ENVIRONMENTAL LAW UPDATE

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ENVIRONMENTAL IMPACT ASSESSMENT

1. It is not wholly clear what the requirement in Article 9 of the Aarhus Convention and Article 10a of the EIA Directive for review capable of "challenging the substantive or procedural legality" requires. In its findings in the Port of Tyne complaint (June 2011), the Aarhus Convention Compliance Committee expressed doubts as to whether the general ***Wednesbury*** approach was compatible with Article 9(2) of the Convention:

> "125. The Committee finds that the Party concerned allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraph 2 and 3, of the Convention, including, inter alia, for material error of fact, error of law, regard to irrelevant considerations and failure to have regard to relevant considerations, jurisdictional error and on the grounds of Wednesbury unreasonableness (see paragraphs 87-89 above). The Committee, however, is not convinced that the Party concerned, despite the above mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords, and the European Court of Human Rights, of the very high threshold for review imposed by the Wednesbury test.
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> 126. The Committee considers that the application of a "proportionality principle" by the courts in E&W could provide an adequate standard of review in cases within the scope of the Aarhus Convention. A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake. While a proportionality principle in cases within the scope of the Aarhus Convention may come a long way in providing for a review of substantive and procedural legality, the Party concerned must make sure that such a principle does not generally or prima facie exclude any issue of substantive legality from a review.
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> 127. Given its findings in paragraphs 125 and 126 above, the Committee expresses concern regarding the availability of appropriate judicial or administrative procedures, as required by article 9, paragraphs 2 and 3, of the Convention, in which the substantive legality of decisions, acts or omissions within the scope of the Convention can be subjected to review under the law of E&W. However, based on the information before it in the context of the current communication, the Committee does not go so far as to find the Party concerned to be in noncompliance with article 9, paragraphs 2 or 3, of the Convention."

2. The UK courts have almost entirely consistently held that the Court will not readily interfere in judgments as to whether the EIA process is adequate: see e.g. the judgment of Sullivan J (as he then was) in ***R. (Blewett) v. Derbyshire County Council*** [2004] Env. L.R. 29, approved by the House of Lords in ***R. (Edwards) v. Environment Agency*** [2008] Env. L.R. 34 at [38] and [61]. See also ***R. (Jones) v. Mansfield DC*** [2004] Env. L.R. 21, where the Court of Appeal took a very similar approach. The consistently robust approach

taken by the Courts in recent years appeared to have been doubted in ***R. (Buglife) v. Medway Council*** [2011] 3 C.M.L.R. 39, by H.H.J. Thornton Q.C. (sitting as a Deputy High Court Judge) although two more recent Court of Appeal cases have made it clear that the orthodox position remains good.

Loader v SSCLG [2012] 3 C.M.L.R. 29

3. In ***Loader v. SSCLG*** [2012] 3 C.M.L.R. 29, Ms Loader challenged a grant of planning permission for an urban development project (for 41 apartments and social facilities including an outdoor bowls green and an indoor rink) which was just above the relevant Schedule 2 threshold on the basis that the test for "*significant environmental effects*" was a "*real prospect of influencing the outcome of the decision*". She relied on the Screening Checklist of June 2001 European Guidance on EIA Screening which says that it is helpful to consider "*whether the effect is one that ought to be considered to have an influence on the development consent decision*". The Court of Appeal disagreed and held that the test was whether a project was "likely to have significant effects on the environment". That called for an exercise of judgment, having regard to the precautionary principle and the degree of uncertainty about the impact (including the outcome of mitigation measures), subject to *Wednesbury* review:

> "43 What emerges is that the test to be applied is: "Is this project likely to have significant effects on the environment?" That is clear from European and national authority, including the Commission Guidance at B3.4.1. The criteria to be applied are set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene (*Commission v United Kingdom [2006] E.C.R. I-3969*).
> The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker.
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> 44 The criteria in the annexes to the Regulations justify the approach to the question proposed in Circular 02/99, paras 33, 34 and annex A (cited at [17] and [18] above). It is stated, at [34], that the number of cases of Sch.2 development which are EIA developments will be "a very small proportion of the total number of schedule 2 developments".
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> 45 I do not consider that the reference in the Commission Guidance to a "useful simple check" ([20] above) can lead to a conclusion that the test proposed by the appellant is appropriate. Whether the perceived environmental effect has an influence on the development consent decision is a relevant consideration but cannot in itself answer the question to be posed. The sentence in the Guidance relied on also requires the decision maker to ask "whether the effect is one that ought to be considered", an affirmation of the need to answer the question "is this

> project likely to have significant effects on the environment" posed at B3.4.1 of the Guidance. The purpose of the checklist is stated to be to help decide whether the effects are likely to be significant. Establishing that the environmental effect will influence a particular development consent decision may well be a necessary requirement for a decision that development is EIA development but it is not determinative of whether the effects are likely to be significant and "ought to be considered".
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> 46 The proposed test does not accord with the overall purpose and tenor of the procedure initiated by the Directive. A formal and substantial procedure is contemplated, potentially involving considerable time and resources. It is contemplated for a limited range of Sch.2 projects, those which are likely to have significant effects on the environment. To require it to be followed in all cases where the effect would influence the development consent decision would devalue the entire concept. It is not contemplated, for example, that if the Secretary of State took the view that a proposed house extension might affect the amenity of a neighbour on environmental grounds, and do so decisively, it would for that reason necessarily be EIA development. I agree with the approach of Moore-Bick L.J. in *Bateman [2011] EWCA Civ 157* and with the judge.

Bowen-West v. SSCLG [2012] Env. L.R. 22

4. In ***Bowen-West v. SSCLG*** [2012] Env. L.R. 22 Mrs Bowen-West challenged a grant of planning permission for the deposit of low-level radioactive waste for a short period of time, on the basis that (as both the Secretary of State and the Inspector explicitly recognised and accepted in their decisions) this created a precedent for future applications for extensions which the developer had admitted it would make and which were at an advanced stage at the time of the inquiry (including as to technical studies). The ES and the EIA had been limited to the present application. The principal grounds of challenge related to whether "project" should include future, as yet unpermitted, but planned, extensions, and whether such effects were "indirect, secondary and cumulative effects". The Court held that the planning application was a "stand-alone" proposal and it distinguished the case from the Carlisle Airport development considered in ***Brown v. Carlisle*** [2010] EWCA Civ 523 which had been an integrated proposal comprising several linked elements.

5. As to *Wednesbury*, the Court held that this was the appropriate test. The cases such as C-221/01 ***Commission v Spain*** were infringement cases which had been decided on EU principles and were no precedent to the contrary. Laws L.J. stated:

> "32 I should next point up the fact that some of the principal authorities relied on by the appellant as demonstrating the breadth of the EIA provisions are not about the scope of the EIA to be undertaken in a case where, as here, an Environmental Statement admittedly falls to be made. Rather, they address the question whether an EIA is required at all. They are "screening" rather than "scoping" positions. This is so of *Kraaijveld , Commission v Spain, Ecologistas* and also [1991] 1 P.L.R. 6 , to which reference was made in the written argument. It is in this type of case, screening cases, that the courts have been concerned, energetically

> concerned, to put a stop to the device of using piecemeal applications as a means of excluding larger developments from the discipline of EIA. That approach cannot simply be read across to a case which is not about screening at all, but rather about the appropriate scope of an EIA.
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> 33 At the heart of this case, it seems to me, is the proposition that the issues arising here are not comparable with those that arose in these screening decisions. In a case such as the present as I have indicated, we are dealing with what is quintessentially a matter of judgment, just as Sullivan J. (as he then was) held was the case in relation to whether a park and ride scheme was an integral part of a larger scheme: see *R. (on the application of Davies) v Secretary of State for Communities and Local Government* [2008] EWHC 2223 (Admin) . A like question as regards the relation between a specific proposal for a freight distribution centre and the overall proposed development of Carlisle Airport arose in *Brown's* case to which I have already referred. There, there was an inextricable link between the two by virtue of the effect of an agreement made under s.106 of the Town and Country Planning Act 1990 ...
> ...
> 34 I should next say a word about the effect of the grant of the present planning permission as a precedent, a "foot in the door": an expression used by Sullivan L.J. in Brown : see [39] of the judgment in that case. It is said it was a foot in the door for the larger intended scheme. As I have shown, the Inspector and the Secretary of State accepted that there would be some precedent effect.
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> 35 The grant of planning permission may, in my judgment, be said to concede the principle of disposing of LLW on this site or adjacent to it, but only to the extent or on the scale allowed by the permission. If the larger application proceeds, the issue of disposal of LLW of the magnitude thereby contemplated will be open and undecided. It will certainly not be foreclosed nor in my judgment prejudiced by the current permission. It seems to me that the Secretary of State was entitled to conclude at para.4 of the decision letter (which I have read) that:
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> > "There is nothing to support the Council's claim that permission in this case would frustrate the aims of the Environmental Impact Regulations and the Directive."
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> It is noteworthy that if the larger scheme is in due course applied for, it will as a whole (including that part of it which is in effect the present scheme) be the subject of an EIA; and thereby it seems to me the purpose of the Directive will be fulfilled."

6. The Supreme Court has refused permission to appeal in ***Bowen-West v. SSCLG. Bowen-West*** was relied upon by Ouseley J in the HS2 case, considered below on the question of strategic environmental assessment.

Champion v (1) North Norfolk District Council & (2) Natural England [2013] EWHC 1065

7. The Claimant challenged of NNDC's grant of planning permission for erection of 2 silos, a lorry park and other development near a river. The river was a *Site of Special Scientific Interest* and designated as an *EU Special Area of Conservation*. There were concerns that the development would pollute the river. NNDC had carried out ecological & flood risk assessments and consulted with NE. 'Mitigation measures' – designed to ensure that pollutants would not enter the river – were proposed. No Environmental Impact Assessments or Habitats Appropriate Assessments were carried out. NE responded as a 'statutory consultee' and stated that, given the mitigation measures, there would not be a

likely significant effect on the river. As a result PP was granted by NNDC subject to conditions.

8. The Claimant's central argument was that that NNDC should not have granted planning permission without an EIA or HAA, in circumstances where it had, at the same time, imposed conditions for control of pollution. Such conditions could only be justified if there was a risk of pollution, but that could not be reconciled with the decision that EIA etc was not required because there was no risk of pollution.

STRATEGIC ENVIRONMENTAL ASSESSMENT

Inter-Environnement Bruxelles ASBL v. Région de Bruxelles-Capitale [2012] Env. L.R. 30

9. SEA is required for "*plans and programmes*" referred to in Art. 3(2) of the SEA Directive *and* which are likely to have significant environmental effects.

10. Art 3(2) says SEA required for plans and programmes:-

> *"(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC"*, or
> *"(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC*)."

11. The decision in Case C-567/10 ***Inter-Environnement Bruxelles ASBL v. Région de Bruxelles-Capitale*** [2012] Env. L.R. 30, suggests that SEA will be required more frequently than many had perhaps anticipated. Two questions were referred to the CJEU:

- *'(1) Must the definition of 'plans and programmes' in Article 2(a) of Directive 2001/42 … be interpreted as excluding from the scope of that directive a procedure for the total or partial repeal of a plan such as that applicable to a specific land use plan, provided for in Articles 58 to 63 of the [Brussels town and Country Planning Code, CoBAT]?*
- *(2) Must the word 'required' in Article 2(a) of that directive be understood as excluding from the definition of 'plans and programmes' plans which are provided for by legislative provisions but the adoption of which is not*

compulsory, such as the specific land use plans referred to in Article 40 of the [CoBAT]?'

12. The CJEU concluded that the concept of plans or programmes in the SEA Directive – "which are required by legislative, regulatory or administrative provisions", within the meaning of Article 2(a) of the Directive, must be interpreted as including plans or programmes (such as the specific land use plan at issue in the main proceedings) whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them even if their adoption is not in all circumstances compulsory.

13. Further, the CJEU held that Article 2(a) of the SEA Directive must be interpreted as meaning that a procedure for partial or total repeal of a land use plan falls in principle within the scope of the Directive, so that it is subject to the rules relating to the assessment of effects on the environment. The CJEU added the qualification that:

> "On the other hand, it must be made clear that, in principle, that is not the case if the repealed measure falls within a hierarchy of town and country planning measures, as long as those measures lay down sufficiently precise rules governing land use, they have themselves been the subject of an assessment of their environmental effects and it may reasonably be considered that the interests which Directive 2001/42 is designed to protect have been taken into account sufficiently within that framework."

14. Thus, the CJEU held that the discretionary repeal of plan could require SEA**.** The CJEU rejected the UK Government's argument that a literal interpretation (such as the Northern Ireland Court of Appeal had given in ***Central Craigavon Ltd v. DoE NI*** [2011] NICA 17) should be applied on the basis that such an approach would not be consistent with the purpose of the SEA Directive. If a plan is regulated by law, the making of such a plan does not need to be compulsory to fall within the scope of the SEA Directive.

15. This case has been cited as one of the reasons for the further consultations on further SEAs of the Regional Strategies and the "plan" to revoke them.

Walton v. The Scottish Ministers [2012] UKSC 44

16. In ***Walton v. The Scottish Ministers*** [2012] UKSC 44 [2013] P.T.S.R. 51, the Supreme Court gave its first consideration to SEA. This Appellant challenged the validity of

schemes and orders made by the Scottish Ministers under the Roads (Scotland) Act 1984 to allow the construction of a bypass for Aberdeen to the west of the city. In March 2003, a partnership comprising local public and private bodies produced a regional transport strategy ("the MTS"), setting out proposals which included the "western peripheral route" ("WPR"), intended primarily to reduce congestion in Aberdeen. The Ministers agreed to undertake the implementation of the WPR though they decided in December 2005 to revise the scheme so as to include "the Fastlink" - a road connecting Stonehaven to the WPR. The Ministers subsequently published EIAs under the 1984 Act, on the basis that the scheme fell within the scope of the EIA Directive. The Scottish Parliament approved the relevant orders and schemes on 3rd March 2010.

17. The Appellant challenged the validity of WPR in the Scottish courts on a number of grounds under EU and domestic law. The Inner House rejected those submissions. The Appellant argued that the Fastlink had been adopted without the consultation required by the SEA Directive and that that the scope of the public inquiry should have included the question whether the Fastlink was required, under common law principles of procedural fairness.

18. The SC rejected the appeal, though holding the Appellant to be a "person aggrieved" in the circumstances. Although there was some issue over whether the MTS could be a "plan or programme", on the assumption that it was nonetheless the Fastlink was not. Lord Reed held that it was the EIA provisions which were engaged in the case of the Fastlink:

> "65. As I have explained, the MTS proposed that the local roads authorities should construct a WPR which would, on completion, become part of the trunk road network. In March 2003 the Ministers took over responsibility for designing and constructing the WPR, as the authority responsible for trunk roads. In doing so, the Ministers assumed responsibility for a specific development. In the terminology of the EIA and SEA Directives, that development could aptly be described as a "project", defined in article 1 of the EIA Directive as meaning, in the first place, "the execution of construction works or of other installation or schemes". It could not readily be regarded as a plan or programme subject to the SEA Directive (assuming that to have been temporally applicable): the Ministers did not assume responsibility for the preparation of a document setting the framework for future development consent of projects.
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> 66. The subsequent decision to enlarge the project, so as to provide a trunk road connection between Stonehaven and the WPR as previously envisaged, was taken by the Ministers primarily in order to relieve congestion on the A90 and anticipate the need to increase the capacity of that road. In taking that decision, the Ministers modified a project: they did not modify the legal or administrative framework which had been set for future development consent of projects. It is therefore not the SEA Directive which would apply, but other EU legislation such as the EIA Directive, as the Commission explained in its guidance document,

> Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment (2003), para 3.9
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> 67. My conclusion that the decision to construct the Fastlink was not a modification of the MTS therefore reflects, in the first place, the fact that the decision was taken by the Ministers in the course of executing a specific project and related solely to that project. They did not take the decision in the exercise of any power to modify the MTS or otherwise set a legal or administrative framework for future development consent of projects."

19. In ***Walton***, the SC doubted that the Fastlink could fulfil the legal requirements for an amendment to a plan or programme. Lord Reed stated:

> "68. Furthermore, there were no national legislative or regulatory provisions, such as the Court of Justice envisaged in *Inter-Environnement Bruxelles ASBL, Pétitions-Patrimoine ASBL and Atelier de Recherche et d'Action Urbaines ASBL v Région de Bruxelles-Capitale* (Case C-567/10) [2012] 2 CMLR 909, para 31, requiring the development in the Ministers' thinking about the project to be implemented by means of the formal adoption of a plan or programme, or the modification of such a document. Under domestic law, the Ministers' decision was implemented in accordance with the procedures laid down for specific road projects in the 1984 Act.
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> 69. In addition, the conclusion that the decision to construct the Fastlink does not fall within the scope of the SEA Directive appears to me to be consistent with a purposive interpretation of that directive. In *Inter-Environnement Bruxelles*, the Court of Justice concluded that the repeal of a plan or programme should in principle be regarded as a modification, within the meaning of the directive, because it changed the framework for future development consent of projects and might therefore be likely to have significant effects on the environment. As I have explained, the decision to construct the Fastlink did not alter the framework for future development consent of projects, but altered a specific project which continued to require development consent. The effects of the Fastlink on the environment were capable of being fully assessed in accordance with other applicable EU legislation, including the EIA Directive."

20. Lord Carnwath, agreeing, added:

> "99. On the first point, like Lord Reed, I am content to proceed on the assumption that the MTS, as approved by NESTRANS in March 2003, was itself such a "plan or programme". However, I should register my serious doubts on the point, even accepting the flexible approach required by the European authorities. I note from that the passage from *Inter-Environnement Bruxelles* quoted by Lord Reed (para 22) refers to regulation of plans and programmes by provisions "which determine the competent authorities for adopting them and the procedure for preparing them..." There may be some uncertainty as to what in the definition is meant by "administrative", as opposed to "legislative or regulatory", provisions. However, it seems that some level of formality is needed: the administrative provisions must be such as to identify both the competent authorities and the procedure for preparation and adoption. Given the relatively informal character of the NESTRANS exercise, it is not clear to me what "administrative provisions" could be relied on as fulfilling that criterion."

21. Further issues with regard to the question of the broad concept of *requirement* arise in the context of the challenges to the Government's decision on the strategy for HS2 where the Government and its predecessor had committed publicly (in a White Paper and otherwise) to producing a strategy and only to do so following consultation. The claimants contended that the Government paper announcing its policy and setting out the means of proceeding

with the HS2 proposals via hybrid bill are sufficient to meet what Lord Carnwath identified as a "certain level of formality".

22. The case also raises two important procedural issues: the scope of the courts' discretion not to quash a decision taken in breach of EU environmental law, and the scope of the standing test "person aggrieved".

23. It is generally understood that the remedies granted in a judicial review claim are discretionary and that, even if judicial review grounds are made out, the decision whether to grant relief will turn on the specific facts of the case. See, for example, ***R v. Panel on Take-overs and Mergers ex p. Datafin plc*** [1987] Q.B. 815 at 840 and ***Bolton Metropolitan Borough Council v. Secretary of State for the Environment*** (1990) 61 P. & C.R. 343 at 353. In the context of a breach of an EU directive transposed into UK law, it was said by Lord Hoffmann in ***Berkeley v. Secretary of State*** [2001] 2 A.C. 603 at 616 that the discretion not to quash could only very rarely (if ever) invoked in cases which involved the failure to comply with a mandatory requirement of EU law transposed into national law on the basis that the breach made no difference to the outcome:

> "A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues.
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> Although section 288(5)(b), in providing that the court 'may' quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell LJ in ***Bolton Metropolitan Borough Council v Secretary of State for the Environment*** (1990) 61 P & CR 343, 353. Mr Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

24. The Supreme Court's decision in ***Walton***, took a more flexible approach to the exercise of the court's discretion. Lord Carnwath pointed out the relationship of standing with the court's powers to refuse relief:

> "103. I will however add a few words of my own on the issue of discretion, which in practice may be closely linked with that of standing, and may be important in maintaining the overall balance of public interest in appropriate cases (see, for example, ***R v Monopolies and Mergers***

> ***Commission, ex p Argyll Group plc*** [1986] 1 WLR 763, 774–775). In this respect, I see discretion to some extent as a necessary counterbalance to the widening of rules of standing. The courts may properly accept as 'aggrieved', or as having a 'sufficient interest' those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests, such as the protection of the environment. However, if it does so, it is important that those interests should be seen not in isolation, but rather in the context of the many other interests, public and private, which are in play in relation to a major scheme such as the AWPR.
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> 104. Mr Mure QC for the Ministers drew a distinction between breaches respectively of domestic and of European law. He accepted that if there had been a substantial failure to accord Mr Walton proper participation as required under European law, then subject to the issue of standing the court should not withhold a remedy. Further, he submitted, since the schemes and orders were drawn in a form which does not enable Fastlink to be dealt with separately, the court would have no alternative under this statutory scheme but to quash them all, with the effect that the statutory procedures for the whole project would have to be started all over again.
> 105. On the other hand, he submitted, if the only breach established were one of fairness under domestic law, then the court would have wider discretion to refuse relief. It could draw a balance between the "very attenuated" nature of Mr Walton's own interest, and the great public interest in allowing this important scheme to proceed without delay."

25. Lord Carnwath drew attention to the distinction between that case and the circumstances in ***Berkeley***:

> "131. In the present case, both the statutory context and the factual circumstances are again distinguishable from those applicable in ***Berkeley***. The factual differences are dramatic. In ***Berkeley*** there was no countervailing prejudice to public or private interests to weigh against the breach of the directive on which Lady Berkeley relied. The countervailing case advanced by the Secretary of State was one of pure principle. Here by contrast the potential prejudice to public and private interests from quashing the order is very great. It would be extraordinary if, in relation to a provision which is in terms discretionary, the court were precluded by principles of domestic or European law from weighing that prejudice in the balance.
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> 132. The statutory context, as I have explained it above, is also significantly different from that applicable in ***Berkeley***. First, under the 1984 Act, even in respect of EIA, a breach of the regulations does not, as under the planning Acts, render the subsequent decision outside the powers of the Act. It is a breach of the requirements laid down by section 20A, and as such is within the second ground of challenge, but is thus also subject to the need to show 'substantial prejudice'. Secondly, and more importantly for the purposes of this case, there is nothing to assimilate the requirements of the SEA Directive to the requirements of the 1984 Act, breach of which alone may give rise to a challenge under that procedure. No doubt the adoption of a plan or programme in breach of the SEA Directive would be subject to challenge by judicial review at the appropriate time. But the legislature has not thought it necessary to provide for a separate right of challenge on those grounds in relation to the approval of a subsequent project made under the 1984 Act."

26. Lord Carnwath then rejected the proposition that they required quashing in all cases and sought instead to align the cases involving breaches of EU law with those under challenge in the purely domestic context:

> "138. It would be a mistake in my view to read these cases as requiring automatic 'nullification' or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As *Wells*6 makes clear, the basic requirement of European law is that the remedies should be 'effective' and 'not less favourable' than those governing similar domestic

> situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered 'impossible in practice or excessively difficult'. Proportionality is also an important principle of European law.
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> 139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.
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> 140. Accordingly, notwithstanding Mr Mure's concession, I would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court's discretion are materially affected by the European source of the environmental assessment regime."

27. Lord Hope agreed:

> "156. The scope for the exercise of that discretion in that context is not therefore as narrow as the speeches in *Berkeley* might be taken to suggest. The principles of European law to which Lord Carnwath refers in para 138 support this approach. Where there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great, as there are in this case, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck."

28. This completes a retreat from ***Berkeley (No.1)*** started by Lords Carnwath in ***Bown v. Secretary of State for Transport, Local Government and the Regions*** [2004] Env. L.R. 509 at 526 and endorsed by the House of Lords in ***Edwards v. Environment Agency*** [2008] Env. L.R. 34. ***Berekely (No. 1)*** now looks like a case pretty much confined to its own facts.

29. In relation to the issue of standing and persons aggrieved, the Supreme Court took a much more generous view of standing than the lower courts. Lord Reed held:

> "87. The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be aggrieved: where for example an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry, as in ***Cumming v Secretary of State for Scotland*** and the analogous English case of ***Wilson v Secretary of State for the Environment*** [1973] 1 WLR 1083. Ordinarily, however, it will be relevant to consider whether the applicant stated his objection at the appropriate stage of the statutory procedure, since that procedure is designed to allow objections to be made and a decision then to be reached within a reasonable time, as intended by Parliament.
> 88. In the present case, Mr Walton made representations to the Ministers in accordance with the procedures laid down in the 1984 Act. He took part in the local inquiry held under the Act. He is entitled as a participant in the procedure to be concerned that, as he contends, the Ministers have failed to consult the public as required by law and have failed to follow a fair procedure. He is not a mere busybody interfering in things which do not concern him. He resides in the vicinity of the western leg of the WPR. Although that is some distance from the Fastlink, the traffic on that part of the WPR is estimated to be greater with the Fastlink than without it. He is an active member of local organisations concerned with the environment, and is the chairman of the local organisation formed specifically to oppose the WPR on environmental grounds. He has demonstrated a genuine concern about what he contends is an

> illegality in the grant of consent for a development which is bound to have a significant impact on the natural environment. In these circumstances, he is indubitably a person aggrieved within the meaning of the legislation."

30. Having referred to the SC decision in ***AXA General Insurance Ltd and others v. HM Advocate and others*** [2012] 1 A.C. 868, Lord Reed noted:

> "92. ... a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates. The words directly affected, upon which the Extra Division focused, were intended to enable the court to draw that distinction. A busybody is someone who interferes in something with which he has no legitimate concern. The circumstances which justify the conclusion that a person is affected by the matter to which an application relates, or has a reasonable concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another, depending upon the particular context and the grounds of the application. As Lord Hope made plain in the final sentence, there are circumstances in which a personal interest need not be shown."

31. He referred to Lord Hope's statement in ***AXA*** at para. 63 that:

> "A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent."

32. Lord Reed then stated:

> "94. In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.
> 95. At the same time, the interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded. In that regard, I respectfully agree with the observations made by Lord Carnwath at para 104."

33. Lord Carnwath pointed out the relationship of standing with the Court's powers to refuse relief:

> "103. I will however add a few words of my own on the issue of discretion, which in practice may be closely linked with that of standing, and may be important in maintaining the overall balance of public interest in appropriate cases (see, for example, ***R v Monopolies and Mergers Commission, ex p Argyll Group plc*** [1986] 1 WLR 763, 774-775). In this respect, I see discretion to some extent as a necessary counterbalance to the widening of rules of standing. The courts may properly accept as aggrieved, or as having a sufficient interest those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests, such as the protection of the environment. However, if it does so, it is important that those interests should be seen not in isolation, but rather in the context of the many other interests, public and private, which are in play in relation to a major scheme such as the AWPR.

104. Mr Mure QC for the Ministers drew a distinction between breaches respectively of domestic and of European law. He accepted that if there had been a substantial failure to accord Mr Walton proper participation as required under European law, then subject to the issue of standing the court should not withhold a remedy. Further, he submitted, since the schemes and orders were drawn in a form which does not enable Fastlink to be dealt with separately, the court would have no alternative under this statutory scheme but to quash them all, with the effect that the statutory procedures for the whole project would have to be started all over again.
105. On the other hand, he submitted, if the only breach established were one of fairness under domestic law, then the court would have wider discretion to refuse relief. It could draw a balance between the very attenuated nature of Mr Walton's own interest, and the great public interest in allowing this important scheme to proceed without delay...."

34. Lord Hope added:

"151. I should like however to add a few words of my own on the question of standing in the context of environmental law. They are prompted by the Extra Division's observation in para 37 that Mr Walton had placed no material before the court to support the proposition that the schemes or orders or any provision therein substantially prejudice his own interests or that they would affect his property. His residence was some significant distance from the leg of the proposal which was the particular target of his attack. There was, therefore, an initial question to be addressed, whether or not he was a person "aggrieved" for the purposes of paragraph 2 of Schedule 2 to the 1984 Act. Indicating that they were of the view that he was not such a person, the judges of the Extra Division said in para 39 that in that situation they would have had no hesitation in concluding that, had they been with Mr Walton in all or any of his attempts to attack the legality of the schemes and orders, they would not have granted the remedy of quashing them. This was because it would have been quite inappropriate that the project, whose genesis came about some 30 years ago and about which there had been a huge amount of public discussion and debate, should be stopped from proceeding by an individual in his position: para 40.
152. I think, with respect, that this is to take too narrow a view of the situations in which it is permissible for an individual to challenge a scheme or order on grounds relating to the protection of the environment. An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.
153. Of course, this must not be seen as an invitation to the busybody to question the validity of a scheme or order under the statute just because he objects to the scheme of the development. Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity. There is, after all, no shortage of well-informed bodies that are equipped to raise issues of this kind, such as the Scottish Wildlife Trust and Scottish Natural Heritage in their capacity as the Scottish Ministers' statutory advisers on nature conservation. It would normally be to bodies of that kind that one would look if there were good grounds for objection. But it is well-known they do not have the resources to object to every development that might have adverse consequences for the environment. So there has to be some room for individuals who are sufficiently concerned, and sufficiently well-informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied.

> 154. For these reasons it would be wrong to reject Mr Walton's entitlement to bring his application on environmental grounds simply because he cannot show that his own interests would be substantially prejudiced. I agree with Lord Reed's conclusion in para 88 that he has demonstrated a genuine concern about the legality of a development which is bound to have a significant impact on the environment, and that he is entitled to be treated as a person aggrieved for the purpose of the statute.
> 155. The better way to meet the concerns that the Extra Division expressed about this case in para 40 would have been to weigh in the balance against any breach of the Directive that the applicant was able to establish the potential prejudice to public and private interests that would result if the schemes and orders were to be quashed."

35. Interestingly, the decision of the Court of Appeal in ***Ashton v. Secretary of State for CLG & Coin Street Community Builders Ltd*** [2011] 1 P. & C.R. 5 (especially at paras. 32 to 55) was not discussed by the Court though ***Walton*** calls into question the potentially narrower approach to standing adopted towards the "persons aggrieved" formula used in cases such ***Ashton***. At para. 54 in ***Ashton*** Pill L.J. held that "His participation in the planning process was insufficient in the circumstances to acquire standing. He was not an objector to the proposal in any formal sense and did not make representations, either oral or written, at the properly constituted Public Inquiry. Mere attendance at parts of the hearing and membership of WCDG, which has not brought proceedings in this court, were insufficient." The principles, summarised at para. 53 in ***Ashton***, may place too much weight on participation in the process in the light of ***Walton***.

R (Buckinghamshire CC) v Secretary of State for Transport **[2013] EWHC 481 (Admin)**

36. This case concerned the challenge to the government's proposals for High Speed Two ("HS2"), the proposed new high speed rail line linking London, Manchester and Leeds contained in a command paper "High Speed Rail: Investing in Britain's Future – Decisions and Next Steps" ("the DNS"). The principle EU law basis of challenge was again that the DNS constituted a "plan or programme" so that SEA was required.

> *93 The crucial issue is whether, on a purposive construction of the SEAD , these DNS decisions set a framework for subsequent decision-making on development consents, laying down rules or criteria or policy guidance, for it. The purpose of SEA is to ensure that the decision on development consent is not affected by earlier plans which through the framework, the rules or criteria or policies they contain, weigh one way or another against the application when the earlier plans have not themselves been assessed for likely significant environmental effects. The significant environmental effects have to be assessed at a time when they can play their full part in the decision; they cannot be left unassessed so that the development decision is made when the framework in the plan has sold the pass. A plan framework tilts the balance, creates presumptions, and urges weight to be given to various factors. I accept that a land use development plan is a very good example of a plan or programme, though is not the only sort of plan to which the SEAD applies.*
> *94 There are, to my mind, two different forms of decision, although the Claimants regard the distinction as illusory. A decision that the Government will favour applications being made to it*

> *for high speed rail developments in sections to create a network shaped as a Y and starting at Euston would be a framework for the grant of development consents, and would be a plan for SEAD purposes. The weighting of the arguments in its favour would be clear; the way in which Government would approach the application of its own policy would be clear. The same would apply to a National Policy Statement on a nationally significant infrastructure project. In that sort of decision-making structure, the decision-maker is not entirely free to go which ever way it sees fit, but is constrained by the policy or framework to set the decision in the context of the plan, even if entitled ultimately to reject the proposal. A plan is not the less a plan because an application for development consent, though compliant with it, might be rejected if out weighed by other factors.*
>
> *95 But that is different here: the decision-maker on the applications for development consent is to be Parliament. Its decisions are legally and formally untrammelled by the statements of Government policy. It is entirely free to accept or reject them as it sees fit. If it agrees with the view expressed by Government, then it will of course give effect to that view; and if it disagrees with those views, it will decide otherwise. The fact that Parliament will consider the detailed work done by Government, and will no doubt give consideration to the views it has expressed, is very different from Parliament having to set its decision within the framework of criteria or policies which Government pronounces. Parliament's views are not trammelled by those pronouncements; no proper justification for disagreeing is required of it: it can just disagree. The policy and judgments in the DNS, which could be a framework for the decision-maker in some contexts, are not such a framework here.*
>
> *96 The very concept of a framework, rules, criteria or policy, which guide the outcome of an application for development consent, as a plan which requires SEA even before development project EIA, presupposes that the plan will have an effect on the approach which has to be considered at the development consent stage, and that that effect will be more than merely persuasive by its quality and detail, but guiding and telling because of its stated role in the hierarchy of relevant considerations. That simply is not the case here.*

37. So the critical point was that, in contrast to a land use plan, the DNS imposed no (formal, legal) constraints on the decisions which Parliament itself was to take. It did not affect that ruling that in practice Parliament was very likely to follow the proposals in the DNS, voting on which would be subject to the whip.

HABITATS

R (Cornwall Waste Forum, St Dennis Branch) v. Secretary of State for Communities and Local Government [2011] EWHC 2761 (Admin). On appeal: [2012] EWCA Civ 379.

38. This case considers the relationship between the planning and pollution control regimes in the context of considering who is the appropriate authority to assess the habitats impact of a development.

39. On 31st March 2009, Cornwall County Council refused permission for the construction of two energy-from-waste plants. The proposed site was next to two Special Areas of Conservation ("SACs") and the reasons for refusal included the effect of the development on the SACs. The appeal was recovered by the Secretary of State, and the Claimant was a

Rule 6 party. The Claimant was concerned about the impact of the proposal on the SACs through emissions from the stack and, initially, when those emissions were assessed in combination with other projects and with traffic emissions.

40. Before the Inquiry, two significant events occurred:

(1) First, in January 2010, the Environment Agency ("EA"), responsible for the environmental permitting regime which would permit operations from the proposed facility, indicated that it would grant a permit because it considered that there could not be any adverse effects from any air emissions from the stack;

(2) Second, on three occasions before the Inquiry, correspondence was sent from the Planning Inspectorate/ the Inspector to the Claimant addressing the question of "appropriate assessment" under regulation 61 of the Conservation of Habitats and Species Regulations 2010[1]. This transposes Article 6(3) of the Habitats Directive. The final letter of this correspondence came from the Chief Executive of the Planning Inspectorate, the day before the Inquiry opened. It stated:

> "I can confirm that as part of the inquiry process the inspector will consider the effect of the proposal under the Habitats Directive. If he deems it to have significant adverse effect he will undertake an appropriate assessment, having first ensured that he has the necessary evidence to do so. The appropriate assessment will then form part of the inspector's report to the Secretary of State."

[1] "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of that site,
must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.
(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.
(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.
(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.
(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given ..."

41. The Inquiry sat between March and October 2010. During the Inquiry, the issues regarding the potential impact of the plants on the SACs narrowed to the effect of emissions from the stacks. On 11 December 2010, the EA issued the final environmental permit and the parties were given the opportunity to comment upon it. The Claimant disagreed with the EA's grant of a permit on the basis that they considered that an increment in the pollution load of less than 1% was "significant" under the Habitats Directive, contrary to the EA's policy ("the 1% rule").

42. In his decision letter, published on 3 March 2011, the Inspector concluded that the EA was the most appropriate authority for assessing the impact of the proposal on the nearby SACs, through the environmental permitting system. He accepted its conclusion that there were no adverse effects from the proposal. The Inspector relied on the issue of the permit as an indication that an "appropriate assessment" of the impact of the development upon the SACs under the Regulations was unnecessary. He reasoned that the Agency was also a "competent authority" and it would not have issued a permit if an appropriate assessment had been necessary. The Inspector did not directly consider evidence relating to the 1% rule which challenged the EA's view. The Secretary of State accepted the Inspector's recommendation, and allowed the appeal on 19 May 2011.

43. Before Collins J, the Claimant challenged the permission on the basis that it had suffered a breach of its legitimate expectation, derived primarily from the pre-inquiry correspondence, that the Secretary of State rather than the EA would determine, as competent authority, whether the project would be likely to have a significant effect on the designated SACs. In its challenge, the Claimant alleged that it was only when the Inspector's Report was published along with the Decision Letter, that its members realised that the Secretary of State was:

> "contrary to what had been promised, now disavowing his role as competent authority…nor had he even evaluated the criticisms made of the approach taken by the [EA]. But by then objectors…were out of time to challenge the approach taken by the [EA]."

44. Collins J granted the Claimant's application and quashed the permission for the project for the following reasons:

    a. There was an expectation created in the minds of the Claimant's members that the Inspector would *"consider and reach a view…on the basis that the Secretary of State would be the relevant competent authority"* on the question of the project's

likely significant effect on the SACs. Reaching such a view would have required the Inspector and Secretary of State to deal with the challenge that the Claimants and other objectors to the project had made to the EA's view on the issue;

b. The Inspector's conclusion in that he was satisfied that the EA was the competent authority through the environmental permitting system was wrong;

c. The Inspector (and therefore the Secretary of State) did not deal with or reach any decision on the evidence which had been produced to challenge the EA's view; and furthermore the Inspector was wrong to find it unnecessary to form a view on this because he thought it was not a matter for the planning process.

45. The Court of Appeal disagreed. It said that, by the time of the Inspector's report, the issues had narrowed sufficiently so that those which required consideration by individuals other than the EA had disappeared from the case. Therefore, the Inspector was entitled to change the position given in the pre-Inquiry correspondence. Carnwath LJ's reasoning is set out in paragraphs 36-38 of the judgment:

> "36. There are in my view three reasons why the legitimate expectation, based on the representations made before or during the inquiry, cannot lead to the conclusion which Mr Wolfe urges upon us. In the first place, as a technical matter, the relevant "competent authority" was the Secretary of State, not the Planning Inspectorate or the Inspector. They had no authority to commit the Secretary of State to an election under regulation 65(2), or to the form of his decision. Their task was limited to that of holding the inquiry and providing a report to the Secretary of State. It was of course important that there should be consistency between the approach adopted at the inquiry and the basis of his ultimate decision. But that was a question of procedural regularity, not legitimate expectation.
>
> 37. Secondly, and more importantly, the representations reflect the circumstances as they were at the time they were made. At that stage the question of appropriate assessment was thought to depend on a range of factors not confined to emissions from the stack. It is understandable that it was assumed by all that the decision-maker under the Directive would be the Secretary of State. The issue of an election under regulation 65(2) was not addressed because it did not arise. In my view, nothing said then can be treated as a binding commitment as to the position under the regulation if circumstances changed, as they did, so that the only relevant issues were ones within the competence of the Environment Agency.
>
> 38. Thirdly, in the context of the planning appeal the debate about responsibility under the Directive is in itself of no practical significance. Whether or not the Secretary of State remained the decision-maker for the purposes of the Habitats Directive, he could not avoid responsibility for the planning decision, one aspect of which, as he recognised, was whether there would be "harm to acknowledged nature conservation interests". On the facts of this case the two issues were inextricably linked. By the same token, in so far as the possibility of harm to those interests arose from stack emissions, he was entitled – in either capacity – to be guided by the expertise of the relevant specialist agencies, the Environment Agency and Natural England. It would be only if their guidance was shown to be flawed in some material way that his own decision, relying on that guidance, would become open to challenge for the same reason."

46. Carnwath LJ therefore held that the circumstances in which the pre-Inquiry

representations had been made had changed, and therefore a legitimate expectation did not arise. As regards the Claimant's substantive challenge to the EA's permitting decision, this issue was resolved against the Claimants when the Secretary of State accepted the EA's reasons in support of the 1% rule. There was no prejudice to the Claimant in being out of time to judicially review the permitting decision. Any such challenge could have been made as part of the present proceedings, as the Inspector relied on the EA's reasoning. The Claimant did not present any legal challenge to the 1% rule in the proceedings, and therefore it cannot be said that this decision erred in law.

47. The case confirms the difficulty of establishing a legitimate expectation in the planning context. Further, Carnwath LJ's conclusion that the Secretary of State could rely on the expertise of the EA is of general application. In many cases there will be more than one competent authority, especially where the planning and pollution control regimes operate together. Under regulation 65 of the Habitats Regulations, one competent authority may decide that another is better placed to assess any implications of the plan or project. Here, the Inspector and the Secretary of State found, in effect, that the EA was better placed to assess the implications, as the sole impact of the proposal on the SAC was the effect on air quality and that the emissions resulted from a process wholly within the control of the EA through the Environmental Permitting system. That decision was not unreasonable.

48. The claimant sought permission to appeal from the Supreme Court arguing that it did not matter that it had not challenged the 1% point as the Court in an EU law context was obliged to consider the point of its own motion and referring to Case C-72/95 ***Aannamaersbedrijff PK Kraaijveld BV v. Gedeputeerde Staten van Zuid-Holland*** [1996] E.C.R. I-5403.

49. The Supreme Court refused permission to appeal on 9 July 2012 saying that in

> "relation to the point of European Union law raised or in response to the application it is not necessary to request the Court of Justice to give any ruling because the question raised is irrelevant; the Court's existing jurisprudence already provides a sufficient answer and the answer is so obvious as to leave no scope for any reasonable doubt. The only possible issue is one of English public law, turning on its special facts."

50. The existing Court of Justice of the European Union ("CJEU") jurisprudence referred to includes:

    a. ***Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten*** [1995] E.C.R. 1-4705 where the CJEU stated:

> "20 In the present case, the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it.
> 21 That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual it safeguards the rights of the defence and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas.
> 22 In those circumstances, the answer to the second question must be that Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim."

b. *In* ***Van der Weerd v Minister van Landbouw, Natuur en Voedselkwaliteit*** *[2007] E.C.R. 1* - 4233 the CJEU examined the relationship between the possible obligation to raise issues of EU law of its own motion and the general principle of effectiveness. It held that provided the party affected had had a "*genuine opportunity*" to raise the issue of EU law, the principle of effectiveness did not require the Court to take the point of its own motion where that would have been procedurally inappropriate in a purely domestic context – see paragraphs 38 to 42 of the judgment.

Anthony Elliott, John Payne v The Secretary of State for Communities and Local Government, The London Development Agency, The London Borough of Bromley [2012] EWHC 1574 (Admin) (currently on appeal to the Court of Appeal)

51. This was a statutory application to quash under section 288 of the 1990 Act against the Secretary of State's decision to grant planning permission for the regeneration of Crystal Palace Park. The proposal for the park was known as the Masterplan and operated in three stages, and the funding for the re-generation was to come from public sources and from the residential development of parts of the park.

52. During the Inquiry, evidence was placed before the Inspector that the residential development would result in the loss of trees in the vicinity of the area and that foraging bats commuted across the park. The Inspector concluded that the implementation of the Masterplan *"would not critically harm bat commuting routes"* and that an outline ecological management plan would need to be approved by Bromley before works commenced in any part of the development. The Inspector took the view that these plans

would *"give scope for adequate mitigation of harmful effects"* and that whilst there would be a short-term impact, planning permission should nevertheless be granted on the basis that *"the alternative would be to do nothing substantial to the Park, resulting in loss of the minor beneficial effect to bats of the completed scheme…The Secretary of State may consider that, in total, these aspects amount to Imperative Reasons of Overriding Public Importance [sic] (IROPI)."*

53. The Secretary of State in his letter did not expressly refer to what is generally known as IROPI – that is an interest of overriding public importance under Article 6(4) of the Habitats Directive, but held that *"the proposals would enhance biodiversity associated with the park over the long term and that, over the construction period, subject to the mitigation measures outlined, the effect would be acceptable."*. Article 6(4) says "*If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted*" (emphasis added)

54. The Claimants argued that (i) the desirability of raising money by development could not as a matter of EU law constitute an imperative reason of overriding public interest for permitting the development and (ii) the Secretary of State had failed to consider whether the benefits of the Masterplan constituted imperative reasons of overriding public interest for permitting the development.

55. As to the first ground, Keith J stated that the question of whether there was an overriding public interest for permitting development was a balancing exercise. In this case, the "relatively modest" impact on the bats' habitat needed to be weighed against the overall benefits to the local community, applying the judgment of the CJEU in ***Solvay*** (at 74) that:

> "[t]he assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration."

56. After considering this approach, and the finding in Case C-182/10 ***Solvay v. Region Wallonne*** [2012] C.M.L.R. 19 (at [76] and [77]) that *"[w]orks intended for the location or expansion of an undertaking [will] only in exceptional circumstances"* satisfy the condition that the development *"must be of such importance that it can be weighed up against [the] directive's objective of the conservation of natural habitats …",* Keith J. held that:

> "…you cannot get from that that if a particular feature of a set of proposals was included only because it would provide some of the funding for the development as a whole, and if it happened to be that aspect of the development which would have an impact on the conservation of natural habitats, there cannot have been imperative reasons of overriding public interest for permitting the development."

57. The Claimant framed its second argument on the basis that one of the functions of the Secretary of State in considering the appeal was to consider whether to grant a licence under regulation 53 for an activity which would otherwise be a criminal offence. In making such a judgment, it was said that the Secretary of State needed to consider whether there were imperative reasons of overriding public interest which should permit that activity. The Claimant argued that the Secretary of State had failed to do this, and that this amounted to a breach of regulation 9(1) and 9(5).

58. This argument required the Court to consider the implications of the judgment of the Supreme Court in ***R (Morge) v. Hampshire County Council*** [2011] 1 WLR 268. This case set out the correct approach to be taken under regulation 9(5) of the Habitats Regulations. The Supreme Court found that the "competent authority" had no obligation when carrying out its responsibilities under regulation 9(5) to satisfy itself beyond reasonable doubt that the development would not contravene Article 12 or alternatively that a derogation from that Article would be permitted and a licence granted. Once the competent authority had carried out its regulation 3(4) duties, it was feel to implement its proposals on the basis that at a later date a decision would be made by an "appropriate authority" as to whether a licence should be granted.

59. The key passage is at paragraph 29 of ***Morge***. There, Lord Brown said:

> "the Planning Committee['s] whose only obligation under regulation 3(4) is, I repeat, to "have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1), the Planning Committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence

granted.

60. At paragraph 30, Lord Brown went on to say:

> "Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so."

61. Keith J found that the question of whether the Secretary of State needed to consider imperative reasons of overriding public interest fell to be considered in light of ***Morge***:

> "50 In my opinion, the flaw in this elaborate argument is that when the Secretary of State was considering whether to grant planning permission for the proposals in the Masterplan, he was not exercising any functions "under the enactments relating to nature conservation". He was exercising his planning functions under the 1990 Act, not his nature conservation functions under the Habitats Regulations . He might in due course be exercising his nature conservation functions under the Habitats Regulations – for example, if and when he is asked to grant a licence under reg. 56 for such purposes as makes him the relevant licensing body. But until then, his duty has been the more limited one under reg. 9(5) of the Habitats Regulations , which was to have regard to the requirements of the Habitats Directive to the extent that they may be affected by the exercise of his planning functions under the 1990 Act.
>
> …
>
> 52 Of course, Natural England may not in terms have expressed itself satisfied that the proposals in the Masterplan would comply with Art. 12 of the Habitats Directive . Natural England was only not objecting to the proposals – presumably on the basis that the impact on the foraging and roosting habitats of bats would be relatively modest. But the upshot was that when the Secretary of State was obliged to have regard to the requirements of the Habitats Directive to the extent that they may be affected by his planning functions under the 1990 Act, he was entitled to have regard to Natural England's views about the impact of the proposals on the foraging and roosting habitats of bats, and to grant planning permission unless it was likely that (a) a licence under reg. 53 would be required and (b) when it was applied for, it would be refused.
>
> 53 Judgment in Morge was handed down on 9 January 2011, a few weeks after the Secretary of State made the decision which is being challenged in this case. At that time, the test was the more onerous one adopted by the Court of Appeal in Morge – reported at [2010] PTSR 1882 – and in R (on the application of Woolley) v Cheshire East Borough Council [2010] Env. LR 57, namely that if the planning committee was uncertain whether or not a licence under reg. 53 would be granted, planning permission should be refused. So if the Secretary of State took the view that it was likely that a licence under reg. 53 would be granted if it was sought, all the more so for him to have thought that it was unlikely that it would not be granted if it was sought."

62. Permission to appeal to the Court of Appeal has been granted.

63. A similar application of ***Morge*** to that made in ***Elliott & Payne*** was made in ***William Grant & Sons Distillers Limited*** [2012] CSOH 98. This was a judicial review of a proposed wind farm development. One of the grounds of challenge related to the Scottish Ministers' treatment of the habitats issues arising from the development. The Claimant argued that the approach of the reporter was flawed because in considering whether a

licence under regulation 44 of the Conservation (Natural Habitats, etc) Regulations 1994 was likely to be granted, he should have considered whether there were imperative reasons of overriding public interest for the proposals in the location proposed and whether there were alternative locations outside the application site.

64. The Court again took the approach of the Supreme Court in ***Morge*** as its starting point. It was noted that Scottish Natural Heritage ("SNH"), the relevant enforcement agency in respect of the Directive, had no objection to the impact of the wind farm. Further, the reporter found that there would be no need to apply for a licence to disturb a protected species. As such, it was held that *"there was no requirement upon him or the respondents to proceed to the second stage of the test outlined by Lord Brown."* Further, *"neither the respondents nor the report were required to assess the proposal under regulation 44."*

COSTS AND AARHUS

65. The issue of costs in environmental litigation is a major issue, given the development of the protective costs regime and the Aarhus Convention. The question of the basis for costs is currently before the CJEU in the reference in ***R (Edwards & another) v. Environment Agency*** [2011] 1 W.L.R. 79 from the Supreme Court. The Commission has also announced the commencement of infraction proceedings against UK in respect of costs in environmental JR cases under the PP Directive (6 April 2011).

66. Prior to the decision of the Supreme Court in ***Edwards***, there had been a vigorous legal debate as to whether a 'subjective' or 'objective' approach should be taken to assessing the means of an individual claimant. Lord Hope noted in ***Edwards***:

> "[i]t is clear that the test which the court must apply to ensure that the proceedings are not prohibitively expensive remains in a state of uncertainty. The balance seems to lie in favour of the objective approach, but this has yet to be finally determined."

67. The Court of Appeal in ***R (Garner) v. Elmbridge BC*** [2012] P.T.S.R. 250 had noted that (per Sullivan LJ) that whether or not the proper approach to the "not prohibitively expensive" requirement under Article 10a [as inserted by the PP Directive] "should be a wholly objective one, I am satisfied that a purely subjective approach is not consistent with the objectives underlying the directive".

68. In ***Coedbach v Secretary of State for Energy and Climate Change*** [2010] EWHC 2312 (Admin) Wyn Williams J had noted that "In ***Garner*** Sullivan LJ left open whether it was permissible to have regard to the personal circumstances of the particular claimant. He did not determine that issue definitively but, in my judgment, the tenor of what he says tends to support the view that some regard should be paid to the individual circumstances of a claimant". See also, in Scotland, ***Road Sense v. Scottish Ministers*** [2011] Env. L.R. 22, in which Lord Stewart (making a protective expenses order) noted the uncertainty with regard to the objective/subjective approach.

69. ***Edwards*** involves consideration of whether in relation to costs in cases covered by the EIA and IPPC Directives (and implementing in part Article 9 of the Aarhus Convention) the assessment of whether litigation is or is not "prohibitively expensive" to be decided on an 'objective' basis by reference (for example) to the ability of an 'ordinary' member of the public to meet the potential liability for costs, or should it be decided on a 'subjective' basis by reference to the means of the particular claimant, or upon some combination of the two bases. The questions referred by the Supreme Court to the CJEU are:

> "1. How should a national court approach the question of awards of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of Article 9(4) of the Aarhus Convention, as implemented by article 10a 85/337/EEC and article 15a 96/61/EEC ("the Directives")?
> 2. Should the question whether the cost of the litigation is or is not "prohibitively expensive" within the meaning of Article 9(4) of the Aarhus Convention as implemented by the Directives be decided on an objective basis (by reference, for example, to the ability of an "ordinary" member of the public to meet the potential liability for costs), or should it be decided on a subjective basis (by reference to the means of the particular claimant) or upon some combination of these two bases?
> 3. Or is this entirely a matter for the national law of the Member State subject only to achieving the result laid down by the Directives, namely that the proceedings in question are not "prohibitively expensive"?
> 4. In considering whether proceedings are, or are not, "prohibitively expensive", is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings?
> 5. Is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance?"

70. On 13 September the CJEU heard oral argument in the reference. The Commission intervened in support of the Appellant and Denmark, Greece and Ireland intervened in support of the United Kingdom. Advocate General Kokott gave her opinion on 18 October 2012 in the reference. She proposed to answer the issues referred as follows:

> "1. Under Article 9(4) of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, Article 10a of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the

environment, as amended by Directive 2003/35/EC, and Article 15a of Directive 96/61/EC concerning integrated pollution prevention and control, as amended by Directive 2003/35, it is in principle for the Member States to determine how to avoid the judicial proceedings covered not being conducted on account of their costs. However, those measures must ensure in a sufficiently clear and binding manner that the objectives of the Aarhus Convention are satisfied in each individual case and, at the same time, observe the principles of effectiveness and equivalence and the fundamental rights under EU law.
2. In examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue.
3. The fact that, despite the refusal of an application for a protective costs order, the claimant has not in fact been deterred from bringing or continuing with the proceedings may be taken duly into account afterwards in an order for costs if the obligation to prevent prohibitive costs was observed in the decision on the application for a protective costs order.
4. It is compatible with Article 9(4) of the Aarhus Convention and with Article 10a of Directive 85/337 and Article 15a of Directive 96/61 to re-]examine at each level of jurisdiction the extent to which prohibitive costs must be prevented."

71. At paras. 29-30 of her opinion, the Advocate General stated:

"29. Consequently, it is not only a question of preventing costs which are excessive, that is to say disproportionate to the proceedings, but above all the proceedings may not be so expensive that the costs threaten to prevent them from being conducted. Reasonable but prohibitive costs are a possibility in particular in environmental proceedings relating to large-scale projects, since these may be very burdensome in every respect, for example with regard to the legal, scientific and technical questions raised and the number of parties.
30. It is therefore now possible to give a helpful answer to the first and third questions: Under Article 9(4) of the Aarhus Convention, Article 10a of the EIA Directive and Article 15a of the IPPC Directive, it is in principle for the Member States to determine how to avoid the judicial proceedings covered not being conducted on account of their costs. However, those measures must ensure in a sufficiently clear and binding manner that the objectives of the Aarhus Convention are satisfied in each individual case and, at the same time, observe the principles of effectiveness and equivalence and the fundamental rights under EU law."

72. She also stated:

"45. Taking the public interest into account does not, however, rule out the inclusion of any individual interests of claimants. A person who combines extensive individual economic interests with proceedings to enforce environmental law can, as a rule, be expected to bear higher risks in terms of costs than a person who cannot anticipate any economic benefit. The threshold for accepting the existence of prohibitive costs may thus be higher where there are individual economic interests. This possibly explains why, in a dispute over odour nuisance between persons who were neighbours, hence a case with a relatively low public interest, the Compliance Committee did not consider a claim of more than GBP 5 000 in respect of part of the costs to be prohibitive.
46. Conversely, the presence of individual interests cannot prevent all account being taken of public interests that are also being pursued. For example, the individual interests of a few people affected by an airport project cannot, upon assessment of the permissible costs, justify disregard for the considerable public interest in the case which in any event stems from the fact that the group of those affected is very much wider.
47. The prospects of success may also be relevant with regard to the extent of the public interest. A clearly hopeless action is not in the interest of the public, even if it has an interest in the subject-matter of the action in principle.

> 48. As regards the level of permissible costs, it is lastly significant that provisions of the Convention on judicial proceedings are to be interpreted with the aim of ensuring 'wide access to justice'. 'Wide access to justice' is admittedly only expressly mentioned in Article 9(2) of the Convention and the corresponding provisions of the directives in connection with the preconditions for an action relating to a sufficient interest and the impairment of a right. However, Article 9(2) at least makes clear that this is a general objective of the Convention. This principle of interpretation must therefore also apply in determining permissible costs. It would not be compatible with wide access to justice if the considerable risks in terms of cost are, as a rule, liable to prevent proceedings.
> 49. The answer to the second question is therefore that in examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue."

73. The court itself gave judgment on 11 April 2013. It ruled:

> *The requirement, under the fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and the fifth paragraph of Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.*
> ...
> *46 It must therefore be held that, where the national court is required to determine, in the context referred to in paragraph 41 of the present judgment, whether judicial proceedings on environmental matters are prohibitively expensive for a claimant, it cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.*

74. It is clear that the Aarhus Convention also has a prominent role in the Lord Justice Jackson's report and has influenced his recommendations on costs in judicial review generally. He rejected different rules for environmental and non-environmental judicial review cases. A Ministry of Justice consultation on protective costs in environmental

judicial reviews closed on 12 January 2012 and summarised the main proposals as follows:

(1) The rules are to apply to judicial review cases falling under the Aarhus Convention. The rules are to apply in relation to all claimants in the same way, regardless of whether the claimant in a particular case is a natural or legal person;

(2) A PCO will obtained by making an application. However, the application need not be supported by grounds and evidence unless an order other than the "default order" (see below) is sought;

(3) A PCO will only be granted if permission to apply for judicial review is granted;

(4) Applications should normally be made at the same time as the application for permission/in the claim form. It will be decided on by the court when it considers whether to grant permission, and will normally be considered on the papers;

(5) The PCO will limit the liability of the claimant to pay the defendant's costs to £5,000 and also limit the liability of the defendant to pay the claimant's costs to £30,000;

(6) By way of exception the defendant may apply for the cap to be removed – i.e. that there should be no costs capping because the claimant is not in need of costs protection -where information on the claimant's resources is publicly available. Consultees are also asked for their views on the possibility of allowing the cap to be raised as well as removed. An application to remove the cap may only be on the basis that the claimant has such resources available for litigation that access to justice is not in issue and no costs protection is required. This should be supported by such evidence as is publicly available, as the applicant will not be able to require the claimant to disclose his or her means.

(7) Costs of the PCO application will not be payable by either party if the PCO is applied for with default terms and is made in those terms (that is to say, there should be no additional costs element for a "default" application and order).

75. The response to the consultation was published on the 28 August 2012. This noted that the *"majority of respondents both broadly welcome and support the broad thrust of the proposals"* but that concerns remained around the detail. It proposes:

(1) A fixed recoverable costs regime will apply in all cases where the claimant states in the claim form that the case is an Aarhus case and the reasons why this is so, subject only to the court determining that the case is in fact not an Aarhus case at all. It will not be dependent on permission having been granted;

(2) The recoverable costs were proposed to be fixed as follows -

(a) the liability of the claimant to pay costs of the defendant will be capped at £5,000 if the claimant is an individual and at £10,000 where the claimant is an organisation; and

(b) the liability of the defendant to pay the costs of the claimant will be capped at £35,000.

(3) The fixed recoverable costs for both claimant and defendant cannot be challenged, but the fixed costs regime will not apply if the claim is not within the scope of the Aarhus Convention;

(4) The rule proposed by Lord Justice Jackson for appeals for cases that have been heard under a fixed costs regime will also apply for appeals in cases brought under the Aarhus costs regime.

76. These proposals were put before the Civil Procedure Rule Committee for consideration at the earliest possible opportunity. These proposed changes do not apply to "statutory

procedures of various kinds (including some statutory appeal and statutory review procedures" because (it is said) further work is needed to identify whether and if so how and to what extent these procedures fall within the scope of the Convention and to identify whether the above approach is the appropriate way forward and, if so, what the impacts might be. For example, it is noted that the permission filter of judicial review is absent in such cases, and they may involve appeals by developers as well as members of the public or NGOs. It also notes that the issues surrounding what application the Convention might have in private law cases are in particular more complex, since (as Lord Justice Jackson noticed in his review) costs protection for one party would potentially have a serious impact on the other party, who might well have very limited resources also. The Government is continuing to look at these issues and proposes to bring forward proposals separately, so as not to delay establishment of the scheme for environmental judicial review.

77. In the meantime, the new provisions now provide as follows:

1. As "Aarhus Convention claim" is defined as *"a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UN ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters… including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."*[2]
2. The PCO provisions will only apply where the claimant has stated in the claim form that the claim is an Aarhus Convention claim and the claimant wishes these rules to apply;[3]
3. In those circumstances, the claimant costs will be limited to the amount specified in the Practice Direction to Part 45 (currently £5000 for an individual not acting on behalf of a business or other legal person, £10,000 in other cases);
4. In those cases, the defendant's cost liability will also be capped (currently at £35,000);
5. Provision for challenging whether the claim is in fact an Aarhus Convention claim is made by CPR 45.44. A defendant who unsuccessfully argues that a claim is not within the Convention will be required to pay costs on the indemnity basis (and cannot recover costs of success)

[2] CPR 45.41.
[3] CPR 45.42.

WATER

Manchester Ship Canal Co Ltd v. United Utilities Water Plc [2013] EWCA Civ 40

78. In ***Manchester Ship Canal Co Ltd v. United Utilities Water Plc***, the Court of Appeal had to consider whether the right of discharge onto third party property without the owner's consent, enjoyed by sewerage undertakers before the introduction of the Water Act 1989, had been transferred to private water companies as part of the privatisation process. In an important decision concerning the construction of privatisation transfer schemes, the Court of Appeal held that the implied right of discharge onto third party property without the owner's consent had not been transferred to private water companies.

79. The Court of Appeal held that transitional provisions had to be interpreted in the light of the general rules of interpretation about retrospective provisions. Where a statutory framework was superseded by another, there was a presumption that the new statutory framework applied only to activities occurring in the future and that Parliament did not intend to take away vested rights. There needed to be clear wording in order to displace those presumptions.

80. Although the transfer scheme was intended to apply to the whole of the transferor's sewerage undertaking, including all assets and rights, the implied right of discharge was not a right in the usual sense. Instead, it was an incident of the sewerage undertaker's statutory functions contained in the 1989 Act. Parliament had not intended that the transfer scheme should vest a right in the transferee that Parliament was creating and vesting separately by other provisions of the 1989 Act.

ENVIRONMENTAL PERMITTING

R. (on the application of European Metal Recycling Ltd v Environment Agency [2012] EWHC 2361 (Admin)

81. In an important decision concerning a suspension notice suspending the environmental permit of a metal waste disposal and reclamation yard, the Administrative Court recently held that in a suspension notice the EA must specify precisely the steps to be taken by a permit holder.

82. Regulation 37 of the Environmental Permit (England and Wales) Regulations 2010 provides *inter alia* that:

> "(4) A suspension notice served for the purposes of Paragraph (2) must:
> (a) specify:
> (i) the risk of serious pollution mentioned in that paragraph;
> (ii) the steps that must be taken to remove that risk, and
> (iii) the period within which the steps must be taken"

83. In ***R (on the application of European Metal Recycling Limited) v. Environment Agency*** [2012] EWHC 2361 (Admin), HHJ Pelling Q.C. held that the wording of the EA's suspension notice did not comply with the requirement of Reg.37(4)(2)(a) because:

i) It failed to specify what if any steps were required to be taken; and/or
ii) It failed to provide a defined threshold criterion objective, or defined threshold criteria or objectives, that had to be satisfied by EMR if it was to comply with the SN; and/or
iii) It was otherwise vague and imprecise.

84. The Judge held that:

> "24. In my judgment it is obvious as a matter of language that a requirement to state explicitly the steps that must be taken to remove an identified risk is not satisfied by a statement requiring the recipient to take steps to remove the identified risk. If this is correct as a matter of language I do not see how a requirement to design and implement measures to eliminate the risk is any more compliant. Had the EA's position been that any noise emanating from the Site as a result of regulated activity pursuant to the Permit had to be eliminated then it might have been possible to say that a provision to this effect was satisfactory because it required the elimination of all noise. However, it is not the EA's case that this is what is required. Thus it seems to me that as a matter of language, what is required for Schedule 2 to be compliant with Regulation 37(4)(a)(ii) is the identification of either outcomes or criteria that have to be achieved by whatever means EMR choose to adopt and/or the identification of specific steps that are required to be taken.
> …
> 30. I return to the terms of the Regulation. It imposed on the EA a mandatory requirement to specify what steps had to be taken in order to remove the risk that triggered the service of the notice. In my judgment that requirement could have been satisfied by specifying an outcome or outcomes rather than by reference to steps in the sense of specifying works to be undertaken at the Site if that was considered to be a more appropriate way in which to proceed. In my judgment however, what it was not entitled to do was to require the elimination of a risk of serious pollution without identifying the steps by which that was to be achieved. Subject to the alternative remedy point considered below, in my judgment EMR is entitled to a quashing order on this ground alone."

85. The decision is also important because it confirms that it is for the EA to decide whether there is a risk of serious pollution justifying service of a notice. The Court held that the EA's judgment on that issue could only be challenged on irrationality basis.

COMAH REGULATIONS 1999

Salt Union Ltd v. Health and Safety Executive [2012] EWHC 2611 (Admin)

86. The decision in ***Salt Union Ltd v. Health and Safety Executive***, considers the extent of the obligations of the Health and Safety Executive when considering preconstruction safety reports.

87. The claimants were salt mine owners who sought judicial review of the Health and Safety Executive's decision that a preconstruction safety report was acceptable. The report related to the construction of an underground gas storage facility in a salt cavern. After obtaining planning permission and hazardous substances consent for the construction of the storage facility, the interested party submitted a preconstruction safety report to the Health and Safety Executive and Environment Agency ("EA"). The Health and Safety Executive concluded that the risk of allowing gas to escape was as low as reasonably practicable, but it did not make specific reference to the neighbouring salt mine own by the claimants.

88. The claimants contended that the preconstruction safety report did not comply with the Control of Major Accident Hazards Regulations 1999 because significant available information has not been disclosed or incorporated into the report. They also contended that the Health and Safety Executive had failed to engage with them

89. Hickinbottom J dismissed the claim. He held that the 1999 Regulations required a series of judgments to be made by the Health and Safety Executive, including as to whether the information in a preconstruction safety report was sufficient to demonstrate that at the preconstruction stage adequate safety and reliability had been incorporated into the design of the proposed installation. This was a judgment by a highly specialised and expert regulator which, moreover, was not a final judgement because the Regulations required it to be reconsidered whenever further relevant information became available. On the facts, the Health and Safety Executive had been entitled to conclude that it had sufficient

information at the preconstruction stage that the construction of the underground gas storage facility was acceptable.

90. Unlike the environmental impact assessment process, the regime of the 1999 Regulations included no right for the general public to be notified or to participate. There was no express procedural obligation owed by the Health and Safety Executive to consult with any third parties prior to draw in its conclusions.

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