it gives no right of appeal (unlike an enforcement notice) and breach is a criminal offence.
25. Section 173 prescribes the contents and effect of an enforcement notice:

Section 173 – Contents and effect of notice

(1) An enforcement notice shall state—
(a) the matters which appear to the local planning authority to constitute the breach of planning control; and
(b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls.
(2) A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.
(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
(4) Those purposes are—
(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
(b) remedying any injury to amenity which has been caused by the breach.

(8) An enforcement notice shall specify the date on which it is to take effect and, subject to sections 175(4) and 289(4A), shall take effect on that date.
(9) An enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased.

26. Section 187A prescribes the contents of a breach of condition notice:

Section 187A—Enforcement of conditions

(1) This section applies where planning permission for carrying out any development of land has been granted subject to conditions.
(2) The local planning authority may, if any of the conditions is not complied with, serve a notice (in this Act referred to as a “breach of condition notice”) on—
(a) any person who is carrying out or has carried out the development; or
(b) any person having control of the land, requiring him to secure compliance with such of the conditions as are specified in the notice.
(3) References in this section to the person responsible are to the person on whom the breach of condition notice has been served.
(4) The conditions which may be specified in a notice served by virtue of subsection (2)(b) are any of the conditions regulating the use of the land.
(5) A breach of condition notice shall specify the steps which the authority consider ought to be taken, or the activities which the authority consider ought to cease, to secure compliance with the conditions specified in the notice.
(6) The authority may by notice served on the person responsible withdraw the breach of condition notice, but its withdrawal shall not affect the power to serve on him a further breach of condition notice in respect of the conditions specified in the earlier notice or any other conditions.
(7) The period allowed for compliance with the notice is—
(a) such period of not less than twenty-eight days beginning with the date of service of the notice as may be specified in the notice; or
(b) that period as extended by a further notice served by the local planning authority on the person responsible.
(8) If, at any time after the end of the period allowed for compliance with the notice—
(a) any of the conditions specified in the notice is not complied with; and
(b) the steps specified in the notice have not been taken or, as the case may be, the activities specified in the notice have not ceased, the person responsible is in breach of the notice.
(9) If the person responsible is in breach of the notice he shall be guilty of an offence.
Statutory nuisance

27. By s.79, Part III to the EPA 1990 prescribes a list of nuisances that are “statutory”, and as such enforceable by the local authority. These include such as smoke, fumes, dust, smell and noise.8

28. If a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in its area, then, pursuant to s.80:

Section 80 – Summary proceedings for statutory nuisance

(1)… the local authority shall serve a notice (“an abatement notice”) imposing all or any of the following requirements—
(a) requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;
(b) requiring the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes, and the notice shall specify the time or times within which the requirements of the notice are to be complied with.

Permitting Regs 2010

29. Where there is an environmental permit in place, the EA may serve an enforcement notice (pursuant to Reg.36) and/or a prohibition notice (pursuant to Reg.37):

36.— Enforcement notices

(1) If the regulator considers that an operator has contravened, is contravening, or is likely to contravene an environmental permit condition, the regulator may serve a notice (an “enforcement notice”) on the operator under this regulation.
(2) An enforcement notice must—
(a) state the regulator’s view under paragraph (1);
(b) specify the matters constituting the contravention or making a contravention likely;
(c) specify the steps that must be taken to remedy the contravention or to ensure that the likely contravention does not occur; and
(d) specify the period within which those steps must be taken.
(3) Steps that may be specified in an enforcement notice include steps—
(a) to make the operation of a regulated facility comply with the environmental permit conditions; and
(b) to remedy the effects of pollution caused by the contravention.

37.— Suspension notices

(1) The regulator may suspend an environmental permit by serving a notice (a “suspension notice”) on the operator under this regulation.
(2) If the regulator considers that the operation of a regulated facility under an environmental permit involves a risk of serious pollution, it may serve a suspension notice on the operator.
(3) Paragraph (2) applies whether or not the manner of operating the regulated facility which involves the risk is subject to or contravenes an environmental permit condition.
(4) A suspension notice served for the purpose of paragraph (2) must—
(a) specify—
(i) the risk of serious pollution mentioned in that paragraph,
(ii) the steps that must be taken to remove that risk, and
(iii) the period within which the steps must be taken;
(b) state that the environmental permit ceases to have effect to the extent specified in the notice until the notice is withdrawn; and
(c) if the environmental permit continues to authorise the operation of a regulated facility, state any steps (in addition to those already required to
be taken by the environmental permit conditions) that are to be taken when operating
that regulated facility.

(7) If a suspension notice is served, the environmental permit ceases to have effect to the
extent stated in the notice.

30. One might think the requirements under the various regimes straightforward. In practice,
enforcing authorities have found them anything but.

31. The authors of the planning encyclopedia say this regarding planning enforcement notices:

P173.05

No area of town and country planning has given rise to such persistent litigation, such
technicality and such conflicting statement of principle, than the issue of what an enforcement
notice should contain. The courts have been caught between two apparently irreconcilable
objectives: on the one hand, to ensure that an enforcement notice contains all the material
which the Act requires it to contain, in sufficient detail to make it clear to a recipient of a notice
what it is that he is alleged to have done, and what he is required to do to put it right; on the
other hand, to ensure that effective enforcement action is not deflected or delayed by technical
and unmeritorious points of law. An enforcement notice may lead to criminal liability, and it is
therefore necessary to ensure that the basic protections for the subject are observed. Yet
attacks on the validity of enforcement notices have, ever since 1948, too often been addressed
to matters of hair-splitting technicality, often designed simply to buy further time and to
postpone the inevitable day of compliance.

32. That same passage, suitably tweaked, could be applied to the various regimes.

33. Most of the notices above provide for an appeal, by one route or another. The breach of
condition notice under s.187A of the Town and Country Planning Act is the odd one out in this
regard. Those appeals allow for points to be taken on the merits (as does the statutory defence
to a s.187A breach of condition notice) and are a topic for another day.

34. What is more interesting is the potential for a notice issued/served under these various regimes
to be judged a nullity, i.e. of no effect, requiring no order of the court or other tribunal to quash it.

Nullity

35. The classic statement of the test for validity of any of these notices is that of Upjohn LJ in
Miller-Mead v Minister of Housing and Local Government [1963] 2 Q.B. 196:

“does the notice tell (the person on whom it is served) fairly what he has done wrong and what
he must do to remedy it?”

36. The recipient is:

“entitled to say that he must find out from within the four corners of the document exactly what
he is required to do or abstain from doing”

37. A notice will be a nullity where it is defective on its face. It may, for example, fail altogether to
specify a date upon which it is to take effect. That defect must be fatal to the notice: without it,
the notice never can take effect. Or the notice may fail to define a period within which the
required steps are to be taken; or it may do so in such an ambiguous manner as to fall short of
the statutory requirement that these matters be “specified” in the notice. There are a variety of
ways in which a careless regulator may produce a worthless piece of paper.

38. But the easiest trap to fall into, and the most deadly given it often requires
litigation to achieve recognition of nullity, is a failure to sufficiently specify steps
to be taken.
39. This crops up time and again.

40. In statutory nuisance cases, the leading authority covering the requirements of a notice as a whole remains *R v Falmouth Port Health Authority, ex p South West Water* [2001] QB 445 (CA).

41. South West Water had installed a sewage outfall at Black Rock, replacing outfalls at Middle Point and Pencance Point which were affecting the quality of bathing waters at three nearby beaches. The water company had the benefit of a discharge consent for the outlet from the EA. The Health Authority received complaints about the outlet, and resolved to serve an abatement notice pursuant to s.80 EPA 1990, alleging statutory nuisance under s.79(1)(h) of that Act, namely a nuisance under s.259(1)(a) of the Public Health Act 1936 because the watercourse known as Carrick Roads was so foul or in such a state as to be prejudicial to health or a nuisance. The abatement notice required the cessation of discharge from the outfall within three months of service, pursuant to s.80(1)(a) EPA 1990 as follows:

> “within three months from the service of this notice...cease the discharge of sewage...via the said New Long Sea Outfall from the sewerage system”

42. The notice imposed no requirement under s.80(1)(b) EPA 1990 for, “the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes”. The water company complained that it was defective as a result. The Court of Appeal disagreed, but added an important rider:

> “in all cases the local authority can if it wishes leave the choice of means of abatement to the perpetrator of the nuisance. If, however, the means of abatement are required by the local authority, then they must be specified; the Network case, 93 LGR 280 and the Sterling case [1996] Env. LR 121 remain good law.”

43. *Sterling Homes v Birmingham City Council* [1996] Env.LR 121 (Divisional Court) concerned an industrial operation in close proximity to a residential property known as Queen’s Court. Part of the operation involved stamping, pressing and toolmaking with a 450 ton press known as “Big Bertha”. The operation of the press gave rise to a great deal of noise and vibration which could be felt by some of the occupants of Queen’s Court. Sterling Homes owned Queen’s Court, and had been the applicant for planning permission. Given the building’s location near to an industrial operation the planning permission had included conditions designed to ensure that noise did not unduly affect residential amenity. Sterling believed it had identified a way to ensure that was achieved. In practice, its solution proved false.

44. In due course the City Council investigated a complaint of statutory nuisance and proceeded to serve an abatement notice, so far as material as follows:

> “TAKE NOTICE that Birmingham City Council being satisfied of the existence of a statutory nuisance at:

Number 1 in Queen’s Court …

arising from

The transmission of noise and vibration through the structure of the premises from the nearby industrial unit so as to be prejudicial to health or a nuisance.

Do hereby require you to abate the said nuisance within 56 days from the service of this notice upon you, and for that same purpose require you to carry out such works as may be necessary to ensure that the noise and vibration does not cause prejudice to health or a nuisance, take any other steps as may be necessary for that purpose.”

45. On a casual reading, that notice might appear sufficient. It is not. A direction that a person carry out “such works as may be necessary” requires the person to take steps but then fails to specify the steps to be taken. It is this kind of vague catch-all language that is a particular pitfall in these cases.
46. The notice in *Sterling* was a nullity, with the result that the appeal was allowed and the matter remitted to the magistrates with a direction to acquit.

47. The same principle has recently been applied in the environmental permitting context.

48. In *R. (on the application of European Metal Recycling Ltd) v Environment Agency* [2012] EWHC 2361 (Admin) HHJ Pelling QC (sitting as a high court judge) considered a claim for judicial review seeking, inter alia, declaratory relief that a suspension notice issued by the EA was a nullity. The claimant operated a sizeable scrap metal facility, subject to an environmental permit. Its activities generated noise, and there were considerable neighbour complaints. As of 31st August 2011 the conditions to the permit required that:

> “Em issions from the activities shall be free from noise and vibration at levels likely to cause pollution outside the Site, as perceived by an authorised officer of the Environment Agency, unless the operator has used appropriate measures, including but not limited to those specified in any approved noise and vibration management plan to prevent or where that is not practical to minimise the noise and vibration”.

49. Complaints continued, and the EA resolved to serve a suspension notice pursuant to Reg.37 of the Permitting Regs 2010. The notice provided, so far as material, that:

> “Under regulation 37 … we may suspend an environmental permit if we consider that operation of the regulated facility involves a risk of serious pollution.

Accordingly the Environment Agency has decided to suspend the environmental permit to the extent specified in Schedule 1 with effect from midnight on 26th February 2012.

In addition you are required to take the steps specified in Schedule 2 to remove the risk.

The reason for this decision is that we consider that the noise arising from operation of the regulated facility involves a risk of serious pollution.

...

Schedule 1

Extent to which the Environmental Permit is suspended

All movement of waste onto, within and off the site.

...

Schedule 2

Steps to Be Taken To Remove Risk of Serious Pollution

Design and implement measures that eliminate the risk of serious pollution from noise …[by] 31 August 2012."

50. The EA’s position was not that all noise from the site was to cease, but that noise constituting serious pollution should cease. The EA has issued guidance concerning its enforcement activities. As regards suspension notices it states that, amongst other things, the notice must … “say what the risk of serious pollution is … say what steps must be taken to remove the risk …”.

51. The claimant challenged Schedule 2 of the notice on the following grounds:

i) It failed to specify what if any steps were required to be taken; and/or

ii) It failed to provide a defined threshold criterion objective, or defined threshold criteria or objectives, that had to be satisfied by (the claimant) if it was to comply; and/or

iii) It was otherwise vague and imprecise.
52. It was common ground that “specify” within Reg.37 meant “to state explicitly”, but as the Judge observed the crucial question was what it was that was required to be stated explicitly. He noted that, unlike abatement notices under the statutory nuisance provisions, Reg.37 makes it mandatory upon the EA to specify the steps that must be taken. As regards the contents of Sch.2 to the notice, he said this at §25:

Schedule 2 to the SN specifies the steps that have to be taken as being to “…Design and implement measures that eliminate the risk of serious pollution from noise”. As a matter of language a requirement to state explicitly the steps required to be taken to eliminate an identified risk cannot sensibly be said to be satisfied by a requirement to design and implement measures to eliminate that risk. There is no material difference between a measure and a step, or between “eliminate” and “remove”, or between “taken” and “design and implement” in this context. In my judgment it is obvious as a matter of language that a requirement to state explicitly the steps that must be taken to remove an identified risk is not satisfied by a statement requiring the recipient to take steps to remove the identified risk. If this is correct as a matter of language I do not see how a requirement to design and implement measures to eliminate the risk is any more compliant. Had the EA’s position been that any noise emanating from the Site as a result of regulated activity pursuant to the Permit had to be eliminated then it might have been possible to say that a provision to this effect was satisfactory because it required the elimination of all noise. However, it is not the EA’s case that this is what is required. Thus it seems to me that as a matter of language, what is required for Schedule 2 to be compliant with Regulation 37(4)(a)(ii) is the identification of either outcomes or criteria that have to be achieved by whatever means EMR choose to adopt and/or the identification of specific steps that are required to be taken.

53. The suspension notice was therefore a nullity and of no effect.

54. The self-same principles apply to enforcement notices and to breach of condition notices under the planning regime.

55. In R. v. East Lothian Council, ex p Scottish Coal Co Ltd [2001] 1 P LR 1 the Scots Court of Session (Lord Prosser) struck down a breach of condition notice issued under the Scottish sister provision to s.187A (s.145(2) of the Town and Country Planning (Scotland) Act 1997) and made exactly the same point as HHJ Pelling QC in European Metal Recycling. The notice failed to “specify” the steps which the authority considered ought to be taken to secure compliance with the conditions. This required actual, factual, steps, not merely a requirement to “ensure” that the requirements of the condition were met. That was particularly so given the potential for criminal liability.

56. In yet another field, the writer recently persuaded Preston Crown Court to declare a nullity a “tidy up” notice issued under s.215 of the Town and Country Planning Act 1990. Which declaration was particularly galling for the local authority concerned given the properties affected stood on the way to a well-known golf course that was shortly to host the Open.

57. What all of these cases show is that unless the enforcing authority take real care when drafting notices they may not only end up with egg on their face and an adverse costs bill, but the nuisance that they wish to enforce against may go unchecked for some considerable time whilst the ramifications of what might be no more than a drafting error are resolved.

Conclusions

58. It is unrealistic, and surely poor practice, to regard the “regulatory” regimes that apply to facilities/sites the subject of nuisance complaints as somehow isolated from the private nuisance actions those facilities/sites give rise to. Despite Barr v Biffa the two are often interdependent, and must be approached holistically by both sides to nuisance litigation. This is a call for joined up thinking.

59. There are opportunities and pitfalls within the regimes for either side to the debate. The above does no more than touch upon a few.
Footnotes

1 jam es.burton@39essex.com
3 Claims for such as tree root nuisance are outside the scope of this paper.
5 After all, PPS22 gave ETSU-R-97 even stronger endorsement.
6 Our chair, Stephen Tromans QC, whose article for UKELA’s e-law edition of March 2004 I have shamelessly plundered.
7 Of course, counsel for the defendants in Nichols, whose submissions the district judge accepted there, acted for the claimants in Barr v Bliffa before the Court of Appeal, where again his submissions were accepted.
8 The full list, subject to exceptions, is:
   (a) any premises in such a state as to be prejudicial to health or a nuisance;
   (b) smoke emitted from premises so as to be prejudicial to health or a nuisance;
   (c) fumes or gases emitted from premises so as to be prejudicial to health or a nuisance;
   (d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;
   (e) any accumulation or deposit which is prejudicial to health or a nuisance;
   (f) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;
   (fa) any insects emanating from relevant industrial, trade or business premises and being prejudicial to health or a nuisance;
   (fb) artificial light emitted from premises so as to be prejudicial to health or a nuisance;
   (g) noise emitted from premises so as to be prejudicial to health or a nuisance;
   (ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street or in Scotland, road;
   (h) any other matter declared by any enactment to be a statutory nuisance.
9 The paragraphs omitted concern suspension notices served for non-payment of fees.
Introduction

1. Following the decision of the Court of Appeal in *Barr v Biffa* [2012] EWCA Civ 312, the law of nuisance has settled back into its 19th century principles. The law is therefore clearer than it was both before and during the Biffa litigation, which marked a significant tussle between the 19th century principles of nuisance and 21st century statutory regulation. However the 19th century cases which gave rise to the established principles did not arise from group litigation. Group litigation seems to be another aspect of more recent times, due possibly to greater unwillingness to put up with factory pollution or more crowded towns and cities. Fact management in group actions is one complexity, as is the assessment of quantum for loss of amenity. Judgment is expected in the case of *Anslow v Norton Aluminium*, which may throw light on such matters.

Fact Management

2. The profile of group actions in private nuisance claims is that each individual claim is modest, worth only a couple of thousand per annum. There can however be hundreds of individual claims which all raise the same issues. Fact management is therefore complex but important. The challenge is to ensure that the claims are assessed economically, efficiently and proportionately. To date, this has been difficult. It is a striking and chilling feature of the Barr and Biffa litigation that the costs incurred on each side were in the region of £3 million. As Carnwath LJ said in the Court of Appeal; “the most important issue now is how to bring these unfortunate proceedings to an end, as speedily and economically as possible”. Other trials have been similarly expensive.

3. The approach taken in the cases that have gone to trial is to select lead claimants who are representative of different aspects of the claim (eg from different geographical zones around the Defendant’s plant); to have a Group Litigation Order to identify and manage common or generic issues for determination by the Court (e.g the amount of damages; causation and extent of nuisance) and a register of Claimants.

4. The lead cases are tried to assist the Court to reach answers to the generic issues. Judgment in the lead cases will decide once and for all the test cases but cannot determine the final outcome of the additional cases. The effect of CPR r.19.12, however, is that the answers which the Court reaches on the generic issues are binding on all the other claimants to the register so that the common issues cannot be re-litigated.

5. It is important to remember that the primary or best evidence to establish whether there was a nuisance or not for each Claimant is the evidence of the Claimant himself/herself. In determining the actual extent of interference experienced by any individual over a number of years where the interference has been intermittent and variable, as is often the case, the evidence of any expert will be of limited value unless they were able to experience, assess and test that interference contemporaneously.
6. The evidence of the individual claimants and their supporting witnesses can be tested against the written material relating to the contemporary operation and regulation of the plant. Relevant evidence in this regard can include: enforcement notices; Agency correspondence; Permits (including the application forms which can be a useful source of company admissions); contemporaneous corporate environmental policies; documents prepared for appeals against enforcement notices; parish council minutes; letters between regulators; company minutes. In addition documents which should be in existence but which are missing (e.g observation data relating to the performance of a stack) can be relevant.

7. In terms of individual claims, an expert can examine and interpret the contemporaneous material and express an expert opinion on whether or not it is likely that the individual claimant did in fact experience the interference alleged. In that sense the expert’s evidence is not the primary evidence relied on, but serves to support or cast doubt on that primary evidence.

8. The relevance of contemporaneous complaints was considered in Barr v Biffa. The Court of Appeal held that the trial judge had been wrong to regard the making of complaints as critical to establishing a case in nuisance. Carnwath LJ stated that whilst a lack of complaints may be a starting-point, “it is not the only consideration to be adopted mechanistically without reference to the general picture created by the evidence as a whole, and the plausibility of the individual witnesses”. So too it is relevant if the Claimant explains the lack of specific complaints. (See Biffa at 140-145.) Conversely however, retrospective noise diaries are of little use and can be damaging for Claimants in that they can be effective tools in cross examination.

9. The real need for expert evidence is likely to flow from the GLO generic issues to which the Lead Claims are intended to provide answers. Extent and causation are common issues. What would have been the maximum spatial extent over which unreasonable interference could have arise and beyond which the matters would not have been sufficiently serious to amount to a nuisance? Did the matters of which complaint is made emanate from the defendant’s operation or from some other source? On these issues the experts’ opinions are likely to constitute the primary material on which the court relies. They are questions which are likely to involve close examination of activities at the defendant’s premises over the claim period in order to establish what were the possible sources of nuisance, how and from where these might have been emitted and in what quantities or concentrations, and what their probable extent of distribution would have been. This will involve careful examination, analysis and interpretation of the available data, whether internal records, the results of emissions monitoring, inspection records and correspondence with the regulators, and recorded complaints, together with available relevant wind direction data in the case of airborne emissions.

10. Whilst the standards of environmental management and compliance with regulatory requirements during the claim period are not directly relevant to whether the Claimants experienced unreasonable odour, noise etc, they do go to the likelihood that the plant was the cause of the matters complained of by the claimants and to the likely extent, duration and severity of the interference which its activities was likely to have caused throughout the claim period. These matters will also be relevant if the defendant suggests that interference with reasonable comfort and enjoyment was something the claimants should “just have to put up with” as part of the character and locality of the area or as an inevitable incident of living near the Defendant’s plant. In these cases the fact that the defendant could have significantly reduced the interference by a more considerate or environmentally responsible attitude, may well be relevant.

Quantum for loss of amenity

11. “Damage for loss of amenity value cannot be assessed mathematically” (Lord Lloyd in Hunter v Canary Wharf). Awards for loss of amenity are ‘modest’.
12. In practice, the Courts have adopted an amalgam of two approaches to assessing quantum which can involve ‘cross checking’ the outcome of one approach against the outcome of the other. One approach is based on rental value and on the difference between the rental value of the unencumbered property as compared with its rental value when afflicted with nuisance. The other approach is to assess damages generally referring as appropriate to decided cases in so far as they are any help.

13. The most helpful starting-point may be the decision of the Court of Appeal in Dobson and others v. Thames Water Utilities Limited (No. 1) [2009] EWCA Civ 28 on appeal from the decision of Ramsey J during the consideration of preliminary issues where Waller LJ (Richards and Hughes LJJ agreeing) said:

The speeches of the majority [in Hunter v. Canary Wharf [1997] AC 655] thus clearly establish that damages in nuisance are for injury to the property and not to the sensibilities of the occupier(s). That is so as much for the case of the transitory nuisance interfering with comfort and enjoyment of the land as it is for the case of the nuisance which occasions permanent injury to the land and to its capital value, or other pecuniary loss.

That leaves open the question how damages are to be assessed where there is (1) no loss of market value or other pecuniary loss, (2) no physical damage to the property and (3) no loss of income from its use/letting, but is simply (4) loss of amenity. This question did not arise in Canary Wharf on the decision of the majority. Lord Hoffmann (706D) contemplated estate agents valuing the difference between the right to occupy a house without the nuisance and the right to occupy one with it, that is to say valuing the loss of (notional) rental value. Lord Lloyd (696C) may have contemplated the same. Lord Hope, however, (724H-725A), said that the assessment is of ‘the extent to which the nuisance has impeded on the comfortable enjoyment of the land’, and he appeared to regard a notional personal injuries award as ‘at best…a guide’.

If the house in question was available to be let during the period of the nuisance, it may be that there would be direct market evidence of loss of rental value. Otherwise, it is perhaps inevitable that the assessment of damages for loss of amenity will involve a considerable degree of imprecision. But if estate agents are to assist in placing a value on the relevant intangibles, whether by calculating the reduction in letting value of the property for the period of the nuisance or in some other way, we would expect them in practice to take into account, for the purposes of their assessment, the actual experience of the persons in occupation of the property during the relevant period. It is difficult if not impossible to see any other way of proceeding. As Lord Hoffman observed, the measure of damages for loss of amenity will be affected by the size and commodiousness of the property. If the nature of the property is that of a family home and the property is occupied in practice by a family of the size for which it is suited, the experience of the members of that family is likely to be the best evidence available of how amenity has been affected in practical terms, upon which the financial assessment of diminution of amenity value must depend.

On ordinary principles, it must also be clear that a claimant must show that he has in truth suffered a loss of amenity before substantial damages can be awarded. If the house is unoccupied throughout the time of the (transitory) nuisance, has suffered no physical injury, loss of value or other pecuniary damage, and would not in any event have been rented out, we are unable to see how there can be any damages beyond perhaps the nominal. A homeowner may be posted abroad, or working elsewhere without knowing when he will return, but may wish to keep the house available for himself at any time. He may be living elsewhere and waiting for the market to rise before selling. The house may be empty awaiting renovation. In none of those situations would there be any actual loss of amenity. So in this way also, as a matter of practicalities, the assessment of common law damages for loss of amenity to the land is likely to be affected by the actual impact of the nuisance upon the occupier, or the lack of it.
It follows that the actual impact upon the occupiers of the land, although not formally the measure of common law damages for loss of amenity, will in practice be relevant to the assessment of such damages in many cases, including such as the present where a family home is in question and no physical injury to the property, loss of capital value, loss of rent or other pecuniary damage, arises.

14. However, the judgment of Ramsey J. at first instance [2007] EWHC 2021 (TCC), is also important, because it provides guidance to the Court at the initial stage when the valuation evidence on which the parties have relied is either unable or too uncertain to be of any reasonably practical use:

“Issue 6: … damages for nuisance … where there is unlikely to be an award for diminution of capital values

179 There is common ground between the Claimants and Thames Water that where nuisance has been caused to a property by smells and mosquitoes then the diminution in letting value is the proper measure of damages. There is also common ground that an assessment by reference to the physical inconvenience and distress to the Claimant is not an appropriate measure of damages.

180 Finally there is common ground that a sum for general loss of amenity will, in certain circumstances, provide an appropriate measure. The Claimants submit that general loss of amenity is only appropriate if no assessment can be made as to the difference in rental values. Thames Water submits that general loss of amenity will be appropriate if the differences in values cannot be reliably ascertained.

181 Whilst there is a difference in language between the parties as to whether a sum for general loss of amenity will apply when “no assessment can be made “ or “ values cannot be reliably ascertained”, the underlying consideration depends on what is reasonable and practicable on the facts and circumstances of the case. If, on the facts, no assessment can be made then a sum for general loss of amenity is more likely to be an appropriate measure. If values cannot be reliably ascertained then the matter is more likely to depend on whether such ascertainm ent as can be made is a reasonable or practicable measure of damages.

182 I accept that, as the Claimants submit, even if the court cannot arrive at a figure for diminution of value with certainty, damages can still be assessed. They refer to the passage in the well-known judgment of Vaughan Williams LJ in Chaplin v Hicks [1911] 2 KB 786 at 792 where he said in relation to assessment of damages: “ Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract .”

183 I also accept that, as Thames Water submits, at this stage and in the absence of valuation evidence, the matter cannot be taken further. There may be a number of difficulties in reasonably and practicably assessing diminution in value so that general damages for loss of amenity may be the correct measure. Whether and to what extent the difficulties arise will depend on the issues raised above and the evidence. I do not think that it is necessary or desirable to go further at this stage.

184 I consider that the common ground between the parties properly reflects the position on the award of damages which may be summarised as follows:

(1) That damages awarded for nuisance, where there has been personal discomfort, are assessed on the basis of compensation for diminution of the amenity value of the land rather than damages for that personal discomfort.

(4) That damages for diminution in value frequently raise difficult issues of assessment which can usually be resolved by expert evidence. If such assessment is not reasonable or practicable then the principles on which
damages are assessed are sufficiently flexible to do justice between the parties by arriving at a sum for general damages for loss of amenity. In Hunter v. Canary Wharf at 696 Lord Lloyd said “Damages for loss of amenity value cannot be assessed mathematically. But this does not mean that such damages cannot be awarded: see Ruxley Electronics and Construction Ltd. v. Forsyth [1996] A.C. 344 …

Issue 7: To what extent, if at all, are the above conclusions dependent on or affected by any evidence of valuers as to the difficulty or otherwise of assessing diminution in rental value in the case of non-permanent nuisance?

187 As set out above, damages for diminution in value frequently raise difficult issues of assessment which can usually be resolved by expert evidence. If such assessment is not reasonable or practicable then the principles on which damages are assessed are sufficiently flexible to do justice between the parties by arriving at a sum for general damages for loss of amenity.

Issue 8: What is the position in damages for nuisance where no diminution in rental value can be shown?

188 Again, if no diminution in rental value can be shown then the principles on which damages are assessed are sufficiently flexible to do justice between the parties by arriving at a sum for general damages for loss of amenity.”

15. Thus, Ramsey J in assessing damages at trial in Dobson v Thames Water [2011] EWHC 3253 (TCC):

I consider that the use of rental values provides a sound basis on which to assess damages for loss of amenity. Obviously there will be a range of values which valuers may put on a property and the loss of amenity will generally be a small percentage. I have sought to place the properties into four groups, ranging from those where the nuisance was most serious to those where the nuisance, whilst still significant, was comparatively the least serious. The percentages I have used are 5%, 3.75%, 2.5% and 1.25%. In addition, having arrived at an assessment of the sums to be awarded as damages, I have considered how those damages compare to the damages awarded, as set out in the various decisions I have been referred to. I consider that they fall within the correct range for the actionable odour nuisance suffered at the properties

16. This approach produced low per annum awards for the Claimants in Dobson. Thus, for a property with a monthly rental value of £900, the Claimant received £135 per annum on a 1.25% reduction. The Judge accepted that a 20% reduction in value “would be at the top end of the range in this case, if all of the Claimants’ allegations had been made out” (para 1030 of the judgment).

17. In comparison, the table below lists general awards made in nuisance cases and uplifted to today’s figures (based on an RPI index in May 2012):

<table>
<thead>
<tr>
<th>Contribution</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milka v Chetwynd Animal By Products</td>
<td>£1,455 per annum</td>
</tr>
<tr>
<td>Fowler</td>
<td>£1,172 per annum</td>
</tr>
<tr>
<td>Halsey v Esso Petroleum</td>
<td>£767</td>
</tr>
<tr>
<td>Anthony v Coal Authority</td>
<td>1261 per annum</td>
</tr>
<tr>
<td>Watson v Croft</td>
<td>£2,265 per annum for Mr and Mrs Watson and £849 for Mrs Wilson</td>
</tr>
<tr>
<td>Barr v Biffa</td>
<td>£1,000</td>
</tr>
</tbody>
</table>
18. Otherwise Judges who adopt the general damages approach tend to look towards the cost of a good holiday as a rule of thumb. Thus in Dennis v. MoD [2003] Env LR 34 when awarding £50,000 for a severe noise nuisance by Harrier jets over a six year period Buckley J. commented (para.89): “That figure would barely cover the cost of a decent holiday each year, which it might be thought is the least compensation that should be awarded for such a disturbance”.

19. The approach chosen is likely to depend on whether the parties can agree an approach and whether rental evidence is available. The advantage of a general damages approach is that it does not require expensive expert input and can provide a commonsense and more flexible approach. Rental value should not, it seems, be used if there is a lack of information on rental values in the area so that it is neither practicable nor reasonable to make use of diminution in value (market rental) figures. Thus rentals outside the affected area in the wrong year or at a time when there is either no problem at all or when matters are much better or the examples given are inferior to the properties occupied by the Lead Claimants. The comparator exercise is very difficult and depends on assumptions and surmise by either side. In these circumstances the Court should, it is suggested, turn to the method of assessing figures for general damages as it is accustomed to do in personal injury claims where there is a claim for loss of amenity. The only difference is that there are few comparators as between nuisance cases.

20. It has been said that in low value claims covered by a Group Litigation Order claimants cannot expect the same attention to detail as they would in high value claims. This seems a correct and proportionate approach. Claimants must take the rough with the smooth across the whole Register.

21. Different approaches may be appropriate for different circumstances. Examples include:

   a. In cases of different types of nuisance (eg dust, noise, odour) a primary annual award in respect of the one emission which has troubled everybody, and added awards for other emissions categorised into, say noise and dust. No specific award for emissions which affected only a few claimants

   b. A monthly award where the severity of the nuisance divides clearly into defined periods which differ according to the location of the claimant (generally speaking monthly figures can become onerous to assess in group actions so this approach needs to be used with care)

   c. no attempt to devise different figures for each year if this will be far too complicated and difficult to determine.

   d. a somewhat rough and ready but sufficiently-nuanced form of compensation is to award annual multiplicands depending on the degree to which they were affected by reference to the contour plans.

22. Judgment is expected in the case of Anslow v Norton Aluminium may indicate how the Courts intend to assess quantum in group actions.

Footnotes

1 justine.thornton@39essex.com
2 CPR 19.10 A Group Litigation Order means an order made under Rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the GLO issues)
EEL news update
Case C-43/10, Nomarchiaki Aftodioikisi Aitoloakarnanias (Greece), 11 September 2012

The European Court of Justice (ECJ) issued a preliminary ruling in a case about the river Acheloos in western Greece. By a number of legislative acts, Greece aimed at the partial diversion of the upper waters of this river to another river, Pinio. This would serve irrigation needs, produce electricity and supply local towns with water. Numerous organisations and local authorities, notably the Prefectural Authority of Aitoloakarnania, opposed the project. The Simvoulio tis Epikrateias, i.e. the Greek Council of State, asked the ECJ for help in the matter of the interpretation of the Water Framework Directive (WFD), the Habitats and Wild Birds Directives, the Directive on Environmental Impact Assessment (EIA) and the one on Strategic Environmental Assessment (SEA). The latter instrument covers plans and programmes and not projects for the partial diversion of waters of a river, the ECJ found.

According to the ECJ, the WFD does not preclude a priori the diversion of water from one river basin to another. Management plans are only required from 22 December 2009 onwards, so in itself the absence of them does not stand in the way of decision preceding that date. However, it is settled ECJ case law that during transposition and transition periods of directives, member states must refrain from any measures liable to seriously compromise the attainment of the result prescribed by the directive. Hence, the diversion may not seriously threaten the objectives of the WFD. In case a river diversion might have adverse effects on the water status (Article 4(7) WFD), then consent may only be given if at the very least the conditions set out in Article 4(7)(a) to (d) are satisfied. This means inter alia that the MS has taken all the necessary measures to prevent water deterioration. The diversion can be justified by overriding public interest reasons, however.

Adopting the project through legislation means that the EIA Directive does not apply, provided that “the objective of this Directive, including that of supplying information, are achieved through the legislative process” (art. 1(5) EIA Dir. 85/337). If such information (detailed in point 85 of the judgment) was not made available to parliament, the exception of art. 1(5) EIA cannot be used.

The ECJ noted that, based on Habitats directive 92/43/EEC, the supply of drinking water can be considered as an “imperative” reason of “overriding public interest” to accept river diversion in Sites of Community Importance (SCI) that host priority natural habitats or species, but in principle irrigation purposes cannot, unless irrigation has beneficial consequences of primary importance for the environment (point 128). It is stressed also that the Habitats Directive in the light of the objective of sustainable development laid down in article 11 TFEU (ex article 6 EC) still allows for the conversion of a natural fluvial ecosystem that forms a part of the Natura 2000 network into a largely man-made fluvial and lacustrine ecosystem, provided the provisions of the directive are satisfied. This means inter alia that (in line with article 6(4) Habitats directive) compensatory measures are to be taken that ensure the integrity of the network (point 139). As for wild birds, the ECJ stressed that development consent for a project that will divert water and is not directly connected with or necessary to the conservation of a special protection area, but likely to have a significant effect on it, may not be given in the absence of information or reliable and updated data on birds in that area (point 117).

Added to ICJ Case Law – Environmental dispute Nicaragua – Costa Rica

The Republic of Nicaragua commenced proceedings against the Republic of Costa Rica at the International Court of Justice (ICJ) regarding violations of Nicaraguan sovereignty and major environmental damages to its territory in December 2011. Nicaragua
accuses Costa Rica that due to its construction plans of a road along the borders, the ecosystem and protected wetlands of the San Juan River are seriously threatened.

Previously, Costa Rica had commenced its own proceedings at the ICJ against Nicaragua. The country claimed an alleged incursion into, occupation of and use by Nicaragua’s Army of Costa Rican territory as well as breaches of Nicaragua’s obligations towards Costa Rica. Costa Rica claims that Nicaragua’s army activities at the border have illegally occupied an area due to the construction of a canal in San Juan River and the relevant dredging works. These activities are claimed to form a serious threat to the river’s water flow to the Colorado River, the wetlands and protected wildlife of the area.

Nicaragua asked the ICJ to examine whether both cases could be joined.

The ICJ issued an order on provisional measures on 8 March 2011, demanding inter alia each Party to refrain from sending to, or maintaining in the disputed territory, including the caño (natural channel), any personnel, whether civilian, police or security.

By an Order of 23 January 2012, the Court fixed 19 December 2012 and 19 December 2013 as the respective time-limits for the filing of a Memorial by the Republic of Nicaragua and a Counter-Memorial by the Republic of Costa Rica in the proceedings initiated by Nicaragua.

See also ICJ Press releases 2011/40 (Nicaragua) and 2010/38 (Costa Rica)

**EP approves new Energy Efficiency Directive**

In September 2012, the European Parliament (EP) voted in favor of the proposed Energy Efficiency Directive [EED]. In line with the EU’s climate and energy 20-20-20 targets (20% reduction in greenhouse gas emissions; 20% energy from renewable resources and 20% more energy efficiency by 2020), the EED aims at cutting energy consumption by 20% by 2020, saving the EU €50 billion annually. The new Directive will be repealing both the [Cogeneration Directive 2004/8/EC](http://example.com) and the [Energy Services Directive 2006/32/EC](http://example.com).

The 20% energy savings target is not binding but “indicative” (art.3). It obliges each Member State (MS) to implement its “national energy efficiency targets” based on its “either primary or final energy consumption, primary or final energy savings, or energy intensity” (as defined in article 2 EED).

As for public buildings, MSs must ensure that 3% of the total floor area is renovated per year and meets the minimal energy criteria (established in art. 4 of Directive 2010/31/EU on Energy performance of buildings). At the start, the percentage is calculated on the basis of floor areas over 500m². From July 2015 onwards, this will change to 250m², in line with the Commission’s proposal. According to article 9 Directive 2010/31/EU, by 2019 all new public buildings must be nearly zero energy buildings.

With the exemption of armed forces’ contracts that are subject to different regulation, each MS is obliged to purchase goods, services and buildings that meet the EU energy efficiency standards [EED Annex III](http://example.com).

MSs also have to set an “energy efficiency obligation scheme”. This scheme obliges energy companies to reach a “cumulative end-use energy savings target” and manage a decrease of 1.5% of their annual sales to final consumers per year until 2020. Large energy enterprises need to execute high quality energy audits that are accountable to efficiency criteria [EED Annex VI](http://example.com). Competent independent national authorities will supervise the audits. EED establishes the first audit three years after its entry into force (probably by the end of 2015) and following once every four years.

Questions remain though. EP already flagged the EED’s effectiveness vis-à-vis EU industry. Also, while the EED’s goal is 20%, estimates show it will achieve only around 15% reduction in energy consumption. An added 2% is to be achieved through the Fuel efficiency Regulation [2009/443/EC](http://example.com) and other rules that are still in the pipeline. Consumers will be effected when energy companies raise their prices in order to meet the EED’s requirements. The EED does underline that energy consumers have the right to receive competitive prices and accurate billing information without extra charges.

See also: [Energy Efficiency: billions to be made in savings](http://example.com)
Leaked RED draft proposes limit of 5% crops biofuels by 2020

The Renewable Energy Directive demands 10% of transport fuel to be derived from renewable sources such as biofuels, by 2020. According to many, this policy is flawed, because many conventional biofuels are doing more environmental harm than good. The RED does stimulate advanced biofuels (notably by allowing to count advanced biofuels double), but in over 90% of the cases MSs are planning to meet the 10% target with conventional biofuels. This follows from the National Renewable Energy Action plans (NREAPs) that were submitted to the European Commission, a 2012 IEEP report notes. The same report also explains the dangers of Indirect Land Use Change (ILUC) effects of conventional biofuels. The increase of crops biomass contributes disproportionately towards an agricultural use that fails to cover food supply, which in its turn leads to higher food prices, further deforestation and higher greenhouse gas emissions.

In that light, a solution like the one the Commission is considering now might offer solace. A leaked draft proposes limiting the use of crop biofuels (made from rapeseed, wheat etc.) to 5% of the total energy consumption in the EU transport sector by 2020. The latest 2011 figures show that already, 4.5% of EU transport fuels stem from crop-based biofuels. A 5% limit would thus mean that no substantial further increases would occur. Instead, the EU wants to increase the use of non-land using biofuels, made from household waste, algae etc. Such advanced biofuels are to be counted fourfold, meaning that if this would lead to increased use of these biofuels the 10% target would be met with less actual use of biofuels.

The draft also plans to cut all public subsidies as of 2020, and only subsidise biofuels crops resulting in greenhouse gas savings and are not produced from crops used for food and feed.

The draft attempts to manage emissions savings by implementing new ILUC emissions values for the three main crop based biofuels; cereals, sugar and oilseeds. The savings from these values are to be included in the EU fuel quality legislation and aim at reducing emissions by 6% by 2020.

To approach the 2020 goal of 10%, the EU wants to increase the percentage by household waste and algae that are “non-land using biofuels”.

1. See also Dutch PBL report on the Commission’s draft plan [Biobrandstoffenbeleid raakt de kern van duurzame ontwikkeling], in Dutch
2. “Biodiesels pollute more than crude oil, leaked data show”, 27.01.2012, updated 30.01.2012
   “Exclusive: EU to limit use of crop-based biofuels-draft law”, 10.09.2012

US Senate decides against EU Emissions Trading Scheme

On 22 September 2012, the US Senate passed a bill asking the Secretary of Transport to prohibit US airlines to participate in the EU Emissions Trading Scheme (EU ETS) “in any case in which the Secretary determines the prohibition to be, and in a manner that is, in the public interest.” In reaching this decision, the impacts on U.S. consumers, U.S. carriers, and U.S. operators; the impacts on the economic, energy, and environmental security of the United States; and the impacts on U.S. foreign relations, including existing international commitments” are to be taken into account. It does not seem likely that the Senate was thinking of the UN Framework Convention on Climate Change here, in which the USA and other parties committed themselves to achieve a stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the world’s climate system.

Europe’s ETS was characterized by a Senate’s member as an “illegal tax” imposed by the Europeans. Interestingly, the Senate provides to the Secretary of Transport the discretion of reassessing this determination in case of either an amendment in EU ETS or of a global agreement or of a national law that addresses aircraft emissions. One year earlier the House of Representatives has already voted for a similar measure that differs in a number of points. Particularly, the House of Representatives expressed their concern that the EU
undermines the efforts by the International Civil Aviation Association (ICAO) and theorized that it is uncertain whether the EU ETS revenues will be used for environmental reasons. The differences between the bills of the US Senate and the one of the House of Representatives need to be bridged before there could become a legally binding act. Under the EU ETS, airlines are required to submit their emissions data per year. All EU airlines and most non-EU airlines – including U.S. based airlines – landing in Europe did so, but Chinese and Indian companies have failed to comply with this obligation. Despite the last EU-China summit and their environmental agreements, there was no mention of the EU ETS. Heads are now turning to the ICAO that could come up with a global framework for an emissions system. The EU has stressed its persistence on the EU ETS unless the ICAO finally arrives at an agreement on such global action. EU Commissioner for Climate Action, Connie Hedegaard, supported the Senate's bill proposal for an international ETS approach. Up till now, ICAO has only established voluntary measures to reduce greenhouse gas emissions. An international ETS plan could lead avoiding conflicts. So far however, ICAO positions show little progress in spite of years of discussions.

4. “U.S. and E.U. on collision course over aircraft emissions”, 25.11.2011
5. “Inclusion of aviation into the EU ETS”, 28.03.2012

Footnotes
1 Thanks to the Institute for European Studies Brussels; Wybe Th. Douma (Senior Researcher, T.M.C. Asser Institute and Lecturer on International Environmental Law, The Hague University); Leonardo Massai (Senior Lecturer on International and EU Environmental Law, University of Lille); Petroula Lisgara (T.M.C. Asser Institute, The Hague)
Feisty and Female – UCL-KCL Postgraduate Environmental Law Symposium

Emily Barritt (KCL)

The UCL-KCL Postgraduate Environmental Law Symposium was an exciting new conference hosted at UCL law faculty and attended by around sixty researchers. It featured sixteen presentations on areas of environmental law ranging from participation in trade agreements to eco-feminism; from the role of the ICJ in environmental law to the role played by Aarhus in Africa; from a cultural analysis of Deep Water Horizon to biosafety in China. The panels were chaired by academics from UCL, King’s College London, Oxford and Trinity College Dublin. It was a day that really showcased the breadth and depth of environmental law scholarship, as well as the tremendous talent and potential of student scholars.

The idea for this symposium came about during another postgraduate environmental law symposium hosted by University College Cork. Carrie Bradshaw (UCL) and I thought it was bonkers that we had to go all the way to Ireland to meet each other when we were both based at London universities, so we thought we ought to have something similar in London. The main aim of the event was to provide an informal but informed setting for environmental law researchers to present their work. We really only anticipated about twenty-five participants and had originally planned to offer ten presentation slots. However when our call for papers returned almost fifty abstracts we realised that we probably ought to re-think our plans! Indeed as the date of the symposium approached and the waiting list reached forty-eight we really did wonder at the monster we had created! I mention these statistics not to boast, but rather to highlight the real appetite for this kind of forum for environmental law researchers.

On the morning of the symposium researchers arrived from as far afield as Ireland, Cyprus and Rome to enjoy coffee (and pastries pilfered from an IP conference) before the day began in earnest. Prof Richard Macrory introduced the symposium, highlighting the importance of student-led initiatives. It was an inspiring start and set the tone for the rest of the symposium. It was a great opportunity to meet other students passionate about environmental law and start conversations that would continue throughout the day. Conversations aided very much by the contributions of a number of academics who also came to the symposium, in particular Dr Liz Fisher and Professor Maria Lee, who stayed for the entirety of the day.

What really characterised the day was the authentic, lively dialogue that preceded each presentation, spilled over into the breaks and, for some of us, continued until midnight in a pub off Russell Square. There was none of the usual conference posturing and there were no uncomfortable silences when the chairs concluded each presentation with ‘any questions?’ Rather, the questions were insightful and stimulated interesting, and often heated, debate. In the International Environmental Law session a discussion about the utility of a human rights analysis in relation to the environment was particularly impassioned. The academics in the audience (and as the chairs) contributed by asking “cheeky” and provoking questioning of the presenters, forcing them to think really carefully about their work. However in spite of the cheek and the heat, the discussion was never such as to make the presenters feel under attack. One presenter joked about how different the environmental lawyers’ questions were from those of the economists she was used to.

During the day some of the debate occurred via the #uclpg hashtag where participants tweeted their thoughts about the different presentations. One particular tweet about the ICJ declaring environmental assessment to be norm of international law was even retweeted a number of times, extending the debate beyond the walls of the UCL law faculty.
The sessions themselves were chaired by a broad variety of high profile academics, who were all very impressed with the quality of work presented on the day. A researcher at Sheffield University was so eager to meet Prof. Sands that she caught a bus from Sheffield at 1am in order to attend. Her early start was rewarded with a long and fruitful discussion with the man she had made such an effort to come and see.

So I turn now to the title of this piece – feisty and female, which I should really expand to feisty, female, Irish or Australian – the whimsical observation of a Masters student at Imperial. I refer to this partly in jest, but also to highlight the dynamism and diversity of environmental law scholars represented at the symposium. It is hoped that this event will become an annual fixture on the calendar of environmental law post-graduate researchers across Europe.
By Ben Du Feu, student adviser to Council

Firstly, welcome to Nicola Peart as our new Student Advisor to Council. Her energy, enthusiasm and fresh ideas will be a great addition to UKELA. Nicola is currently studying for a LLM in international Environmental Law at UCL and studying on the Bar Professional Training Course.

As you will hopefully be aware we have recently gone through a process of trying to revamp the competitions programme and package offered to students by UKELA more generally. This will be an ongoing process and we would still appreciate your input on this.

By way of an update this is a summary of the key changes.

The Student competitions evening will be moved to a date in June with the moot final and optional Andrew Lees presentations held in the evening. The moot semi-final (behind closed doors) will be in the afternoon.

We will offer free moot training to those not on vocational training courses in January/February and hope to offer this in London, Birmingham, Bristol and Scotland. The moot problem will appear around December with the deadline for skeletons in the Easter holidays. Winners of the moot will be able to keep the trophies and display them at their institutions.

The Andrew Lees Prize will be an article competition and can be on your own subject matter or a title suggested by us. The length will be between 1,000 and 2,500 words (including footnotes but not tables or diagrams). The marking criteria will be published in advance. The prize will be a free place at the UKELA conference on July 12-14 at Cambridge University. Entries can be submitted from December to April.

Simon Ball Prize for Student Achievement – there is a change of emphasis in this prize with the removal of “outstanding” and “academic” – this doesn’t seek to reduce the quality of entrant but simply broaden participation. Entries will be open to the end of June.

Perhaps most significantly we are looking at developing an internship scheme, more to follow on this.
East Midlands regional group meeting: 20 November

Jo Briggs speaking on the “Localism Act – experiences of its implementation”

Please contact the convenor if you would like to attend: http://www.ukela.org/rte.asp?id=5

The Practicalities of the Presumption in Favour of Sustainable Development: 22 November

An early evening seminar organised by the Planning & Sustainable Development Working Party and the Planning and Environment Bar Association to be held at Simmons and Simmons. As the Coalition Government continues to present planning reforms aimed at promoting sustainable growth and jobs, this seminar consider what this really means both for the delivery of projects and for the environment. The new National Planning Policy Framework talks of the planning system playing an ‘environmental role’ as well as an economic and social role. How can we expect the environmental role to develop? How can promoters benefit from the presumption in favour of sustainable development? How can guardians of the environment ensure the presumption upholds their priorities? How can decision makers ensure they are fully informed and equipped by the parties to make sound decisions expeditiously?

Booking Details here: http://ukela.sym-online.com/sustainabledevelopment2012/

Annual Garner Lecture: 29 November

Karl Falkenberg is the Director General of DG Environment in the EU. His lecture is titled: “Better EU regulation for a greener environment and sustainable economic activity in Europe”.

As a former trade commissioner with a background in negotiations he will throw a spotlight onto the inter-relationship between business and the environment, and how it is regulated at the EU level. We hope to involve our regional groups and sister organisations in Europe, and possibly further afield, by videolink. We’re grateful to Clifford Chance for hosting this event and to GroundSure for sponsoring the videolinks.

Booking details here: http://ukela.sym-online.com/Garner2012

Young UKELA Seminar: “Environmental Law – the Basics” series; Seminar I: Waste: 5 December

Join us for the first in a series of evenings covering the basics of environmental law across a range of topics, aimed squarely at the Young UKELA membership. This early evening seminar will focus on waste and will feature presentations from a solicitor, barrister and environmental consultant covering the legal and practical aspects of waste law. There will be a strong emphasis on discussion and Q&A between all delegates and the panel after the presentations, followed by drinks.

Booking Details here: http://ukela.sym-online.com/youngukelawaste/
Climate Change and Energy Working Party mini conference: “How is climate change regulation affected by economics and World Trade law? What climate change mitigation policies could governments introduce that might achieve better results?” 16 January 2013

The Climate Change and Energy Working Party (CCEWP) will be holding a mini conference on the impact of economics and world trade issues on climate change regulation at 5.30pm at Nabarro LLP’s office (Lacon House, 84 Theobald’s Road, London WC1X 8RW).

Dr Cameron Hepburn (Grantham Research Institute, LSE) and Francesco Sindico (Reader in International Environmental Law at the University of Strathclyde) will address the following questions:

- What impact does the energy mix and gaming theory have on climate change policies – is this preventing climate change regulation from being successful?
- What are border carbon adjustments and can they work or will they provoke trade wars?
- What is the right price of carbon? Where should carbon be trading in order to achieve the level of emission reductions to achieve the 2Degrees goal?
- How are tensions between the EU, the US and China playing out in the context of the WTO?
- What impacts will these tensions have on the EU ETS (and other trading schemes)?
- Are there any other policy measures that work better (such as taxes)?
- Can the EU ETS survive? Will the EU manage to reign in the number of allowances auctioned in Phase III?

The event will end with questions/ an open discussion followed by a drinks and networking opportunity.

Admission is £10 for UKELA members and £20 for non-members. Bookings will open shortly.

London meeting on Flooding 5 February 2013

The next in our series of London meetings at Herbert Smith on topical issues will be on Flooding and is being organised by Simon Boyle, of Argyll Environmental. Please note the date in your diaries. Full details will be circulated when available.

Wildlife, Wilderness & Wild Law weekend – Loch Lomond & Trossachs National Park: 24-27 May 2013

The weekend focuses on wildlife and nature conservation law in Scotland and the challenges of wild land management in and around Scotland’s first national park. There will also be a Wild Law update. We are aiming to include talks from the National Park Authority, the John Muir Trust and a Scottish lawyer. The weekend is being organised by John Hunt who has attended the last two UKELA weekends in Scotland, and has worked professionally in nature conservation north of the border.

Booking Details here: http://ukela.sym-online.com/wildlaw2013/default.htm
Annual Conference: The next 25 years: The Future for Environmental Law 12-14 July 2013

As the UK Environmental Law Association celebrates 25 years, the anniversary conference at Cambridge University looks forward to ask where Environmental Law is going? We have an exciting programme to offer, a gala dinner in the lovely setting of King’s College and some great field trips. If you are interested in sponsoring the conference please contact Ben Stansfield, Ben.Stansfield@CliffordChance.com. Sponsor opportunities are being taken up fast so for your chance to appear in the launch information please contact Ben now.

Further details and booking information will be sent with member renewals at the beginning of December.

Non UKELA events

Castle Environmental Symposium: Depletion of our Finite Resources 20 November

Debate this topical issue at the Castle Environmental Symposium. You will hear presentations from an expert panel and have the opportunity to discuss with colleagues issues relevant to you and your organisations.

Booking Details here: http://www.ukela.org/rte.asp?id=12&task=View&itemid=270

The Journal of Environmental Law 2012 Annual Lecture 10 December

UCL Gustave Tuck Lecture Theatre, London, 6pm

The lecture will be delivered by Professor Ellen Vos, Faculty of Law, Maastricht University, on the topic ‘Law and Science in the EU Courtrooms.’ The lecture will be followed by a drinks reception starting at 7pm at the South Cloisters.

The lecture is free to attend. 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/4811/10

Also, visit the Journal of Environmental Law online: http://www.oxfordjournals.org/page/4811/5

NELA Annual Conference 7-9 March 2013

The 2013 NELA National Conference is being held in Melbourne, 7—9 March 2013 at the Sebel Albert Park. With the conference theme “Delivering a low carbon future”, the 2013 NELA National Conference will focus on legal aspects of Australia’s pathway to a low carbon economy in the 21st century. The conference will examine state, national and global developments in environment and climate change litigation and review emerging regulations and programs with a focus on facilitating clean energy. The conference will attract an audience of over 350 lawyers, policy makers, academics and regulators, as well as business leaders, NGOs, environment practitioners, scientists and students.

For more information go to http://www.nelaconference.com.au
Environmental Law Handbook, Fourth Edition
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Environmental Law Handbook, Fourth Edition is a handy compilation of every major statute, statutory instrument and section of EU legislation connected with environmental law.

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ISBN: 978 1 78043 006 5
Pub Date: December 2012
Format: Paperback
Price: £90
UKELA price: £76.50
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Transnational Environmental Law

The second issue of new journal Transnational Environmental Law has published and is now freely available online at www.journals.cambridge.org/TEL along with the inaugural issue. The second issue is themed around transnational dimensions of climate governance.
Call for Papers

Special Issue: Environmental Law
International Journal of Law in the Built Environment

The International Journal of Law in the Built Environment, first published in 2009, is now firmly established as a leading international journal in its field. This year saw the journal receive the Emerald Best New Launch Journal Award 2012.

The interrelationship between the built and natural environments is well established and from the journal’s inception, it has embraced the environmental law discipline and published work by leading environmental law scholars.

I am fortunate enough to have the opportunity of guest editing an Environmental Law Special Issue and would like to invite you to submit papers in any area of environmental law.

The Special Issue will be published in paper form in April 2014, but electronic publication via Emerald EarlyCite will take place early in November 2013 (inside the deadline for submission to the United Kingdom’s Research Excellence Framework).

The deadline for the submission of papers is 1st April 2013.

Submissions to the Environmental Law Special Issue should be made using ScholarOne Manuscripts – the journal’s online submission and peer review system. Registration and access is available at http://mc.manuscriptcentral.com/ijlbe. Papers should conform strictly to the author guidelines and require a structured abstract.

If you require any guidance or have any other questions about the submission of your manuscript, please contact myself or the journal Publisher, Aimee Nixon.

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UK Environmental Law Association

Registered Charity number: 299498 (Registered in England and Wales), Company limited by guarantee: 2133283 (Registered in England and Wales)

For information about working parties and events, including copies of all recent submissions contact: UKELA, PO Box 487, Dorking, Surrey RH4 9BH or visit www.ukela.org

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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 2013. All contributions should be dispatched to Catherine Davey as soon as possible by email at:
catherine.davey@stevens-bolton.com by 9 January 2013

Letters to the editor will be published, space permitting

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