



e-law

Better law for the environment

November/December 2017 | Issue 103



Welcome to the November/December edition of e-law. The theme for this edition is flooding.

It was around this time two years ago that Storm Desmond wreaked havoc in Cumbria and other parts of the United Kingdom. Shortly after, Storm Eva originating in the Republic of Ireland also hit Northern England. It was the wettest December in over 100 years and resulted in about 16,000 homes being

flooded. Prior to that there were the major floods of November/December 2009 and before that the floods of Summer 2007.

As stated by Duncan Spencer and Steve Packer in their article below '[Flood Insurance Update, December 2017](#)' it seems the memory of these devastating floods has been short lived, with prices of residential properties remaining largely unaffected and people being more likely to check for parking spaces than the risk of flooding when purchasing a property.

As the likelihood of extreme weather events increases, the importance of undertaking flood searches to identify flood risk, obtain flood insurance and consider flood adaptation measures is critical. Thanks to the new Flood Re scheme homeowners have access to affordable flood insurance, and the British Insurance Brokers' Association (BIBA) is introducing a new scheme for SMEs. Homes built since 1 January 2009 will not be covered by the scheme with the aim of discouraging new developments in flood-affected areas.

The Environment Agency is responsible for managing the risk of flooding from main rivers, reservoirs, estuaries and the sea. A number of measures are available for managing and alleviating flood risk, from flood and coastal defences, to flood storage and land management approaches. Choosing an appropriate measure will depend on the nature of the site and the risk.

In the recent case of *Hall v Environment Agency* [2017] EWHC 1309 (TCC) the court considered a claim in negligence brought against the Environment Agency and other statutory bodies for negligently performed flood defence works. For more information, see Charles Morgans' article [Compensation or Damages – An avoidable dilemma? The decision in Hall v Environment Agency](#).

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While in *R(Sharp) v North Essex Magistrates' Court* [2017] 1 WLR 3789, the Court of Appeal considered the use of section 172 of the Water Resources Act 1991, for the purpose of entering land and constructing flood defences. For more information, see Matthew Dale-Harris' interesting article: [An alternative to compulsory purchase? The Environment Agency's powers under s172 of the Water Resources Act 1991: breadth and scope for challenge.](#)

It is important to remember that sources of flooding are not limited to rivers and seas. Flooding can also occur from groundwater sources, sewers and surface water drains. Sustainable drainage systems are an alternative approach to piped systems and a more natural means of addressing site runoff and managing flood risk.

In her article [Sustainable Drainage Principles in Menston Action Group v Bradford MDC](#), Andrea Chong discusses the decision of the Court of Appeal in *Menston* in relation to the interpretation of 'sustainable drainage principles' contained in a planning condition. The condition required a surface water drainage scheme 'based on sustainable drainage principles' to be submitted and approved before development commenced.

Finally, do take a look at the [Environmental law headlines](#) for recent developments. It has been an extremely busy period for news on environmental law and policy from the Clean Growth Strategy to developments in light of Brexit, including the government's plans to consult early next year on a new independent statutory body to maintain environmental standards and on a new policy statement to ensure environmental principles underpin policy making.

In this regard, you will also find of interest Nina Pindham's article which highlights an interesting case on the way the government of Trinidad and Tobago implemented national policy in relation to the polluter pays' principle. See her case summary [Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment \(Trinidad and Tobago\) \[2017\] UKPC 37.](#)

I look forward to editing next year's editions of *elaw*, which will celebrate 30 years of UKELA.

With best wishes for the festive season,



Hayley Tam
UKELA Trustee & e-law Editor

E-law editorial team

Hayley Tam, Editor – Hayley is Head of Environment at LexisPSL having previously worked in both the private and public sector at the Environment Agency, Allen & Overy, Stephenson Harwood and Ashurst Australia. She is qualified as an environmental lawyer in Australia, England and Wales.

Jessica Allen, Assistant Editor – Jessica is a postgraduate student pursuing the Bachelor of Civil Law at the University of Oxford, having recently finished her term as Vice President for Academic Activities of ELSA United Kingdom. She graduated with honours in Law with French and French Law at the University of Nottingham in 2017.

Ben Christman, Assistant Editor – Ben is a final year PhD candidate in the School of Law at Queen's University Belfast.

Lewis Hadler, Assistant Editor – Lewis currently studies the BPTC at the University of the West of England, having previously worked as a paralegal with Richard Buxton Environmental & Public law. He graduated in 2015 after completing his LLB at Anglia Ruskin University Cambridge.

Words from the Chair



Welcome everyone to the November edition of elaw.

Time is certainly flying and before we know it 2018 will be upon us. 2018 marks the 30th anniversary of UKELA, which is in itself an enormous achievement, and as an organisation UKELA continues to

be as relevant and necessary as it was in 1988. In fact, possibly never more so than right now. Although disappointing that all of the environmental-related amendments to the Withdrawal Bill tabled so far have been defeated, we continue to engage with governments and parliamentarians and we are seeing increasing evidence of UKELA's Brexit reports influencing their thinking. For example, points from our report 'Brexit and Environmental Law: The UK and International Law After Brexit' were raised as questions in Parliament by Caroline Lucas MP, and we were delighted to hear that the co-Chair of the Brexit Task Force, Andrew Bryce, was invited to present evidence to the Commons Select Committee on Exiting the EU, which was particularly interested in our research on different models for enforcement. We are also participating in a roundtable meeting organised by the Scottish government looking at what's at stake for human rights, environmental and social protections in light of Brexit. It is on these kinds of interactions, along with events like our hugely successful half-day conference in October, that we will focus our efforts in the coming months. I would like to extend my thanks again to all the speakers at the Brexit conference and to 39 Essex Chambers for their generosity in hosting.

I am delighted to announce the formation of UKELA's newest working party, the Public Health and Environmental Law Working Party, convened by Dr Veneta Cooney. The new working party provides an exciting opportunity to look at the role of public health in environmental law and to forge connections between the medical and environmental law professions. This is very timely given our forthcoming 30th anniversary as it gives us pause to look back at the origins of environmental law and forward to the role environmental law should play in society at large.

I thought I would do a little research for this piece and found this excellent [article](#) written by UKELA member, Ben Christman, which I would strongly encourage you to read. Ben's paper explains how the myriad complexity of UK environmental law we currently have stems from Victorian responses to industrialisation, beginning with the Public Health Act in 1848 and the Alkali Act 1863. Increasing awareness of environmental issues in the public consciousness during the 20th century, coupled with disasters that had huge public health implications such as the Great Smog of 1952, led to the development of a comprehensive body of environmental law. By the time of UKELA's formation in the late 1980s, environmental regulation was becoming increasingly 'light touch' in response to the prevailing political agenda of the day. Hence the motivation of UKELA's founding members to create an organisation to make the law work for a better environment. Fast-forward to the present day and one of the highest profile environmental law issues is still air quality in London, just as it was in the 1950s. A broad coalition has formed calling for a new Clean Air Act, including both environmental groups and public health bodies. Although UKELA is not part of this coalition, our expertise and independent analysis forms an important part of the debate.

So, enjoy your last elaw of 2017, best wishes for the festive season, and I look forward to an exciting 2018.

Regards,

Anne Johnstone

Anne Johnstone
UKELA Chair

UKELA News

UKELA meeting with Judicial Delegation from China

Four senior environmental judges from Beijing, Tianjing and Hebei High Courts participated in a study visit to London and Oxford during 19-23 September. The group of delegates had a meeting with senior lawyers from UKELA on 20 September, hosted by Paul Davies of Latham and Watkins and UKELA's International Ambassador for China and former UKELA Chair, Stephen Sykes of Sykes Environmental. The judges had a valuable and enjoyable exchange of views. The delegates highlighted the strong emphasis on environmental protection given by the Chinese Government, and reported on the recent progress in China's public interest litigation.

The delegates were keen to explore questions concerning standing issues of environmental organisations in the UK, and UKELA's experience of promoting careers in environmental law to relevant audiences. Representatives from UKELA valued the friendship between the Chinese Judiciary and UKELA, and expressed great interest in continuing the exchange of knowledge in the areas of environmental law and environmental science. The judges sincerely expressed their thanks for UKELA's interest and support to the development of China's environmental law. Both sides are looking forward to more exchange and cooperation in the future.



UKELA Annual Conference 2018

The UKELA Conference for 2018 will take place at the University of Kent in Canterbury from 22 to 24 June 2018. The format for 2018 will be similar to 2017, but with an earlier start time of 11am on the Friday, so we can offer you even more relevant CPD content. The theme of 'Past Reflections and Future Horizons - environmental law in post-Brexit Britain' will provide plenty of scope to keep you up to date on current developments, address Brexit matters, and mark our 30th anniversary. Watch out for more details in December.

Membership subscriptions

Your membership subscription notice for 2018 renewals will be coming your way at the beginning of December. Please look out for it landing in your inbox and do take a moment to renew promptly. Many thanks!

Direct debits

Have you considered paying your membership subscription by direct debit? It is really straightforward to set up and takes all the hassle out of renewal. It also helps UKELA to save admin costs and time, meaning we can put more effort into other areas to benefit members. If you would like to sign up for a direct debit, please contact [Alison Boyd](#) for a form.

Gift Aid

Do you pay your own subscription? If you are a UK taxpayer*, you can register to allow us to claim Gift Aid on your subscription. Thank you to those of you who already allow us to do this, as it makes a big difference to our budget. If you would like to find out more and complete a Gift Aid form, please [get in touch](#). Every penny counts!

*you must be able to confirm that you are a UK taxpayer and that you understand that if you pay less Income Tax and/or Capital Gains Tax in the relevant tax year than the amount of Gift Aid claimed on all your donations, then it is your responsibility to pay the difference.

Update on UKELA's Brexit Activity and Working Party News

By Rosie Oliver and Joe Newbigin, UKELA's Working Party Adviser and Brexit Researcher

Brexit

As the European Union (Withdrawal) Bill continued through the House of Commons the Brexit Task Force has been monitoring changes and contributing to debate, both in public and behind the scenes. The BTF has been maintaining regular contact with other stakeholders in the Brexit process including IEMA, Green NGOs, the Institute for Government, the European Commission, and Government Lawyers both in Westminster and the devolved capitals.

Following the success of our report on [Enforcement and Political Accountability Issues](#), BTF co-chair Andrew Bryce was invited to give evidence to the [House of Commons Select Committee on Exiting the European Union](#). The Committee was particularly interested in exploring the BTF's work on ensuring environmental law is properly enforced absent the European Commission. Particular attention was given to the New Zealand model of a Parliamentary Commissioner for the Environment in the Annex to the BTF's report on [Enforcement and Political Accountability Issues](#).

The BTF has since been invited to make submissions to the [Environmental Audit Committee inquiry into UK progress on reducing F-Gas emissions](#). Drawing on the Brexit Task Force report on [The UK and International Environmental Law after Brexit](#), we were asked to elaborate on the issue of how the UK deals with mixed international agreements, with particular reference to the Montreal Protocol and the Kigali Amendment. The BTF's written submissions are available on the inquiry's website, and co-chair Richard Macrory will be giving oral evidence to the inquiry in December.

Work continues apace on our two forthcoming reports on environmental governance after Brexit, one on standard setting in the UK after Brexit, and the other on European co-operation bodies, networks and agencies.

Brexit also continues to be a major focus for UKELA's working parties, each of which is represented on our Brexit Task Force. Convenors and members of the Nature Conservation, Waste, Water, Wales, Scottish

Law and Northern Ireland Working Parties spoke at our highly successful 13th October conference on 'Brexit, the Withdrawal Bill and the Environment' about implications in their respective fields. Nature Conservation Working Party member Tom Huggon referred to the [Brexit and Nature Conservation Fact Sheet](#) prepared by the group to bust some of the myths in this area, for example concerning the impact of nature conservation regulation on business and development.

Wales Working Party co-convenor Victoria Jenkins presented the key findings and recommendations of her BTF report on [Wales, Brexit and Environmental Law](#). The report highlights the challenges that will need to be faced in developing environmental law in Wales after Brexit. It emphasises the importance of maintaining common frameworks for action on environmental protection across England, Wales, Scotland and Northern Ireland. It argues that this should be done in a way that involves all four nations, and leaves room for Wales to tailor its approach to meeting or even exceeding common standards. Recent innovative approaches, such as legal reforms for the well-being of future generations, can provide strategic direction and stability for the future development of Welsh environmental law.

More Brexit-related activity by Working Parties, including possible topic-specific papers and involvement in government consultations, is anticipated once the Government produces proposals for statutory instruments to roll-over the law on Exit Day, and publishes its Agriculture Bill.

Government consultations

Brexit aside, the working parties have been engaging with policy makers in a number of areas. The Wales Working Party responded to the Welsh Government's proposals for Designated Landscapes set out in their consultation *Taking Forward Wales' Sustainable Management of Natural Resources*. The response urges a rethink. It cautions against unnecessary or premature new legal frameworks, and emphasises the need for greater clarity, joined-up policies, and continued compliance with international conventions. It is available [online](#).

Members of the Scottish Working Party attended a meeting hosted by SEPA and the Scottish Law Society to discuss the Scottish Government's consultation on draft regulations introducing an Integrated Authorisation Framework.

Meetings, seminars and courses

Events organised by working parties this autumn include an Environmental Litigation Working Party seminar at CMS London on 21 September, featuring David Hart QC; and the annual Wildlife Law course at Brown Jacobson organised by the Nature Conservation Working Party, 8-10 November.

New Public Health and the Environment Working Party

We are delighted to announce the creation of a new Public Health and the Environment Working Party. The group aims to raise the profile of public health issues in the environmental law context. It will be convened by UKELA Council member and consultant physician Dr Veneta Cooney. Anyone interested in joining, should contact [Veneta](#).

Students News

UKELA Moot Competition 2018

We are pleased to announce that the Moot finals day will be held again at Kings College London on 23 February 2018. The [moot problem](#) has now been released. Skeleton arguments should be submitted no later than midday on 17 January 2018, in Word format, to [Elly-Mae Gadsby](#). All competitors will be notified of the selection outcome during the week commencing 29 January 2018. Please do read the [rules](#) thoroughly.

Thanks go to No5 Chambers for sponsoring the Moot competition. Nina Pindham of No 5 Chambers kindly organised free moot training at three venues around the country. You can download a copy of the [Training Moot Handout](#) with key tips for mooting.

Student publication opportunity

Interested in publishing a hot topic article with an environmental professional? UKELA provides an opportunity for students to publish their work in e-law, our members' journal which is circulated to over 1400 practitioners. Students are invited to email a short abstract of up to 500 words to [Lewis Hadler](#) or [Rosie McLeod](#), our student advisors. If selected, the Editorial Board will endeavour to pair students with a supervising practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. The theme of the next issue is the role of environmental courts and tribunals, expected to be published in the week commencing 12 February. The deadline for submitting articles is 31 January.

UKELA Events

The programme for 2017 is now concluded. Thank you for coming along to an event if you did. Your support of UKELA's events programme is appreciated and helps us to fund future activities. Take a look at the diary dates below for details of what's coming up in 2018. Booking details will follow soon!

UKELA Diary Dates

- 25 January – Wales Working Party seminar
- 30 January – CCEWP seminar on 'Emissions Reduction Plan' at Simmons & Simmons, London
- 7 March – Waste Working Party seminar on 'Waste & Brexit'
- 26 March – London meeting on 'Nature & Wellbeing'
- 9 May – London meeting on 'The Changing Face of the Energy Mix'
- 25-28 May – Wild Law weekend

For more details about these and our whole events programme, please visit our [website](#).

The e-law 60 second interview

Christian Jowett, Barrister and Co-convenor of the Wales Working Party



What is your current role?

Barrister, based at 30 Park Place in Cardiff, with a door tenancy at Foundry Chambers, London, and member of the Attorney General's Regional Panel (Wales) since 2007. Since 2010 I have sat as a Deputy District Judge (Civil) on the Wales Circuit, and recently became a CMC accredited mediator. I'm co-convenor of the Wales Working Party, and was elected to UKELA's National Council in 2017.

How did you get into environmental law?

I'd always had an interest in the impact of human activity on the environment. Growing up in the Swansea Valley, I was very aware of the work done by the Lower Swansea Valley Project in the restoration of land that had been heavily industrialised since well before environmental control. When choosing optional courses as an undergraduate student at UCL, I looked at Planning and Environmental Law and thought 'that looks interesting'. It was. I then took EU Environmental Law as a postgraduate student, also at UCL.

What are the main challenges in your work?

On a wide level, keeping up-to-date with continually evolving law. My practice often involves areas where environmental law interacts with other areas of law, including criminal confiscation and insolvency, so there is always a lot of diverse law for me to think about. On a narrow level, working out whether any given material is 'waste' or not at any given time.

What environmental issue keeps you awake at night?

Very little keeps me awake at night; but. I am interested to see how the Landfill Disposals Tax (Wales) Act 2017 works in practice. Sadly, few (if any) of my friends share my fascination with landfill regulation.

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

Generally, a greater recognition that environmental law is not a discrete discipline, but has wide-ranging impact. More specifically, the enormous and totally unnecessary waste caused by packaging.

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

The Wales Working Party. I grew up in Wales in the Swansea Valley, live just outside Cardiff, and my primary place of practice is also here. It is a fantastic forum to keep apace with specifically Welsh developments in environmental law and to develop UKELA's aims in Wales. It's also a great blend of practitioners, academics and others who work with environmental law.

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

Legal organisations tend to be focused on specific groups, such as lawyers in general, barristers, etc. UKELA however has a much more diverse membership. It's a great opportunity to get involved with people from all walks of life with an interest in environmental law.

Conference report

On The Breaking Of Environmental Promises



Tom Burke, UKELA Patron and Chairman of E3G, Third Generation Environmentalism

This is a note of the keynote speech given by Tom Burke on 13 October 2017 at the UKELA Brexit half-day conference at 39 Essex Chambers.

There are a great many champions of the environment in Britain. Between them, our environmental bodies have several times the membership of all the political parties in Britain combined. They probably know rather more about the will of the people than the political leaders who somehow managed not to mention the environment at all in making their case, either way, on Brexit.

Brexit will have more immediate impact on our ability to manage the growing stresses on the environment than any other single political development of the past 50 years. Environmental problems pose particular challenges for policy makers. Many of the most serious problems are geographically blind. They pay no attention to political borders or legal jurisdictions.

Consider the poor air quality in London, which is undoubtedly a product of the failure of our own government to enforce the law here. But there are days when, even if the law were fully enforced, pollution blown across the Channel from France, Holland and Belgium damages the health of Londoners.

We may well regain control of our traditional fisheries as we leave the EU. We will not however, be able to prevent climate change, as it warms our waters, from driving those fish back out of our control.

Britain's membership of the European Union has been an immense benefit to the health of the British public and to its environment. This is so, not the least, because it has created a whole new route by which the will of the British people on the environment could find effective expression.

This Government has made, and repeated, a clear promise to be the first ever to leave a better environment to its successors than it inherited. This is a big promise. There can be no doubting its environmental ambition.

Whether it can meet its ambition and fulfil this promise will largely be determined by how well it manages the environmental aspects of Brexit. This means getting the Withdrawal Bill right. The transposition of current EU law into domestic UK law must not leave the regulatory and institutional

frameworks for protecting Britain's environment weaker than they are today.

In the longer term, whatever future arrangements with the EU and other trading partners are finally agreed must offer not just a better level of environmental protection they must also offer similar levels of regulatory stability and cost. Otherwise the promise will be broken.

With this in mind, it is worth looking at some of the ways in which our membership of the EU currently supports the Government's environmental ambition. It offers a set of clear principles for the development and interpretation of environmental law. It offers regular environmental action programmes that set a forward-looking agenda for the development of policy. This makes it possible for businesses and civil society organisations to plan strategically for their participation in policy development.

It offers a mechanism for the enforcement of EU legislation, and therefore the achievement of its environmental goals. It is a mechanism that backs the power of persuasion with the prospect of sanctions.

It offers stronger influence on the development of global regimes to manage the environment than would be available to any one of the 28 present members acting on their own.

The size of the EU market is such, and the rewards of access to it so large, that its environmental legislation on matters such as chemicals, shapes the development of policy in other parts of the world.

What will be different after we leave? There is no place in British policy practice for the writing into legislation of principles such as the 'polluter pays' principle or the precautionary principle. This weakens the strategic guidance to policy makers and judges as to the tests that should be applied in policy formation or implementation.

There is no equivalent in British environmental policy making of the series of environmental action programmes produced by the Commission over the past four decades.

The publication of 'Our Common Inheritance in 1990' was Britain's first comprehensive statement of policy on the environment to offer guidance to business and civil society over the longer-term development of environmental policy. In the 27 years since then there has been no further publication of a framework for the future development on environmental policy in the UK.

What we have seen instead is a succession of Governments whose attention to environmental policy has been intermittent. On occasion, there have been outbursts of arbitrary and rapid policy change destructive of both business and civil society confidence. This loss of regulatory stability will be accompanied by an increase in the cost of regulation as the UK mirrors domestically the work of European agencies whose costs are currently shared by 27 other countries.

The European Court of Justice, has acted as a powerful incentive on Member States to comply with the requirements of European environmental law. This has largely worked, flexibly and efficiently, by encouraging negotiated settlements of disputes. An approach to compliance that we in the UK have long favoured.

However, the ability of the Court, as a last resort, to impose sanctions has been a powerful incentive to settle. The UK found this out to its cost when a failure to implement the Nitrates Directive properly led to a crash spending programme in Northern Ireland of some £240 million to avoid the possible imposition of fines that could have cost even more. The UK Courts have no such ability to fine the British Government.

These changes set a clear bar for the Government's long delayed 25 Year Environment Plan to clear if Brexit is not to lead to the Government breaking its environmental promise. The plan will first have to appear. It will then need to show how the Government will transpose not only the text of European legislation, but also its functionality. Without the functionality the text can make little difference to outcomes. It is environmental outcomes that matter to the people of Britain, not environmental words, no matter how warm.

Environmental law headlines

October- November 2017

A selection of recent environmental law news and updates prepared by the teams at [Lexis®PSL Environment](#) and [Practical Law Environment](#).

Plans for a new environmental regulator post-Brexit

Lexis®PSL Environment

Following concerns that the UK's environmental laws could be watered down post-Brexit the Environment Secretary, Michael Gove, has announced plans to consult on a new independent statutory body to maintain environmental standards.

The consultation will consider issues such as the specific powers and scope of the new body and whether Scotland, Wales and Northern Ireland wish to take a different or similar approach.

Currently environmental decisions made in the UK are overseen by the European Commission, which monitors targets, scrutinises new legislation and takes action against illegal behaviour. The current UK system is underpinned by a number of environmental principles, such as sustainable development and the polluter pays principle. Although these principles are central to government environmental policy, they are not set out in one place beside EU law. The proposed consultation will therefore also explore the scope and content of a new policy statement to ensure environmental principles underpin policy making.

It is expected that the consultation will be launched in early 2018.

For more information, see News Analysis: [A green Brexit? Government unveils plans for new environmental watchdog](#).

Government publishes Clean Growth Strategy and related consultations and documents

Practical Law Environment

On 12 October 2017, the Department for Business, Energy and Industrial Strategy (BEIS) published the long-awaited Clean Growth Strategy (previously referred to as the emissions reduction plan and the Clean Growth Plan). The Clean Growth Strategy, which is part of the government's Industrial Strategy set out in its green paper in January 2017, sets out a number of proposals and policies for meeting the UK's carbon budgets under the Climate Change Act 2008 and accelerating the pace of clean growth. For the government, this means increased economic growth and decreased carbon emissions.

The key areas covered by the Clean Growth Strategy are set out below. Several of these had been announced previously.

Green finance. Key initiatives include:

- setting up a Green Finance Taskforce;
- working with mortgage providers to develop green mortgage products that recognise the benefit of more energy efficient properties; and
- working with the British Standards Institution (BSI) to develop a set of voluntary green and sustainable finance management standards.

Business and industry energy efficiency. Key initiatives include:

- consulting in 2018 on improving the energy efficiency of new and existing commercial buildings;
- consulting on raising minimum energy efficiency standards (MEES) for rented commercial buildings;
- simplifying the requirements on businesses for measuring and reporting on energy use; and
- establishing an Industrial Energy Efficiency scheme to help large companies install measures to reduce energy use.

Energy efficiency in domestic properties. Key initiatives include:

- introducing an "aspiration" for as many homes as possible to be band C under the Energy Performance Certificate (EPC) regime by 2035;
- consulting on strengthening energy performance standards for new and existing homes under the Building Regulations;
- consulting shortly on making the forthcoming 2018 requirements for landlords to meet MEES more effective; and
- reforming the Renewable Heat Incentive (RHI).

Low carbon transport. Key initiatives include:

- ending the sale of new conventional petrol and diesel cars and vans by 2040; and
- investing in the uptake of ultra-low emission vehicles (ULEVs) and the charging infrastructure.

Clean, smart and flexible power. Key initiatives include:

- targeting a total carbon price in the power sector;
- phasing out the use of unabated coal to produce electricity by 2025; and
- improving the route to market for renewable technologies, including further investment in the contract for difference (CFD).

Value of natural resources. Key initiatives include:

- the publication of a new resources and waste strategy; and
- designing a new system of agricultural support after Brexit that focuses on better environmental outcomes, including addressing climate change directly.

Public sector. The government will agree tighter targets for central government for 2020 and actions to reduce greenhouse gas (GHG) emissions beyond 2020. The government will also introduce a voluntary public sector target of a 30% reduction in GHG emissions by 2020-21 for the public sector.

Alongside the Clean Growth Strategy the government published related consultations and other documents, including:

- a consultation on streamlined energy and carbon reporting for businesses;
- action plans for seven energy intensive sectors setting out government and industry commitments to reduce greenhouse gas emissions and improve energy efficiency;
- a consultation on decarbonisation in the public sector; and
- a call for evidence on reform of the Green Deal.

For more information, see [Practice note, Clean Growth Strategy 2017](#).

Government publishes consultation on streamlining energy and carbon reporting for businesses

Practical Law Environment

On 12 October 2017, BEIS published a consultation on streamlining energy and carbon reporting (SECR) for businesses, alongside the government's Clean Growth Strategy.

This consultation follows on from the government's March 2016 response to its 2015 consultation on business energy efficiency taxes, which confirmed that it would:

- abolish the CRC Energy Efficiency Scheme (CRC) from the end of the 2018-19 compliance year;

- increase the main rates of the climate change levy (CCL) from April 2019 in order to recover the revenue lost from abolishing the CRC; and
- consult later in 2016 on a simplified business energy and carbon reporting framework for introduction by April 2019.

The consultation proposes a new energy and carbon reporting regime combining elements of the CRC and mandatory greenhouse gas (GHG) reporting under the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (*SI 2008/410*) (LMCGARR 2008).

The consultation seeks views on a number of issues including:

Which companies will have to report. It is proposed that quoted companies will continue to be required to report on their GHG emissions and an intensity metric under the LMCGARR 2008. They should also be required to disclose total global energy use across all energy types. Reporting will continue to be done through companies' annual reports. For unquoted companies the government is seeking views on what the qualification threshold for reporting should be. The consultation also invites views on whether limited liability partnerships (LLPs) should be included in the new reporting requirements.

The scope of reporting requirements. The proposals suggest the energy uses and GHG emissions (Scope 1 (direct) and 2 (energy indirect)) that should be covered and an energy intensity metric. Quoted companies would have to report more widely than unquoted companies, including on global energy use and global GHG emissions.

The reporting standards to be used and how the information should be reported. The consultation invites views on whether the recommended voluntary disclosures published by the Financial Stability Board task force on climate-related financial disclosures in June 2017 should become mandatory company annual report disclosures in future.

Enforcement. The consultation proposes that the new reporting requirements should be enforced through the mechanisms of the Companies Act 2006, by the Financial Reporting Council.

The government proposes that the new requirements would apply from 2019 across the UK.

The consultation closes on 4 January 2018.

For more information, see [Legal update, Government publishes consultation on streamlining energy and carbon reporting for businesses \(detailed update\)](#).

EU ETS developments

Lexis®PSL Environment

On 25 October 2017, the Commission released a draft regulation amending [Commission Regulation No 389/2013 of 2 May 2013](#) establishing a Union Registry (Draft EU ETS Registry Regulation), as a way of ensuring the environmental integrity of the EU Emissions Trading System (EU ETS) during the ongoing third trading period.

In the absence of any future agreement between the EU and the UK, EU law will cease to apply to the UK as of 30 March 2019. In such an event, the UK's installations and aviation operators will not be subject to any obligations in relation to the EU ETS, specifically the obligation to surrender allowances corresponding to the verified emissions during 2018 by 30 April 2019. Without appropriate safeguards, the allowances auctioned and allocated for free by the UK in 2018 and 2019 could increase the surplus of allowances on the EU's carbon market at the same time as the Market Stability Reserve begins operating to prevent market surplus.

The EU's proposed measures outline marking and restricting the use of allowances issued by the UK from 1 January 2018. These marked allowances will no longer be surrendered in order to meet compliance obligations under the EU ETS. The proposal would apply from 1 January 2018 to:

- the auctioning of allowances
- the issue of free allocation by the UK
- the exchange of international credits for allowances

The measures are in accordance with the opinion of the Climate Change Committee and are without prejudice to any future agreement that may be negotiated with the UK, eg without prejudice to any agreement which provides for specific arrangements after the withdrawal date that may enable UK entities to enforce compliance obligations arising under the EU ETS for the years 2018 and 2019. For more information, see: [LNB News 25/10/2017 122](#).

On 6 November 2017 BEIS launched a [consultation](#) seeking views on the proposals. The intention is to provide clarity to EU ETS participants on the UK's 2018 compliance obligations during the UK's withdrawal from the EU and alleviate the negative impacts of the amendment to the EU ETS. Bringing forward the 2018 compliance deadlines would mean that obligations for 2018 compliance would not be lapsing and it would therefore not be necessary to implement the measures which would have negative and disruptive effects on the smooth operation of the carbon market and on EU ETS participants. Subject to responses to the consultation, the government proposes to introduce legislation in December 2017 with the

intention that the changes take effect from 1 January 2018. The deadline for responses to the consultation was 24 November 2017. For more information, see: [LNB News 07/11/2017 139](#).

Meanwhile on 22 November 2017 the European Council announced endorsement of the provisional deal reached between the Estonian presidency and the European Parliament on 9 November 2017 on the reform of the EU ETS for the period after 2020 (Phase IV of EU ETS). The agreed text will now be submitted to the European Parliament for approval. The new directive will enter into force on the 20th day following its publication in the Official Journal.

The revision will strengthen the EU ETS through the introduction of:

- a cap on the total volume of emissions which will be reduced annually by 2.2%
- double the number of allowances to be placed in the market stability reserve (MSR) until the end of 2023
- a new mechanism to limit the validity of allowances in the MSR above a certain level which will become operational in 2023.

For more information, see [LNB News 22/11/2017 56](#).

Water abstraction licensing reforms

Lexis®PSL Environment

In October 2017, Defra issued the [Government response to consultation on changes to water abstraction licensing exemptions in England and Wales: New Authorisations](#).

In 2009, the UK and Welsh governments issued a joint consultation on implementing the abstraction elements of the Water Act 2003 but the responses to that consultation raised some complex issues which led to the proposals being revised. In January 2016, the governments issued a response to the 2009 consultation along with a further consultation to explain and invite views on the revised proposals.

The response sets out the proposed final plans for changing exemptions to the water abstraction licensing system in England and Wales. It sets out the exemptions that will end and some new exemptions for low-risk abstractions and impoundments that will be created. Regulations have been laid in Parliament and the National Assembly for Wales that will take effect on 1 January 2018.

Those that will need an abstraction licence following the changes will have a two-year window to apply for their licences from when the regulations come into force on 1 January 2018. The Water Abstraction (Transitional Provisions) Regulations 2017, SI 2017/1047 set out the procedural requirements for

making and determining these applications.

The proposals form part of a wider programme of reform of the water abstraction licensing system which includes a plan to move abstraction licences into the existing environmental permitting regime. For more information, see News Analysis: [Water abstraction licensing reforms - the final leg](#).

Does the statutory compensation scheme in the Water Resources Act 1991 preclude a cause of action in negligence at common law? (*Hall v Environment Agency*)

Lexis®PSL Environment

In *Hall v Environment Agency* [2017] EWHC 1309 (TCC) the court provides guidance on how to handle claims brought against the Environment Agency (EA) and other statutory bodies for negligently performed flood defence works.

The claimant's property flooded after water escaped from a culverted section of stream at the rear of his property. He sought compensation from the EA in negligence at common law. The Technology and Construction Court held that the compensation scheme in the Water Resources Act 1991 (WRA 1991) did not provide an exclusive remedy and, therefore, did not preclude the bringing of such an action.

This is the first case considering the limits of the statutory scheme under WRA 1991 outside which an ordinary right of action remains.

For more information, see News Analysis: [What next for claims against the Environment Agency? \(*Hall v Environment Agency*\)](#). See also Charles Morgan's article in this edition of [elaw Compensation or Damages: an avoidable dilemma? The decision in *Hall v Environment Agency*](#).

New Habitats Regulations apply from 30 November 2017

Lexis®PSL Environment

The Conservation of Habitats and Species Regulations 2017, SI 2017/1012 (CHSR 2017) apply from 30 November 2017. They consolidate and update the Conservation of Habitats and Species Regulations 2010, SI 2010/490 which applied from 1 April 2010 (CHSR 2010) and updated and consolidated all amendments to the Regulations since they were first made in 1994. Minor modifications reflecting changes to related legislation are also made and aspects of the Marine and Coastal Access Act 2009 are also implemented. The CHSR 2010 are revoked, except in relation to certain parts.

In addition the Conservation of Offshore Marine Habitats and Species Regulations 2017, SI 2017/1013 also apply from 30 November 2017. They consolidate and update the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007, SI 2007/1842 (OMCR 2007). Minor modifications reflecting changes to related legislation are also made. The OMCR 2007 are revoked.

For more information, see [LNB News 02/11/2017 57](#) and [LNB News 02/11/2017 30](#).

Court of Appeal decides parent company duty of care for subsidiary operations and confirms jurisdiction

Practical Law Environment

In *Lungowe and others v Vedanta Resources Plc and another* [2017] EWCA Civ 1528 around 1,800 Zambian citizens living near a copper mine owned and operated by Konkola Copper Mines Plc (KCM) brought proceedings against Vedanta Resources Plc (Vedanta) and KCM. The claim alleged personal injury, damage to property and loss of income, amenity and enjoyment of land, due to alleged pollution and environmental damage caused by discharges from the mine since 2005.

KCM is a public limited company incorporated in the Republic of Zambia. Vedanta is incorporated in England. It is a holding company for a group of base metal and mining companies, including KCM.

The claimants brought the proceedings in England on the basis that Vedanta was domiciled in England and KCM was a necessary or proper party to the claim against Vedanta. Vedanta and KCM challenged the jurisdiction of the English courts.

On 13 October 2017, the Court of Appeal confirmed the High Court's May 2017 decision that England was the appropriate jurisdiction for the claims. The Court of Appeal rejected both defendants' jurisdiction challenges.

The decision is important, from a jurisdiction point of view, in confirming the first instance refusal to admit an exception to the rule in *Owusu v Jackson* (Case C-281/02), and the court's approach to granting permission to serve proceedings outside the jurisdiction where a question of law goes to existence of jurisdiction.

The court also gave important clarification of the principles to be taken into account when considering whether a parent company owes a duty of care to the employees of subsidiaries.

The court summarised previous cases (including *Chandler v Cape plc* [2012] EWCA Civ 525 and *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635) on whether a parent company could owe a common law duty of care to the employees of its subsidiaries and drew a number of principles which it said may be material when deciding whether a duty is owed by a parent company to those affected by the operations of a subsidiary.

The circumstances where a parent company may owe a duty of care are where the parent company either:

- has taken direct responsibility for developing a material health and safety policy, where the policy is the subject of the claim; or
- controls the operations that give rise to the claim.

For a parent company to owe a duty of care to the employees of its subsidiaries, *Chandler v Cape Plc* requires that the parent is well-placed, because of its knowledge and expertise, to protect the employees of the subsidiary. It is not enough for the businesses of the parent and the subsidiary to be the same in the relevant respect. If the parent and subsidiary have similar knowledge and expertise and jointly take decisions about mine safety, and the subsidiary implements those decisions, both companies may owe a duty of care to those affected by those decisions.

A parent company may owe a similar duty to those affected by the operations (as well as to employees of the subsidiaries). The court said the fact that there had never been a reported case in which a parent company had been held to owe a duty of care to a person affected by the operation of a subsidiary did not make such a claim unarguable.

The Court of Appeal agreed with the High Court that the claimants' case against Vedanta was arguable. This decision could significantly extend the scope of liability by parent companies for the impacts of subsidiary operations.

For more information, see [Legal update, Parent company duty of care for subsidiary operations and confirmation of jurisdiction \(Court of Appeal\)](#).

Flooding

Flood Insurance Update, December 2017



Duncan Spencer, EDIA Limited and Steve Packer, Property Insurance Initiatives Limited

At a glance

- Memory of the devastating floods in 2015 has been short lived;
- The Government and industry backed, Flood Re scheme, is currently supporting domestic homeowners and tenants in the UK providing access to affordable insurance coverage, although from 2039 a free market will be introduced;
- Commercial properties have no such scheme, although open market insurance schemes are becoming available; and
- There remains a requirement for developers and property owners to take responsibility for flood risk and provide their own risk mitigation solutions.

Flood experience

The devastating floods of late 2015 (storms Desmond, Eva and Frank) have, fortunately, not been repeated. In early 2016, the Association of British Insurers (ABI) published statistics that showed:

- more than 3,000 families were in alternative accommodation while repairs are made to their homes;
- the average expected pay out for each domestic flood claim is £50,000 – compared with an average from the 2013/14 winter storms of £31,000;
- of the £24 million emergency payments made, £9million has been to domestic customers and £15million to businesses;
- customers made nearly 15,000 claims for property damaged by the flooding, more than 5,000 of these claims coming from business customers.

Memory of flood events appears to be a very short term practice:

- research by the BBC in 2015 identified that after the 2007 and 2009 flood events in Tewksbury and Cockermonth, the price of residential properties have remained largely unaffected;
- the Committee on Climate Change has stated that for the period 2011 to 2015, the growth of housing in areas where flooding is likely has grown by 1.2%, while in areas of low risk, growth has been 0.7%;
- the ABI conducted a survey in early 2016, which found homebuyers were more likely to have looked into the ease of parking in the area (33%) than checked whether their house could be at risk from flooding (28%).

James Dalton, Director of General Insurance Policy at the ABI, said:

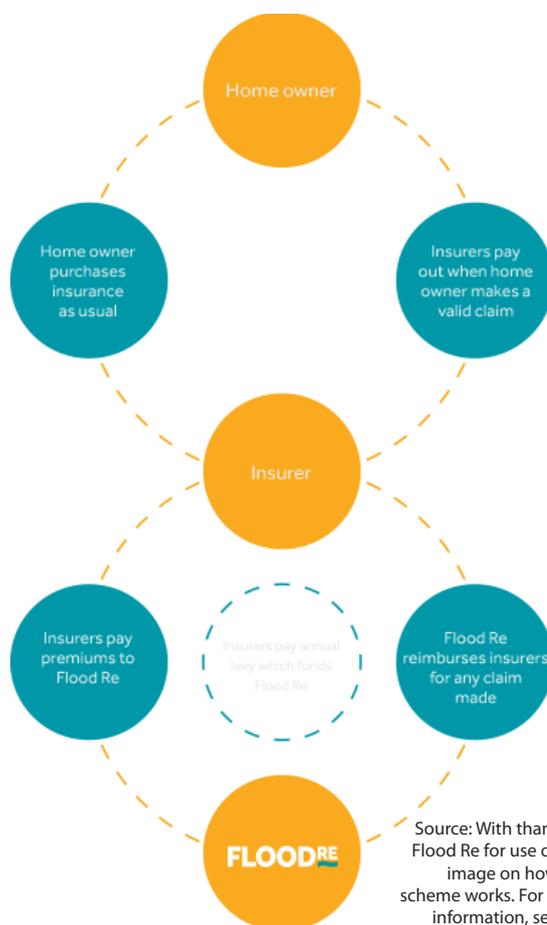
"Flooding is a growing threat that as a nation we have to adapt to living with. As the floods of last winter reminded us, being flooded is horribly traumatic and can leave people out of their home or business for months. Anyone whose property is at flood risk needs to be aware of that so they can take steps to protect themselves."

Insurance for domestic properties – Flood Re

The Government has worked closely with insurers in the UK delivering Flood Re, a not-for-profit scheme funded by insurers. Flood Re will give homeowners and tenants access to affordable insurance allowing local authorities to get better prepared for flooding.

How Flood Re works

Flood Re takes the flood risk element of home insurance from an insurer in return for a premium based on the property's Council Tax band.



Source: With thanks to Flood Re for use of this image on how the scheme works. For more information, see the [Flood Re website](#).

Flood Re also:

- charges the insurer an excess of £250; and
- takes an annual levy on insurers of a total of £180m,

allowing them to charge a premium that is lower than that normally charged on properties at the highest risk of flooding.

Eligible properties

Properties will be eligible only if they meet all of the following criteria:

- 1 They are covered by an insurance contract which is held in the name of, or on trust for, one or more individuals or by the personal representative of an individual;
- 2 The holder of the policy, or their immediate family, must live in the property for some or all of the time (whether or not with others) or the property must be unoccupied;
- 3 They have a domestic Council Tax band A to H (or equivalent);
- 4 They are used for private, residential purposes;
- 5 They are a single residential unit or a building comprising of two or three residential units;
- 6 They are insured on an individual basis or have an individual premium;
- 7 They were built before 1st January 2009 (if a home is built before 1st January 2009 but then demolished and rebuilt, the new home is still eligible); and
- 8 They are located within the UK comprising England, Wales, Scotland and Northern Ireland (excluding the Isle of Man and the Channel Islands).

It is expected that the following properties will be eligible for buildings or combined cover provided **they also meet the criteria 1-8 above:**

- A Bed and breakfast premises paying Council Tax and insured under a home insurance contract;
- B Farmhouse dwellings and cottages. Where farmhouse dwellings are included in a commercial line policy, provided the insurer can split out the dwelling element (which meets the criteria 1-8 (inclusive) above), that part of the risk can be ceded to Flood Re;
- C Holiday/Second Homes;
- D Properties occupied by home workers;
- E Individual leaseholders protecting their own property/flat;
- F Leasehold blocks if they contain 3 units or fewer and the freeholder(s) lives in one of the units to be insured;
- G Single unit leasehold properties where the leaseholder insures the structure of the property;
- H Residential 'buy to let' properties;
- I Static Caravans/homes if in personal ownership.

Flood Re will also cover a tenant's / individual's contents in rented or leasehold properties even where the buildings risk would not be eligible (such as in large blocks of flats) provided the policy and the property it relates to fulfil the criteria 1-8 above.

Properties that are not expected to fulfil the eligibility criteria for buildings or combined cover include:

- A Bed and breakfast premises paying business rates;
- B Blocks of more than three residential flats;
- C Company houses/flats;
- D Properties covered by contingent buildings policies (e.g. held by banks);
- E Farm outbuildings;
- F Properties used by freeholders/leaseholders in deriving commercial income insuring blocks/large numbers of properties in a portfolio;
- G Housing association's residential properties;
- H Multi-use properties under commercial or private ownership;
- I Residential 'buy to let' (which do not meet the criteria 1-8 (inclusive) above);
- J Social housing properties; (eligible for Contents cover but not eligible for Buildings cover);
- K Static caravan site owners (for commercial gain).

Claims

Claims will continue to be handled by individual insurers with Flood Re reimbursing insurers for any valid claims paid out to its customers.

Transition

Flood Re is planned to be in place until 2039. As well as helping to enable home insurance to remain affordable in areas at risk of flooding, Flood Re also has a role to help manage a transition to home insurance prices that fully reflect flood risk.

This means that people benefiting from Flood Re need to become more aware of their flood risk and, if possible, take action to reduce it: after 2039, there will be a free market for flood risk on domestic properties.

Andy Bord, Chief Executive of Flood Re, commented: *"It's important to us that people across the UK understand how the scheme can help them more easily access affordable flood insurance. People across the UK should speak to their current insurer to see if it has signed up to Flood Re and shop around to ensure they are able to get the best possible deal. We've seen how flooding can cause destruction and distress and are proud that tens of thousands of people have benefitted from the scheme since launch."*

Insurance for commercial properties

Research by the British Insurance Brokers Association (BIBA) identifies that of the 28 million properties in the UK, more than five million are at risk of flood (1 in 6). Whilst the introduction of the government and

industry backed Flood Re will increase the availability and affordability of flood insurance for eligible homes, there will still be a large number of landlords that are either unable to obtain any insurance at all or pay huge premiums for minimal levels of cover.

There is currently no provision for small businesses in areas prone to flooding who may struggle to get insurance cover or who may have onerous terms applied such as a very high excess for flood claims. The Association of British Insurers (ABI) are of the view that there is not currently a need for a commercial Flood Re scheme, claiming that most businesses are still able to arrange flood cover at a competitive premium.

BIBA's evidence goes against this view, however. Following Storm Desmond which hit Cumbria in 2015, flood damage was caused to 25,000 business premises. Many of these premises were either not covered or had very high excesses imposed on their policies following previous damage from the storms in 2012. This additional financial burden has caused some SMEs to cease trading, and this problem is not likely to go away any time soon with the global forecasts indicating that these severe storms are likely to become a regular occurrence.

BIBA has launched a commercial insurance scheme which aims to significantly improve the ability of small and medium sized businesses (SMEs) and property owners to find suitable flood insurance.

Key benefits include:

- quotations for many SME's/leasehold/let properties in flood risk areas;
- recognition of flood resilience/resistance measures in pricing and terms;
- state of the art mapping tools;
- additional policy options covering high flood excesses.

In addition to specialist schemes there are also alternative insurance options:

- insuring high excesses if these are applied to an insurance programme is something that is becoming widely available in the market;
- flood prevention/protection specialists can work with landlords to improve flood defences.

Both brokers and insurers are starting to understand the requirements of their clients and are working hard to provide solutions at reasonable cost.

In summary, there are many tools available to check the flood exposure when looking to purchase property. Involving a broker at the earliest possible stage of due diligence prior to purchase can be of huge benefit and allows both broker and insurer to advise and structure an insurance solution.

Liability for flooding

The schemes and approaches described above reflect insurance for flood damage caused to your own property. Liability for flood damage you cause is still unclear – other than with respect to pollution (i.e. a fuel tank that floats off).

In the period since the last major flood event, the environmental insurance market has continued to grow, with some unsubstantiated, evidence of pollution claims. Impact caused by the next flood event may result in more experience.

Conclusions

In the absence of significant flood events since 2015, the general interest in flood risk has reduced. However, over the same period, the Government and insurance industry has prepared to respond to the next flood event by:

- successfully launching Flood Re to support residential property owners; and
- creating schemes for commercial properties.

However, this does not remove the requirement for property owners to be prepared to protect and mitigate flood events.

Insurance, via an experienced insurance broker, should be considered as part of a whole risk management approach to manage the risks associated with flooding.

Duncan Spencer, EDIA Limited, A specialist environmental insurance broker and consultant with nearly 30 years' industry experience.

Steve Packer, Property Insurance Initiatives Limited, A real estate insurance broker with over 20 years' experience.

Compensation Or Damages – An Avoidable Dilemma?



The decision in *Hall v Environment Agency*

Charles Morgan, *Six Pump Court*

At a glance

- injurious consequences of flood defence works
- common law damages vs. statutory compensation; where to draw the line?
- *Marriage v East Norfolk Rivers Catchment Board* revisited.

Introduction

English law contains many statutory codes providing for compensation following interference with private law rights of land ownership. The interference may range from indirect consequences involving no direct entry, through entry to maintain existing works, the performance of new works to outright acquisition of land. The Environment Agency ('EA') possesses numerous such powers in the Environment Act 1995 and the Water Resources Act 1991 (WRA 1991). For example in *R (oao Sharp) v North Essex Magistrates' Court* [2017] EWCA Civ 1143; [2017] 1 WLR 3789 (which is discussed in another article within this issue) the Court of Appeal adopted a very wide interpretation of the Environment Agency's powers of entry under s.172 of the WRA 1991 in the context of flood alleviation works, obviating the need for the exercise of either compulsory purchase order or compulsory works order procedures in the case of quite intrusive operations. In that case, the EA accepted that whatever route it adopted, an entitlement to statutory compensation would arise.

The usual forum stipulated for the determination of disputed claims for statutory compensation in respect of interference with land is the Upper Tribunal (Lands Chamber), formerly the Lands Tribunal. That forum has no power to award damages at common law. Courts of law can of course do so, but they have no power to award statutory compensation where that power has been given to the Upper Tribunal. There is no procedural method for proceedings commenced in one forum to be transferred to the other if it transpires that the initially chosen forum lacks jurisdiction. This would not greatly matter if it was or should always be obvious which remedy was open to a claimant following an injury. But it is not. If land has actually been acquired, the position is generally straightforward - the Upper Tribunal is possessed of exclusive jurisdiction to value the compensation. In

the case of works and their consequences, things are less straightforward. If the works have been meticulously designed and executed, then their inevitable, residual injurious consequences are plainly the subject of an exclusive claim to the Upper Tribunal. Any claim for common law damages in a court would be successfully met by the defence of statutory authority.

It is well-established law that a claim for statutory compensation can usually only arise where, but for an available defence of statutory authority, the activities complained of would constitute an actionable nuisance of trespass. But what if the works have additionally not been so well designed or executed, so negligence is also alleged? At what point does the defence of statutory authority peter out and a claim at common law arise? What form of activity lies within the zone of statutory immunity, and what without?

The facts in *Hall v Environment Agency*

In *Hall v Environment Agency* [2017] EWHC 1309 (TCC)¹ the distinction loomed large, not least because, as HHJ Havelock-Allan remarked at the end of his judgment, the claimant had left it so late to commence his proceedings in court that (in the teeth of repeated warnings from the EA) he faced limitation problems if forced to abandon them in favour of a claim in the Upper Tribunal.² The case concerned the outcome of flood alleviation works at Morpeth in Northumberland, carried out under powers given by s.165 of the WRA 1991. Those works required temporary removal of the roof of a culvert. The EA left the culvert uncovered for a fortnight, during which in a period of heavy rainfall it overflowed through its open roof and flooded the claimant's nearby property (which was outwith the works).

The issues

The claimant commenced court proceedings, contending that the EA had acted negligently in leaving the roof uncovered for so long, in breach of a duty to take reasonable care in the planning and/or commissioning and/or carrying out of the works. The EA denied any negligence, but also contended that any claim which the claimant might have was

exclusively one for statutory compensation under s.177 of and Schedule 21 to the WRA 1991. The EA applied to strike out the common law claim.

The claimant contended that the scope of the statutory compensation scheme was circumscribed by the principles laid down in *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284 and that the facts of the claim took it outside the scheme. *Marriage* concerned an exercise of powers under the Land Drainage Act 1930 and explored the boundary between the similar compensation scheme contained in that statute and common law claims. Jenkins LJ laid down a four-fold test:

- (1) was the act which occasioned the injury authorised by statute?
- (2) did the statute contemplate that the exercise of the powers might cause injury?
- (3) was the injury complained of an injury of the kind contemplated by the statute?
- (4) did the statute provide compensation for this kind of injury?

and further set out a number of requirements (of frankly Delphic opacity and perhaps also a degree of circularity) which if satisfied would also confine the claim to one for statutory compensation:

- (a) the injury must be the product of an exercise of the board's powers as such, as opposed to the product of some negligent act occurring in the course of some exercise of the board's powers but not in itself an act which the board was authorised to do;
- (b) the injury must be the product of the operation which the board intended to carry out, and not of some unintended occurrence brought about in the course of carrying out the work owing to negligence in carrying it out;
- (c) the operation must not be one which on the face of it is so capricious or unreasonable, or so fraught with manifest danger to others, that no catchment board acting bona fide and rationally, not recklessly, would ever have undertaken it.

The decision

HHJ Havelock-Allan reviewed the authorities and concluded that the rule in *Marriage* precluded the bringing of a common law claim 'wherever the injury is a necessary, in the sense of being an inevitable and direct, consequence of authorised works', and that this might still appertain even if a case in nuisance or negligence were made out. The judge then interpreted the particular scheme created by s.177 of and Schedule 21 to the WRA 1991 and concluded that the limits of its scope were not so clear as to justify striking out the common law claim. Whilst he held that taking the roof off the culvert was an integral part of the scheme, he held that leaving it off for two weeks

was not. He likened it to a hole dug in the road under statutory powers but left unprotected, into which someone falls. The ensuing injury would not be one contemplated by a similarly worded statutory compensation scheme to that under consideration, so as to preclude an action in negligence. The common law claim was therefore allowed to proceed. Quite how the tests numbered (1) - (4) and (a) - (c) above were individually applied and cumulatively passed is less than clear from the judgment.

Comment

The distinction sought to be drawn bears some broad similarity to that developed in the quite distinct line of cases culminating in the House of Lords decision in *Marcic v Thames Water Utilities Ltd.* [2004] UKHL 66; [2004] 2 AC 42, where the sewerage undertaker was held not liable in common law nuisance in respect of damage caused by an overflowing sewer in circumstances amounting to an overall lack of capacity in the system. Such a claim was held to be incompatible with the statutory system of economic regulation by OFWAT under the Water Industry Act 1991, which afforded immunity (without compensation). In this context also a boundary has been recognised between the result of 'strategic' actions or inactions (result: immunity) and 'operational' ones (result: liability),³ although it too has proved difficult to draw in practice.⁴ Had the roof of the culvert been instead the manhole of a public sewer, potential common law liability would perhaps have been more readily demonstrable. It is certain that the man in the street, whether on foot or on the Clapham omnibus, would be surprised to learn that the law and lawyers see the two situations as being substantially distinct in analysis.⁵

In practical terms, the distinction is so difficult that it seems unlikely that either the court or the Upper Tribunal will of its own motion be minded to take any jurisdictional point if both parties were agreed as to the forum in which any issue of negligence or nuisance and resulting remedies was to be determined. However, there will be circumstances in which such agreement cannot be reached, in particular where liability is hotly contested or the measure of damages differs from the measure of statutory compensation. In such cases, the best approach would be therefore either (1) to commence a claim in the preferred forum in good time to commence one in the other forum should the first one fail on jurisdictional grounds or (2) to seek to agree with the compensating authority a 'standstill' agreement for limitation purposes.

Charles Morgan is a barrister practising at Six Pump Court in environmental law, with a particular depth of experience in all aspects of water and water industry law.

Endnotes

- 1 The case has been late to the table for reporting and comment; judgment was delivered at the end of May 2017 but it was not widely published until November.
- 2 it should be noted that in the Upper Tribunal, as in the courts, expiry of a limitation period is merely a procedural bar capable of being waived by the acquiring or compensating authority - *Co-operative Wholesale Society Ltd. v Chester-le-Street District Council* [1996] 2 EGLR 143; on appeal [1998] 3 EGLR 11; that is a concession which a public body undoubtedly liable under one régime or the other might on occasions feel minded to make in the context of the injurious consequences of the exercise of intrusive statutory powers cf. the observations of Lord Bridge in *R v Tower Hamlets LBC, ex parte Chetnik Ltd* [877] 1 AC 858 @ 877 concerning the 'high principled way' in which a court would expect rating authorities to behave in relation to the repayment of rates paid under a mistake of law (and thus, at the time of the decision, irrecoverable in law)
- 3 *Dobson v Thames Water Utilities Ltd.* [2007] EWHC 2021 (TCC) (not affected by the successful appeal); see also *Bell v Northumbrian Water Ltd.* [2016] EWHC 133 (TCC) @ [38] - [39].
- 4 *Nicholson v Thames Water Utilities Ltd.* [2014] EWHC 4249; *Oldcorn v Southern Water Ltd.* [2017] EWHC 62 (TCC)
- 5 Howarth, *Flood Defence Law* (Shaw and Sons 2002) cites both *Marriage and Marcic* in close proximity within an impressive attempt at section 2.9 to find a comprehensive set of principles governing civil liability of public bodies acting under statutory powers or duties

Flooding

An alternative to compulsory purchase? The Environment Agency's powers under s172 of the Water Resources Act 1991: breadth and scope for challenge



Matthew Dale-Harris, barrister, Landmark Chambers

At a glance

Summarises and explores the decision of the Court of Appeal in *R(Sharp) v North Essex Magistrates' Court* [2017] 1 WLR 3789, which confirms breadth of Environment Agency ("EA") powers to enter land for purpose of constructing flood defences as an alternative to using compulsorily purchase powers.

Suggests that judicial review of the magistrates' may increasingly form a key tool for keeping the EA's use of those powers in check, and that use of HRA 1998 jurisprudence may have a role in future caselaw.

Statutory background

Under Part VII of the Water Resources Act 1991 ("WRA 1991") the EA has extensive powers to take, enter and carry out works to land. In the realm of flood defence, it may have recourse not only to its general power to compulsorily purchase land for the purposes of carrying out its statutory function (s.154) but also a specific set of powers to carry out flood defence and drainage works (s.165-167A), to seek a compulsory works order with accompanying compulsory powers from the Minister (s.168), and a general power of entry (s.172).

Situations may often arise where the EA has a choice of power on which to rely; a choice which can have significant consequences for the procedural remedies available to affected parties. In particular, a decision to exercise compulsory purchase powers gives rise to an opportunity for third parties to substantively challenge the decision on its merits; whereas a decision to exercise powers of entry under s.172 is only constrained by the requirement on the EA to seek a warrant from the magistrates which will be granted if they are satisfied that there are reasonable grounds for exercising that power.

The facts

Mr and Mrs Sharp owned a 365-acre pastoral farm near Chelmsford, Essex, on which they grazed some 1400 sheep and cattle. In 2013, the EA obtained planning permission for a scheme of flood alleviation works which included significant works on the Sharps'

land, including the construction of:

- a 500m long, 5.5m high earth embankment; and
- a concrete control structure with two sluice gates and ancillary features.

These works formed part of a wider scheme aimed at alleviating flooding from the River Wid, which involved rerouting parts of that river. As a result, they fell within the powers available to the EA under s.165(1) to carry out flood risk management works including the construction of new works or improvement of existing. The Sharps, it goes without saying, opposed the proposals which they said would cause substantial disturbance to their use of the farm and for which they might not obtain proper compensation.

Following an unsuccessful judicial review brought by the Sharps against the planning permission, the EA attempted to negotiate access to the land but, when that failed, served notices of intended entry under s.172 of the WRA 1991 on the basis that they proposed to carry out works under s.165 of the WRA 1991. When these were opposed the EA applied to Chelmsford Magistrates' Court for a warrant under Schedule 20 to the WRA 1991.

Decision of the Court of Appeal and judgments below

The primary issue which arose at each stage of the litigation (magistrates, High Court on judicial review of failure to state case, and Court of Appeal) was whether the EA was entitled to rely on their powers under s.165 and s.172 in a context where compulsory purchase powers could also be relied upon.

This submission founded on ss. 165(6) which purported to restrict the scope of s.165 by providing that "Nothing in subsections (1) to (3) above authorises any person to enter on the land or any person except for the purpose of maintaining existing works". The Sharps argued that the effect of s.165(6) must be to remove the power to enter land for the purpose of constructing new works and, that power

having been removed from s.165, it could not be replaced by the general s.172 as this would render s.165(6) otiose. The Sharps also argued before the magistrates and High Court that the EA had not established that there were no reasonable grounds for granting the warrant.

The Sharps lost at each stage. In the Court of Appeal, Gross LJ concluded that the statutory language was such that he had no real hesitation in concluding that the EA did in fact have the wide statutory powers which they argued for and was entitled to exercise powers of entry under s.172 in preference to s.154 or s.168 when seeking to enter onto land for the purpose of carrying out new works.

Comment

This provides useful clarification to a confusing legislative scheme but two further points are also worth drawing out which may be of particular relevance to future cases.

- First, it is worth noting the EA's concession (following comment by Haddon-Cave J in the High Court) that the correct basis for compensation in a case such as this was pursuant to Schedule 21 to the WRA 1991. This was a point which had previously given rise to some uncertainty and the clarification will make it easier for advisers to anticipate the heads of compensation which may be realised.
- Second, and perhaps most interestingly, Gross LJ expressed concern with the result of the case. At paragraph 32 he acknowledged that:

"Moreover, questions of policy could be invoked to lend support to this argument. It is one thing to enter onto private land for the purpose of maintaining existing works; it is quite another to do so for the purpose (inter alia) of constructing new works, without the safeguards contained in the CPO and CWO regimes – and moreover leaving open questions of some nicety as to the structures subsequently left on the landowners' land. Still further, I would not, for my part, be dismissive of the concern highlighted by Mr Edward's submissions as to the tension between individual rights of property and the interests of society in general; striking the right balance in that area is important and not necessarily straightforward. Interference with private rights of property plainly requires careful justification."

- He then went on to raise the problem that "the formalities attached to such notice provisions as are contained in section 172 are hardly onerous and thus provide but a weak foundation for the suggested purpose underlying section 165(6)", before concluding that the statutory language was sufficiently clear to permit no other interpretation.

In the author's view, Gross LJ's concern as to the weakness of the procedural steps and his allusion to tensions created by the existence of an equally extensive but less safeguarded set of powers alongside the CPO and CWO regimes is worth noting. The statutory regime may be (tolerably) clear but it is surprising that the EA is able to circumvent important procedural protections in this way and the unease of the Court of Appeal points to the difficulties which might have arisen for the EA in a less straightforward case on the merits; and perhaps even to the possibility that use of s.172 in this way might give rise to issues under Article 8 or Article 1 of the First Protocol to the European Convention on Human Rights.

Of course, whether we will see any further litigation on this theme depends substantially on the approach which the EA takes and particularly whether it tries to exploit this feature of the WRA 1991, which it may do with an eye to both the costs and risks associated with more onerous compulsory regimes. If it does, then we may well see landowners seeking to judicial review magistrates' decisions if, as seems likely, they feel that their concerns have not been given sufficient airing at first instance and particularly if they can make a good case that the interference with their property rights (and/or homes) is not proportionate to the public interest which the EA seeks to protect.

Matthew Dale-Harris is a barrister at Landmark Chambers. He practises across the span of environment, planning and property law and writes the Environment section of the Green Book as well as the SEA chapter of Garner's Environmental Law. Recent work has focused on air quality issues, including an involvement in the Shirley case and instructions for Gatwick Airport, and he continues to work for local authorities, developers, parish councils and private individuals.

Case note

Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment (Trinidad and Tobago) [2017] UKPC 37



Nina Pindham, Barrister, No5 Chambers

At a Glance

- A successful case brought before the Privy Council by an environmental NGO in Trinidad and Tobago confirms the Polluter Pays Principle is “firmly established” as a basic principle of international and domestic environmental laws, despite some academic controversy.
- Statutory national policy had set out that a “key principle” of pollution control policy was that the cost of preventing pollution or of minimising environmental damage due to pollution was to be borne by those responsible for the pollution.
- National regulations which provided for permitting fees which sought full recovery only of operating costs and did not include an additional amount “to correct environmental damage” in line with the Polluter Pays Principle were unlawful.
- Providing for the prevention and control of pollution, including remediation works, to be funded by way of permitting fees was consistent with the Polluter Pays Principle, because it ensures that the cost is attributed at least in part to those responsible for polluting activities rather than to the community at large.

Introduction

This judgment was handed down by the Board of the Privy Council consisting of Lord Mance, Lord Wilson, Lord Carnwath, Lord Hughes and Lord Briggs on 27 November 2017. It concerns a claim brought by a non-governmental organisation with “*an impressive record of some ten years of giving advice, guidance and assistance to the national community*” (per Lord Carnwath, paragraph 7) in relation to the way the government of Trinidad and Tobago implemented national policy on the Polluter Pays Principle through fees for environmental permits.

Key facts

In Trinidad and Tobago a statutory National Environmental Policy (“the NEP”) was applied to charges for environmental licences. Paragraph 2.3 of the NEP provides:

“Polluter Pays Principle

A key principle of pollution control policy is that the cost of preventing pollution or of minimising environmental damage due to pollution will be borne by those responsible for pollution. The principle seeks to accomplish the optimal allocation of limited resources. Important elements of the principle are:

- (a) Charges are levied as an application or processing fee, purchase price of a licence or permit, which entitle the holder to generate specific quantities of pollutants; and
- (b) Money collected will be used to correct environmental damage.”

Lord Carnwath stated (at paragraph 6) that:

“[t]he central issue in this case is whether the Ministerial regulations by which charges [for permits] were fixed were consistent with this aspect of the NEP (in particular sub-paragraph 2.3(b)). There is a further issue in any event as to whether the Minister, in formulating the regulations, gave proper consideration to the NEP and to the WPMP.”

In the context of water pollution, the NEP was implemented through the Water Pollution Management Programme (“the WPMP” referred to by Lord Carnwath above).

To complete the context, the 2001 Water Pollution Rules established a permitting system for the regulation of water pollution in Trinidad and Tobago. Of key importance to the implementation of the Polluter Pays Principle, rule 8 allowed a person who released a water pollutant outside the permissible level that was likely to cause harm to human health or to the environment to be notified to apply for a permit. In order to obtain a permit that person was required to pay “the prescribed fee” (by rule 8(2)). The fee was set under the Water Pollution (Fees) Regulations 2001 at an annual charge of TT\$10,000. This fee was fixed and so did not allow for variation in light of the type or amount of the permitted pollution.

The impugned legislation was the subsequent Water Pollution (Fees) (Amendment) Regulations, 2006. The amending regulations made no change to the fixed annual permit fee to be paid under rule 8(2).

The NEP was revised in 2006. The Polluter Pays Principle remained as in the earlier version, but the revised NEP included a section on “Water Resources” which provided that the government was: (1) to develop a registration programme for all facilities that are the sources of any release of water pollutants, and (2) to control water pollution through a system of permits for facilities that are the sources of any release of water pollutants. The Water Resources section of the 2006 NEP specified:

“This control system will be based on the Polluter Pays Principle, which will set pollution limits or performance standards for water. The cost of pollution prevention or of minimising environmental damage due to pollution will be borne by those responsible for pollution.”

The appellants then wrote to the Minister in 2007 requesting the reasons for using a flat fee/fixed fee structure in the 2006 regulations, and seeking confirmation as to whether the Polluter Pays Principle was taken into account when setting the annual permit fees.

The Minister’s reply referred to the importance given to the Polluter Pays Principle in the NEP and confirmed that “a full cost recovery analysis” had been used in determining the fee structure, evidenced by the fact that “charges are levied for the processing of such applications as well as sampling and analysis of effluent”.

Key issues

The matter made its way to the Privy Council, by which point the grounds for judicial review were:

- (ground 1) the fee structure was in breach of the Polluter Pays Principle as expressed in paragraph 2.3 of the NEP; and
- (grounds 3 and 4) the fee structure was contrary to the policies of the Ministry and the Authority.

The question for the Privy Council was described by Lord Carnwath as:

“Is it sufficient that the fees are assessed on the basis of full recovery only of the operating costs of the authority, including the administration of the permit scheme? Or should they also allow for an additional amount to be used by the Authority itself ‘to correct environmental damage’ [referring to paragraph 2.3(b) of the NEP set out above]?”

The ‘Polluter Pays Principle’

The wider interest in this case is how the Polluter Pays Principle was implemented by the government, as well as for the Privy Council’s commentary on the principle when giving judgment. Lord Carnwath, giving the judgment for the Privy Council, confirmed that the Polluter Pays Principle is now “firmly established” as a basic principle of international and domestic environmental laws. He went on to describe its aims thus: “to achieve the ‘internalization of environmental costs’, by ensuring that the costs of pollution control and remediation are borne by those who cause the pollution, and thus reflected in the costs of their goods and services, rather than borne by the community at large” (citing as an example OECD Council 1972 Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies; Rio Declaration 1992 Principle 16).

The Draft Global Pact for the Environment, presented by President Macron to the United Nations Assembly on 19 September 2017, was also cited. This provides at Article 8:

“Polluter-Pays

Parties shall ensure that prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their originator.”

Lord Carnwath noted that when discussing the Polluter Pays Principle (as it appeared in the EC Treaty, article 130r(2), now article 191(2) of the TFEU) in Case C-293/97 R v Secretary of State for the Environment, Ex p Standley [1999] QB 1279 Advocate General Léger had identified “two aspects” (at paragraphs 92-95 of Standley):

“It must be understood as requiring the person who causes the pollution, and that person alone, to bear not only the costs of remedying pollution ..., but also those arising from the implementation of a policy of prevention ...”

AG Léger added at paragraph 97 that the principle may take the form that “in return for the payment of a charge, the polluter is authorised to carry out a polluting activity”.

The academic controversy underlying the Polluter Pays Principle was also noted:

“Despite the antiquity and strong ethical foundations of the polluter pays principle, its content is less easy to determine. Proclaiming that ‘the polluter should pay’ is a simple statement which is intuitively fair, but of necessity it requires

an investigation into issues such as who is the polluter? For what should they be made to pay? How much should they be made to pay? And so on ...” (citing Burnett-Hall on Environmental Law 3rd ed (2012), p 91, para 2-121)

Court of Appeal decision

The Court of Appeal¹ found with the government, whilst accepting that paragraph 2.3(b) of the NEP contemplated the use of permit fees to correct environmental damage and that it was difficult to determine whether that requirement was satisfied by the flat-fee structure. Ultimately, the Court of Appeal considered that as the fees were intended to cover the costs of administering the management of water pollution, to that extent the principle was complied with “albeit very simplistically”. Reliance was also placed on the fact that permits would include conditions:

“These permit conditions constitute provisions for the correction or minimization of environmental damage which may result from the release of pollutants which are authorised by the permit. To the extent that the permittee is required to take steps to avoid, minimize or mitigate, he bears the ‘costs of pollution prevention’. The PPP seeks not only to prevent pollution but to minimize it. Minimization is relative. It is a function of the state of economic development of any given country and of the resources available to it to manage pollution control.” (paragraph 54, Court of Appeal judgment)

Very interestingly, the Court of Appeal stated that pollution management was a “*work in progress*” and that the court must “*defer to the views of...officials... and suppress its own misgivings about the unsophisticated nature of the model*.” (paragraph 56, Court of Appeal judgment). As will be seen below, the Privy Council felt no need to suppress its “mischiefings” in light of the legal errors it found.

Privy Council’s decision

The Privy Council² rejected the Court of Appeal’s reasoning, stating (at paragraph 41):

“...Even allowing for the fact that the paragraph is intended by way of ‘guidance’ only, sub-paragraph (b) [of paragraph 2.3 of the NEP set out above] must be given separate effect in accordance with its natural meaning. It is in terms directed, not to the general purpose of the permitting system nor to the implementation of permit conditions, but to the use by the Authority itself of the ‘money collected’ by way of fees for the correction of environmental damage. (Mr Roe accepts that there is no other relevant source of ‘money collected’ in this context.) Thus, it is not sufficient that the polluter will necessarily expend its own money in

complying with the permit conditions, and so contribute to the “correction” of environmental damage. The fees are to be used to finance or contribute to correction activities by the Authority itself.”

Lord Carnwath continued at paragraph 42:

“This view is supported by reference to the functions of the Authority under the Act (section 16), and to the purposes of the Fund set up under section 72, the resources of which include amounts collected as permit fees (section 74(b)). The functions are not limited to the oversight of polluting activities by others, but include all ‘appropriate action for the prevention and control of pollution’, which would naturally include remediation or correction works by the Authority. Similarly, the purposes of the Fund extend to the operations of the Authority and other purposes authorised under the Act, and specifically for ‘emergency response activities’ by the Authority itself including ‘remediation’. Providing for such work to be funded out of permitting fees is consistent with the [Polluter Pays Principle], in that it ensures that the cost is attributed at least in part to those responsible for polluting activities, rather than to the community at large.”

The consequence is that, as far as relates to the prescribed fee for an application for a permit, the 2006 regulations were declared to be unlawful.

As a final note, this was the first video-link hearing from the Privy Council courtroom in Parliament Square, London. The hearing was attended in Trinidad and Tobago by counsel for the appellant, and in London by the respondent’s counsel. This was evidently considered to have been a success as the judgment expressly invited parties to future appeals to consider using this means of hearing appeals.

Nina Pindham is a barrister specialising in environmental and planning law at No5 Chambers, and Convenor of UKELA’s Water Working Party.

Endnotes

- 1 Court of Appeal decision http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2012/bereaux/CvA_12_P240DD16jul2015.pdf
- 2 Privy Council decision [http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKPC/2005/32.html&query=\(fishermen\)+AND+\(trinidad\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKPC/2005/32.html&query=(fishermen)+AND+(trinidad))

Student article

Sustainable Drainage Principles in Menston Action Group v Bradford MDC



Andrea Chong, Downing College, Cambridge

Reviewed by Dr Haydn Davies, Head of the School of Law, Birmingham City University

At a glance

- A look at the decision in *Menston Action Group v Bradford MDC* [2016] EWCA Civ 796
- The interpretation of ‘sustainable drainage principles’
- Whether a local planning authority erred in approving a drainage scheme for a residential development, as it did not consider how the scheme would alleviate the problem of flooding beyond the site’s boundaries.

Abstract

The Court of Appeal held in *Menston* that the interpretation of the words ‘based on sustainable drainage principles’ contained in one of the conditions of a planning permission grant was adequately interpreted with reference only to the planning permission document. The court did not need to look beyond the document to understand the meaning of the words. Further, the court held that there was no requirement within the words ‘based on sustainable drainage principles’ for the developers to take into account flooding problems in the surrounding area outside the boundary of the development itself. This short article discusses the decision of the Court of Appeal and asks whether the decision is satisfactory both in law and in practice.

The issues

The appeal concerned the interpretation of a planning condition (“condition 15”) that required the development on the site not to begin ‘until a surface water drainage scheme for water passing through the site, based on sustainable drainage principles has been submitted to and approved in writing’ by the council as the local planning authority.¹ This interpretation also turned on whether the council could lawfully approve the surface water drainage scheme submitted by the developers of the development site under condition 15.

The facts

The site in contention was BDW Trading’s (“the developer”) proposed development for 173 dwellings. This development was to be on a sloping field crossed by a watercourse that flowed adjacent to housing in and around Derry Hill. The Menston Action Group (“the action group”) objected to this proposal on grounds that this new development would be likely to exacerbate the existing problem of flooding in the

residential area. However, in its “Flood Risk and Drainage Assessment”, BDW’s engineering consultants, Eastwood & Partners, proposed that the situation would actually be ‘substantially improved’ as a result of the proposed development due to the interception of existing overland flows and positive drainage of the site. This would mitigate an existing flood risk to properties along the northern boundary.

The council’s decision notice granted planning permission and required that permission was granted ‘in accordance with the plans, drawings and documents which form part of the application and subject to the following schedule of conditions.’ Of these 27 conditions, conditions 13 to 19 addressed the issue of drainage. However, in this case, it was the interpretation and application of condition 15 that was contentious.

Condition 15 states:

“15. Development shall not begin until a surface water drainage scheme for water passing through the site, based on sustainable drainage principles has been submitted to and approved in writing by the local planning authority. This must include details of how the surface water run off rate of 8.2 litres/second/ha will be maintained for up to and including the 1 in 100 year (plus climate change) rainfall event.

Reason: To prevent flooding by ensuring the satisfactory storage/disposal of surface water from the site.”

Interpretation of ‘sustainable drainage principles’

The court said that the general rule governing interpretation of a planning permission that is clear, unambiguous and valid on its face is that regard may only be had to the planning permission itself, including the conditions imposed upon it and reasons given for the imposition of the conditions. It cited the judgment of Arden J. in *Carter Commercial Developments*² that it should be construed as a whole as a ‘reasonable reader’ would. Only in instances where the wording of the planning permission was ambiguous was it permissible to look at extrinsic material such as the application for the planning permission, to resolve the ambiguity.³ This principle

was supported by Lord Hodge in *Trump International*⁴ who reiterated the limited scope for the use of extrinsic material in interpreting a public document such as a planning permission.

In the present case, these principles of interpretation were relevant to the expression in condition 15: 'based on sustainable drainage principles'. The court defined the general context, in which the meaning of the words was to be interpreted, as the context of development control. The specific context was a planning permission for a development of housing and the requirement to submit a scheme for surface water drainage to a local planning authority.

As such, the court agreed that 'sustainable drainage principles' did not extend to include a surface water drainage scheme that took into account the nearby existing residential housing in Derry Hill. It would be too far a step for 'sustainable drainage principles' to require 'betterment' to alleviate the existing flooding problems beyond the development site. The House of Lords emphasised in *Newbury District Council*⁵ that conditions attached to a grant of planning permission must fairly and reasonably relate to the development permitted. These principles are also seen in national planning policy such as Circular 11/95 that states the conditions should not be imposed if they place 'unjustifiable burdens on applicants' and would be ultra vires if the conditions did not fairly and reasonably relate to the development.⁶

The court then sought to construe the words 'based on sustainable drainage principles' in condition 15 in accordance with the fundamental principles of law and policy outlined above.

Mr David Wolfe Q.C., on behalf of the action group, argued that condition 15 requires the submission of a surface water drainage scheme in which 'sustainable drainage principles' were properly represented. This necessarily involved a demonstration that there was consideration of the potential for reducing any existing flooding, both within and around the development. The action group relied on provisions for "Sustainable drainage" in section 32 and Schedule 3 of the Flood and Water Management Act 2010 even though section 32 and Schedule 3 had not yet come into force at the time of the council's grant of planning permission. Nonetheless, they were significant in that they were the only statutory source of a definition of 'sustainable drainage'. Paragraph 2 of Schedule 3 states:

"Sustainable drainage" means managing rainwater (including snow and other precipitation) with the aim of:

- (a) reducing damage from flooding,
- (b) improving water quality,
- (c) protecting and improving the environment,

- (d) protecting health and safety, and
- (e) ensuring the stability and durability of drainage systems.

The action group relied on several other documents, such as the consultation draft "National Standards for sustainable drainage systems – Designing, constructing, operating and maintaining drainage for surface runoff", the Planning Policy Statement 25: Development and Food Risk Practice Guide, passages in the section of the NPPF headed "Meeting the challenge of climate change, flooding and coastal change", and on the corresponding guide in the Government's Planning Practice Guidance, which replaced the PPS25 practice guide.

The court found this reliance on the Flood and Water Management Act 2010 misplaced as none of the provisions of the act displaces the proper construction of the concept of 'sustainable drainage principles' in the context of this planning condition and planning permission. It was further noted by the court that the definition in paragraph 2 of Schedule 3 was framed in very general terms and the policies and guidance cited only contained very general references to the 'desirability' of development that would alleviate existing flooding on adjacent land. While the court accepted that there might be a broader interpretation of 'based on sustainable drainage principles', it did not agree that it was applicable to the present context.

Mr Vincent Fraser Q.C., for the council, responded by submitting that the concept of 'sustainable drainage principles' is well enough understood by the 'reasonable reader' referred to by Lord Hodge in *Trump International* and condition 15 is neither ambiguous nor unclear in its context. As such, none of the above arguments applied as the court need not look outside the planning permission to interpret condition 15. However, the court did not accept this contention that 'sustainable drainage principles' are widely familiar to the 'reasonable reader' and disagreed that its meaning was obvious. 'Sustainability' and 'sustainable development' are 'broad and versatile concept[s]'.

Nonetheless the court agreed with the council that there was no need to look beyond the terms of the planning permission itself, holding that it was a legitimate approach to interpretation following the Supreme Court's decision in *Trump International*. It then looked at the text of condition 15 itself and analysed the basis for the authority's assessment of whether the submitted surface drainage scheme was 'based on sustainable drainage principles'. The only measurable requirement in condition 15 was that the scheme 'must include details of how the surface water run off rate of 8.2 litres/seconds/ha will be maintained for up to and including the 1 in 100 year (plus climate change) rainfall event'. Condition 15 did not require any improvement to the drainage of neighbouring land. As a result of

both the specificity of certain requirements, and the express lack of mention of the need to consider any flooding in the surrounding area, condition 15 could not extend to include the requirement to address the flooding problem of a nearby area.

The council had also submitted that condition 15 had to be read together with condition 14 that also refers to the 'surface water drainage scheme'. As such, the 'Proposals For Surface Water Drainage' in the flood risk assessment should be considered. The court found that those proposals had satisfactorily reflected the purpose of requiring a proper surface water drainage scheme and were explicitly based on 'SUDs principles'. Read as a whole, the court considered that the flood risk assessment could not legitimately justify reading into condition 15 a requirement to reduce existing flooding outside the development site.

Ultimately, the court considered that an interpretation of condition 15 that did not require a surface water drainage scheme to reduce existing flooding outside the site best avoided any conflict with the 'fundamental principles of law and policy'.

Conclusion

The court's decision in *Menston* clearly reiterates principles of interpretation that are neither novel nor controversial. The question arises, however, where this will leave Derry Hill if, in reality, the new development does exacerbate or affect a distinct but nearby flooding problem. The action group has argued precisely this, that an issue exists with water emerging from the ground and these proposed developments would worsen the flooding. The action group has campaigned against this development for years, holding a referendum opposing the new Derry Hill developments with a 98% vote against allowing the new development, and 2,000 letters of objection. In spite of such heavy objection, Bradford Council has nonetheless approved the schemes.

The conclusion reached by the court in *Menston* on the strictly proper interpretation of condition 15 can be considered rather uncontroversial and it accurately reflects how principles of interpretation should be applied in law. However, such a strict interpretation of 'sustainable drainage principles' is arguably at odds with the real tangible problem of flooding in Derry Hill. In practice, this decision remains unsatisfactory. To grant planning permission to a new development in an area that faces existing flood risks not only exacerbates the risk of flooding, but continues to ignore the pressing need to acknowledge and resolve the problem of flooding. While it is correct to distinguish one development from another, and correct to distinguish between the problems each development faces, this decision places legal principle above the practical realities of flood risk planning. If an area is already afflicted with flood risk, it is a matter of

fact that granting planning permission to another nearby development without considering existing flood risks in the surrounding area would not resolve the issue of drainage. This does beg the question of whether 'sustainable drainage principles' are being adhered to. Perhaps this broader consideration of the practical consequences of a new development is the context in which the words 'sustainable drainage principles' should instead be interpreted and applied.

It is conceded that an approach that encourages a more expansive interpretation of the words 'sustainable drainage principles' may be a step too far, and one that might introduce an unacceptable level of uncertainty for developers, particularly in an era of pressing housing need. Nonetheless, to guide this relatively more expansive interpretation, the court could consider other materials and texts that aid the interpretation of such words. Based on the court's judgment, it appears necessary to first establish a compelling case for why the court should go beyond the text of the planning permission and consider the words 'sustainable drainage principles' in light of the surrounding law and literature. Without establishing such a case, it is unlikely the court will willingly deviate from the principles of interpretation outlined by Lord Hodge in *Trump International*. It is perhaps unfortunate, however, that the court did not take the opportunity to elucidate just how compelling a case must be before matters external to the current development can be taken into account. In an era where flood risk is increasing due to the effects of climate change, it might be thought that the courts have a role to play in encouraging planning that might both serve the pressing need for housing and improve the existing situation in the immediate vicinity. Such a narrow and rather 'isolationist' approach to the consideration of sustainable drainage principles as was applied in *Menston* may not ultimately serve the wider public interest.

The action group has obtained permission from the Court of Appeal to continue its challenge and it is possible that by drawing attention to the tension between immediate and short-term considerations and the longer-term demands of sustainable drainage (and sustainable development more widely) that a more balanced approach to sustainable policies and practices may emerge.

Andrea Chong is an undergraduate reading law at Downing College, Cambridge.

Dr Haydn Davies is Head of the School of Law at Birmingham City University. He is also Vice Chair of UKELA and co-convenor of the Wales Working Party. Haydn has a background in biochemistry and law and his research interests centre around the Environmental Justice Movement and comparative environmental governance.

Endnotes

- 1 *R. (on the application of Menston Action Group) v Bradford MDC* [2016] EWCA Civ 796, [3]
- 2 *Cartier Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] J.P.L. 1048, [27]
- 3 *R v Ashford Borough Council, ex parte Shepway District Council* [1999] P.L.C.R. 12, (Keene J.)
- 4 *Trump International Golf Club Scotland Ltd. and Another v Scottish Ministers* [2015] UKSC 74, [33]
- 5 *Newbury District Council v Secretary of State for the Environment* [1981] A.C. 578
- 6 Circular 11/95, para 24

Adverts, jobs and tender opportunities

Book reviews

The e-law editorial team is regularly sent book lists by various publishing houses which may appeal to UKELA members keen to write a review. If you are interested in contributing a book review to a future edition of e-law, but would first like some guidance or suggestions, please drop [us](#) a line.

Survey of UKELA members – Access to justice in Scotland

Ben Christman, UKELA member in Scotland, is working on a research project for the Scottish Environment LINK, which is looking at the case for setting up an environmental rights centre in Scotland.

He says – “We are aware that many people have concerns about environmental and planning issues in Scotland but often find it difficult to know who to turn to for legal advice and representation. We also understand that getting legal help in this area is expensive in Scotland. We hope that the centre will be able to provide free or affordable legal help in environmental and planning law matters in Scotland. [See here for some more background information about the project.](#)

To help better understand the access to environmental justice situation in Scotland, I have set up an online survey to ask members of the public, civil society organisations and the legal profession about their experiences in this area. I am particularly keen to hear from legal professionals with experience of providing environmental and/or planning legal services to individuals, communities and civil society organisations.

I would be very grateful if you could take 10-15 minutes to [fill in the survey](#).

There are also 2 x £25 Lush vouchers to be won for those who complete the survey.”

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The editorial team is looking for quality articles, news and views for the next edition due out in February 2018. If you would like to make a contribution, please email elaw@ukela.org by Wednesday 31 January 2018.

Letters to the editor will be published, space permitting.

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Linda Farrow
Executive Director
Linda@ukela.org
07970 956 171