United Kingdom Association of European Law

EU LAW AND THE LAND:

RECENT DEVELOPMENTS IN ENVIRONMENTAL AND AGRICULTURAL LAW

Gwion Lewis[1]

1. This is a selection of some significant recent developments in the application of EU environmental and agricultural law by the courts of the EU and the UK. Abbreviations used generally in this paper are as follows:

IPPC	-	Integrated Pollution Prevention and Control
EIA, SEA	-	Environmental impact assessment, strategic environmental assessment

General issues

EIA: meaning of 'semi-natural areas'

2. In ***R (Wye Valley Action Association) v Hereford Council and EC Drummond & Son*** [2011] EWCA Civ 20, the Court of Appeal considered whether the EIA directive extended to polytunnels used for agricultural purposes.

3. The case concerned a farmer who applied for planning permission for polytunnels covering 255 ha, of which only 54 ha would be covered at any one time. Natural England objected on the grounds of visual intrusion, but the local planning authority (**"the LPA"**) granted planning permission. The key question for the LPA was whether the application fell into any of the categories of development potentially requiring EIA in schedule 2 of the EIA Regulations 1999, in particular para.1(a): *"projects for the use of cultivated land or semi-natural areas for intensive agricultural purposes"*.

4. According to European Commission guidance, the term semi-natural included an area where some human intervention prevented it from being classed as 'natural'. The guidance said that the main emphasis should be on identifying areas "which reflect natural conditions and which have some intrinsic nature conservation or other environmental value which would be lost by

[1] Some sections of this paper were previously delivered by the author and David Elvin Q.C. to the annual conference of the lawyers of the Environment Agency (Bristol, 2011).

agricultural management proposals employed to permit intensification of agricultural practice".

5. In the High Court, the Deputy High Court Judge had emphasised the wide scope and broad purpose of the EIA directive and he considered that the guidance confirmed the need to adopt a broad approach. He held that the LPA had erred in assuming that because the land was cultivated it fell outside this category of the Regulations. The Court of Appeal held that the Deputy Judge had wrongly gone beyond the supervisory role of the court in ensuring that decisions taken under the EIA Regulations were lawful. The decision whether development qualified as EIA development was primarily for the local planning authority and it was not for the court to substitute its own judgment. In determining whether development was in a "semi-natural area", the question was whether the local authority had correctly understood the meaning of the expression and, in applying the expression to the facts, had reached a conclusion that was rationally open to it.

6. The Court of Appeal did not consider that the local authority had reached an irrational conclusion and was particularly critical of the weight given by the Deputy Judge, when deciding whether the land in question was in a "semi-natural area", to the fact that it abutted a European designated site of nature conservation. Any designations attaching to the area surrounding the site could not affect the question of whether the land itself was a semi-natural area.

EIA: screening opinion

7. In ***R(Bateman) v South Cambridgeshire DC*** [2011] EWCA Civ 157, the Court of Appeal reinforced the need for sufficiently clear reasons if the screening opinion of a local planning authority is that no EIA is required. The negative screening opinion in this case had been accompanied by statement from a planning officer giving a number of reasons for the decision. The claimant contended that the officer had failed to demonstrate that she had considered the likely traffic, landscape and noise impact of the proposal or, if she had, had not adequately explained why an EIA was not required. Applying the judgment of the ECJ in ***R(Mellor) v Secretary of State*** (C-75/08) [2010] P.T.S.R. 880, Moore-Bick LJ held:

> 20. […] I think it important to bear in mind the nature of what is involved in giving a screening opinion. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term "screening opinion".

> 21 Having said that, it is clear from ***Mellor*** that when adopting a screening opinion the planning authority must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision. Such information may be contained in the screening opinion itself or in separate reasons, if necessary combined with additional material provided on request.
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> …
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> 29 This case differs, in my view, from that of ***R (Wye Valley Action Association Ltd) v Herefordshire Council*** in an important respect. In that case it was reasonably clear from the way in which the opinion was expressed that the council had formed the view that the project was not an EIA development because the land in question was already under cultivation and was therefore not uncultivated or semi-natural. Having done so, it was unnecessary for it to identify or discuss the range of considerations taken into account in reaching that decision. In the present case, on the other hand, the planning officer failed to identify the correct test and failed to explain in any relevant way why she concluded that the development was not likely to have significant effects on the environment."

8. In this case, the Court of Appeal agreed (Mummery LJ dissenting) that there was no clear statement of the officer's reasons for coming to the conclusion that she did, leaving the court with no alternative other than to quash the decision to grant the permission.

EIA: demolition

9. In ***Save Britain's Heritage v Secretary of State*** [2011] EWCA Civ 334, the Court of Appeal held that the demolition of buildings and other structures is capable of constituting a "project" for the purposes of Annex II of the EIA Directive. The Court of Appeal applied a very recent ruling of the European Court of Justice in ***Commission v Ireland*** (Case C-50/09), in which the court considered a complaint that Irish legislation relating to demolition works had failed to give effect to the EIA Directive. The ECJ had ruled that:

> "101. It follows that demolition works come within the scope of Directive 85/337 and, in that respect, may constitute a 'project' within the meaning of Article 1(2) thereof. [...]
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> 103. Ireland does not deny that, under the national legislation in force at the date of the additional reasoned opinion, demolition works were not subject, as a general rule, to an environmental impact assessment but, on the contrary, were entitled to an exemption in principle.
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> 104. It is clear from the rules laid down in sections 14 to 14B of the NMA as regards the demolition of a national monument that, as the Commission claims, they take no account of the possibility that such demolition works might constitute, in themselves, a 'project' within the meaning of Articles 1 and 4 of Directive 85/337 and, in that respect, require a prior environmental impact assessment. However, since the insufficiency of that directive's transposition into the Irish legal order has been established, there is no need to consider what that legislation's actual effects are in the light of the carrying-out of specific projects, such as that of the M3 motorway. [...]

> 106. In those circumstances, the Commission's third complaint in support of its action must be held to be well founded.
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> 107. Accordingly, it must be declared that [...] by excluding demolition works from the scope of its legislation transposing that directive, Ireland has failed to fulfil its obligations under that directive."

10. Applying this ruling, the Court of Appeal held that paragraph 2(1)(a)-(d) of the Town and Country Planning (Demolition – Description of Buildings) Direction 1995 was unlawful and should not be given effect. Accordingly, with the exception of buildings smaller than 50 cubic metres in volume or the whole or any part of any gate, fence, wall or other means of enclosure [see paragraph 2(1)(e)-(f) of the Direction], the demolition of buildings is no longer excluded from the definition of development under the Town and Country Planning Act 1990 and is therefore:

(1) subject to prior approval under Part 31 of Schedule 2 of the General Permitted Development Order; and

(2) potentially subject also to EIA screening.

Strategic environmental assessment

11. In ***Cala Homes (South) Ltd v Secretary of State (No. 1)*** [2010] EWHC 2866 (Admin), Sales J. considered *obiter* the applicability of SEA requirements to the revocation of national policy and stated that, had it been necessary to do so (which it was not), he would have quashed the Secretary of State's purported revocation of regional planning strategies on SEA grounds:

> "60 It is common ground that no screening assessment or more detailed strategic environmental assessment under Part 3 of the 2004 Regulations has been carried out in relation to the decision of the Secretary of State of 6 July 2010 to revoke the South East Plan. It is also common ground that a plan, programme or modification the adoption of which may have significant environmental effects should be the subject of a screening assessment, even if it is thought on the face of it that the environmental effects may be beneficial ...
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> 61 In my judgment, the "development plan" as defined in section 38(3) of the PCPA 2004 (as amended) is a relevant plan for the purposes of the 2004 Regulations. It is that "development plan" which is the principal (composite) instrument to be applied to determine (subject only to countervailing material considerations) the outcome of applications for planning permission, and so falls within regulation 5(4)(b) . The "development plan" defined in section 38(3) includes as a component "the regional strategy for the region in which the area is situated", alongside other development plan documents adopted or approved in relation to that area. The Regional Strategy may play a decisive role for the outcome of any particular planning application (a point which the facts of the present case go some way towards illustrating – the revocation of the South East Plan is likely to have an immediate impact upon determination of planning applications: see paragraphs [11] and [12] above). Any significant change in the content of a Regional Strategy capable of having a material impact upon planning decisions may therefore qualify as a modification of the relevant "development

plan" applicable in relation to a particular area. Revocation of a Regional Strategy will amount to such a significant change, and so will qualify as a modification of the relevant "development plan" which leaves only the relevant "development plan documents" referred to in section 38(3)(b) of the PCPA 2004 in place to provide the substantive content of the "development plan".

62 All the existing Regional Strategies were made the subject of environmental assessment before they were adopted, no doubt because of the practical impact that they would inevitably have by setting part of the framework for decision-making in planning cases. I can see no sound basis for the contention put forward by the Secretary of State that revocation of Regional Strategies does not equally require at least consideration under Regulation 9 whether similar detailed environmental assessment is required. The revocation of a Regional Strategy may have as profound practical implications for planning decisions as its adoption in the first place. Thus the purposive approach to the interpretation of the 2004 Regulations referred to above supports the same conclusion.

63 I would add that I also consider that there is force in the alternative analyses proposed by the Claimant, to the effect that a Regional Strategy is itself a relevant "plan" for the purposes of the 2004 Regulations, and that revocation of that "plan" either amounts to a modification of such "plan" (applying a purposive interpretation of the Regulations, since it is difficult in the context of the object of the SEA Directive and Regulations to see why significant but lesser changes to a Regional Strategy should require there to be an environmental assessment, but that if the change takes the extreme form of revocation of the Regional Strategy that requirement should suddenly fall away) or to the adoption of a new relevant "plan", namely the local development plan documents standing alone, to be read without reference to the Regional Strategy.

64 On a straightforward reading of the 2004 Regulations in the present context, therefore, I consider that the Secretary of State acted unlawfully by purporting to revoke the South East Plan Regional Strategy without first at least conducting a screening assessment under Regulation 9 ."

12. In ***Cala Homes (South) Ltd v Secretary of State (No. 2)*** [2011] EWHC 97 (Admin), Lindblom J. rejected the submission that a policy statement by a Minister concerning the weight to be given to regional strategies pending revocation did not require SEA:

"94 On a straightforward reading of the relevant provisions of the SEA Directive and the SEA Regulations, the proposition that the Government's stated policy commitment to the abolition of Regional Strategies constitutes a "plan or programme" or a "modification" susceptible to Strategic Environmental Assessment seems to me to be ill-founded.

95 For a need to undertake Strategic Environmental Assessment to arise there must be a relevant "plan or programme" or a "modification" of such a "plan or programme". Under the provisions of the SEA Directive, mirrored as they are in the SEA Regulations, a "plan or programme" subject to Strategic Environmental Assessment is not any plan or programme, but one that is "required by legislative, regulatory or administrative provisions".

96 In the present case there has been neither any subtraction from nor any adjustment to the statutory development plan. Nothing has been done to any Regional Strategy. There has been no "modification" such as might attract the need for Strategic Environmental Assessment. The Secretary of State's statement of 10 November 2010 and the Chief Planner's letter may be an expression of government policy. But they do not purport either to revoke or to modify any of the Regional Strategies which have been adopted, or any development plan ...

...

> 98 National planning policy does not constitute a "plan or programme" for the purposes of the SEA Directive and the SEA Regulations, unless it is specifically required by "legislative, regulatory or administrative provisions". Thus National Policy Statements for the planning of waste management (at present PPS10 in England and TAN21 in Wales), because they are required by Article 7 of the Waste Framework Directive, are within the reach of Strategic Environmental Assessment.
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> 99 Advice given by or on behalf of the Secretary of State that an intention or policy of the Government is a material consideration in a planning decision is not a "plan or programme" or a "modification" of a plan or programme; it is merely advice. The same may be said of the policy itself, whether it came into existence when announced in the Coalition Agreement or only in the statement and letter of 10 November 2010. Neither the policy nor the advice takes the form of a "plan or programme". Whether or not the statement and letter are to be regarded as national planning policy, they clearly do express "freely taken political decisions on legislative proposals". Furthermore, they were not "required" by any legislative, regulatory or administrative provision."

13. In ***Save Historic Newmarket Ltd v Forest Heath District*** Council [2011] EWHC 606, one of only a few cases still to have considered the requirements of the SEA directive domestically (see ***St Albans DC v. Secretary of State*** [2010] J.P.L. 7), Collins J quashed housing policies in the Forest Heath Core Strategy relating to a controversial urban extension of Newmarket. A consortium of local and horseracing interests opposed the allocation of land for some 1,200 new houses on the basis that it would substantially undermine Newmarket's status as a world-class centre of racing excellence.

14. The main ground of challenge was that the Core Strategy had been adopted in breach of the SEA directive, in particular had failed to meet the requirement in Article 5 that the 'environmental report' accompanying the draft plan or programme explain what reasonable alternatives to the proposed policies had been considered and why they had been rejected. The main argument against was that the issues had been considered over a protracted period of some 4 years when the various stages of the plan had been considered – options, preferred options etc. – and that in an "iterative" plan process, it was not then necessary to repeat the considerations in the environmental report which actually accompanied the consultation draft of the plan. The Council's report had indicated in the statement of contents that the issue of alternatives was dealt with at section 6 of the report. In fact, section 6 said nothing about alternatives at all. Moreover, none of the earlier reports had dealt with the incremental changes in the scale of the proposed urban extension (from 500 to 1200 houses).

15. Collins J held:

    (1) For there to be compliance with Article 5 of the Directive, the public has to be presented with an accurate picture of what reasonable alternatives there were to the proposed policies and why they were not considered to be the best option.

    (2) The environmental report and the draft plan must operate together so that consultees can consider each in the light of the other. At [17] he held –

> "17. It is clear from the terms of Article 5 of the Directive and the guidance from the Commission that the authority responsible for the adoption of the plan or programme as well as the authorities and public consulted must be presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option (See Commission Guidance Paragraphs 5.11 to 5.14). Equally, the environmental assessment and the draft plan must operate together so that consultees can consider each in the light of the other. That was the view of Weatherup J in the Northern Irish case ***Re Seaport Investments Ltd's Application for Judicial Review*** [2008] Env. LR 23. However that does not mean that when the draft plan finally decided on by the authority and the accompanying environmental assessment are put out to consultation before the necessary examination is held there cannot have been during the iterative process a prior ruling out of alternatives. But this is subject to the important proviso that reasons have been given for the rejection of the alternatives, that those reasons are still valid if there has been any change in the proposals in the draft plan or any other material change of circumstances and that the consultees are able, whether by reference to the part of the earlier assessment giving the reasons or by summary of those reasons or, if necessary, by repeating them, to know from the assessment accompanying the draft plan what those reasons are. "

(3) In an iterative plan-making process, it is not inconsistent with the SEA Directive for alternatives to the proposed policies to be ruled out prior to the publication of the final draft plan, but if that does happen, the environmental report accompanying the draft plan must refer to, summarise or repeat the reasons that were given for rejecting the alternatives at the time when they were ruled out and those reasons must still be valid.

(4) These principles were not followed in the present case. It was not possible from the environmental report accompanying the draft plan for the public to know what were the reasons for rejecting any alternatives to the urban extension or to the amount of development proposed.

(5) A plan or programme adopted contrary to the SEA directive was bound to be quashed regardless of whether prejudice was caused to the particular claimant(s).

16. Collins J. considered at [15] the EU Commission Guidance on SEA to the effect that (emphases added):

> "4.7. It is clear that the decision to reuse material from one assessment in carrying out another will depend on the structure of the planning process, the contents of the plan or programme, and the appropriateness of the information in the environmental report, and that decisions will have to be taken case by case. **They will have to ensure that comprehensive assessments of each element of the planning process are not impaired, and that a previous assessment used at a subsequent stage is placed in the context of the current assessment and taken into account in the same way**. In order to form an i**dentifiable report**, the relevant information must be brought together: **it should not be necessary to embark on a paper-chase in order to understand the environmental effects** of a proposal. Depending on the case, it might be appropriate to summarise earlier material, refer to it, or repeat it. But there is no need to repeat large amounts of data in a new context in which it is not appropriate."

17. Collins J. added:

> "As the second half of 4.7 makes clear, the final report may rely on earlier material but must bring it together so that it is identifiable in that report. This is consistent with the requirement that members of the public must be able to involve themselves in the decision-making process and for that purpose receive all relevant information. It cannot be assumed that all those potentially affected would have read all or indeed any previous reports (in the context of this claim previous environmental assessments)."

Habitats

18. The broad effect of the Habitats Directive and Regulations (the 1994 Regulations were replaced by Conservation of Habitats and Species Regulations 2010 SI 2010 No. 490) and its purpose in protecting the environment was vividly illustrated by a recent High Court decision. In ***R. (Akester) v Department for Environment, Food and Rural Affairs & Wightlink*** [2010] Env. L.R. 33 a resident challenged the introduction of a new, larger class of ferry by the second defendant, Wightlink Ltd. (a private company and the owner of and statutory harbour authority for the ferry terminal at Lymington Pier), on an established ferry route, part of which was along the Lymington River between the mainland and the Isle of Wight. The route included salt marshes and mud flats which were designated amongst other things as part of a Special Area of Conservation under the Habitats Directive.

19. Owen J. held that the introduction of the new ferries amounted to a "project" within the Habitats Regulations and Directive and that the requirement for an appropriate assessment was triggered under art. 6(3) unless the risk of significant adverse effects could be excluded. Given the broad meaning to be attached to "plan or project" under the Directive, given its broad purpose, the introduction of the larger ferries was a "project" within the ambit of art.6(3). When considering the proposal, any decision-maker would have been bound to conclude that the risk of significant adverse effects on the protected sites could not be excluded and that in consequence the requirement for an appropriate assessment was triggered: see ***Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*** (C-127/02) [2005] Env. L.R. 14. Owen J. stated:

> "77 ... I am satisfied that the facts in *Waddenzee* provide a very close parallel. In Waddenzee the intervention with the natural surroundings was the effect of the dredging operation on the seabed, both by the plate at the leading edge scraping the top 4–5 centimetres into the cage, and by the disturbance of the seabed by the powerful jet of water from the nozzle attached to the leading edge. Similarly the operation of the W class has the potential to interfere with the natural surroundings in that by their size and displacement, means of propulsion and steering, and the fact that they operate in narrow channels and at certain states of the tide in very shallow water, the vessels may disturb the bed and banks of the river and cause erosion to the mudflats and salt-marshes within the protected sites. Mr Drabble argued that *Waddenzee* is to be distinguished on the basis that the intervention in the natural surroundings was a direct effect of the dredging operations, whereas any effect of the use of the ferries is indirect. But in my judgement that is not a distinction of significance. The question is whether the activity gives rise to a risk of adverse effects on the protected sites, whether directly or indirectly.

> 78 In his written advice to Wightlink to which I have referred at [53] above, Mr Drabble further argued that if the claimants' contention that the introduction of the W class is a plan or project within the ambit of the Habitats Directive is accepted, then that "would mean that every time a shipping line employed different or larger vessels in any port, there would be a requirement to consider whether an appropriate assessment had first to be carried out". But that argument is flawed in that it is not the introduction of the vessels that triggers the requirement to consider whether an appropriate assessment has to be carried out, but rather the possible effect of the operation of such vessels on the protected sites."

20. In discharging its functions as a statutory harbour authority for Lymington pier and ferry terminal, the second defendant was not only obliged by s. 48A of the Harbours Act 1964 to have regard to nature conservation objectives, it was also a competent authority with an obligation under reg. 3(4) of the Regulations to have regard to the requirements of the Habitats Directive so far as they might be affected by the exercise of those functions. It was in a position to authorise and control the use of the ferries and as a consequence their effect upon designated sites. Other authorities with statutory responsibilities for the area and the ferry operations, including Defra, had no power to intervene. It followed that the only competent authority at the material time, namely the point at which the second defendant decided to introduce the new ferries, was that defendant itself.

21. The Court found in reaching its decision that there would be no adverse effect but Wightlink's board should have made clear what it relied upon as an appropriate assessment in its record of the decision-making process. It had not done so. Furthermore, the board appeared to have misled itself as to the test it was obliged to apply as a competent authority in that it had failed to recognise that it was for the board itself to carry out the appropriate assessment, and that the question was not simply whether it was satisfied in the light of an expert's report that the introduction of the new ferries would not have an adverse effect upon the integrity of the sites. It followed that the decision was unlawful.

22. In ***Morge v. Hampshire CC*** [2011] 1 W.L.R. 268 the claimant sought judicial review of the decision to grant planning permission for the proposed SE Hampshire Bus Rapid Transit Phase 1 on the ground that it breached the Habitats Directive because disturbance to bats had not been considered properly. The area had become overgrown with trees and shrubs, and was inhabited by bats and badgers. In order to build the bus route, it would be necessary to cut a swathe 8-9m wide through the vegetation. The Council had granted planning permission and issued a screening opinion stating that the development was not EIA development.

23. The first question was what was meant by "deliberate disturbance" of a protected species within the meaning of Article 12(1)(b) of the Habitats Directive. Lord Brown held:

> "19. In my judgment certain broad considerations must clearly govern the approach to article 12(1)(b). First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on

> species. Secondly, and perhaps more importantly, the prohibition encompassed in article 12(1)(b), in contrast to that in article 12(1)(a), relates to the protection of "species", not the protection of "specimens of these species". Thirdly, whilst it is true that the word "significant" is omitted from article 12(1)(b) — in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having "a significant negative impact on the protected species" — that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a "disturbance" of the species. Fourthly, it is implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited "disturbance" than activity at other times."

24. Lord Brown added two further considerations that may "usefully be identified to be borne in mind by the competent authorities deciding these cases":

(1) Factors highlighted by DEFRA in correspondence during the litigation, namely:

> "Consideration should … be given to the rarity and conservation status of the species in question and the impact of the disturbance on the local population of a particular protected species. Individuals of a rare species are more important to a local population than individuals of more abundant species. Similarly, disturbance to species that are declining in numbers is likely to be more harmful than disturbance to species that are increasing in numbers."

(2) A set of considerations now enshrined in Regulation 41(2) of the Habitats Regulations 2010, namely:

> "(2) …disturbance of animals includes in particular any disturbance which is likely (a) to impair their ability (i) to survive, to breed or reproduce, or to rear or nurture their young, or (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or (b) to affect significantly the local distribution or abundance of the species to which they belong."

25. In respect of (2) above, Lord Brown added that the reference to disturbance which is likely to include "in particular" the disturbance described, does not mean that "other activity having an adverse impact on the species may not also offend the prohibition".

26. On the facts, although the loss of woodland and scrub vegetation could well result in a reduction in the abundance of invertebrates and a decrease in the quality of the foraging habitat available for bats, that loss was a loss of *habitat* and was not of itself within Article 12. The risk of bats colliding with buses as the bats flew across the bus route could not amount to a disturbance within the meaning of Article 12(1)(b).

27. The case also raised an EIA issue because the LPA had issued a screening opinion to the effect that the proposed development was not EIA development.

28. The duty under what is now reg. 9(5) of the 2010 Regulations was considered by Lord Brown at paras. 26-31 and Lady Hale at paras. 35-36 and 44-46. Reg. 9(5) provides:

> "Without prejudice to the preceding provisions, a competent authority, in exercising any of

> their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions"

29. The Supreme Court made clear that in terms of the planning authority's duty when granting planning permission it was not for the authority to police compliance with the Directive:

> "it is quite unnecessary for a report such as this to spell out in detail every single one of the legal obligations which are involved in any decision. Councillors were being advised to consider whether the proposed development would have an adverse effect on species or habitats protected by the 1994 Regulations. That in my view is enough to demonstrate that they "had regard" to the requirements of the Habitats Directive for the purpose of regulation 3(4)." (Lady Hale at para. 45)
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> "I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the Planning Committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty." (Lord Brown at para. 29).

30. The decision also, though not explicitly, calls into question ***R. (on the application of Woolley) v Cheshire East BC*** [2010] Env. L.R. 5 where a decision to grant permission was quashed as a result of the failure to consider the licensing duties of Natural England under the Habitats Regulations. The judgments in ***Morge*** underline the division of responsibilities which supersedes the consideration of these issues by the Deputy Judge in ***Woolley***.

31. ***R (Hulme) v Secretary of State for Communities and Local Government*** [2010] EWHC 2386 (Admin), concerned a challenge to the grant of planning permission for the installation of nine wind turbines and associated equipment. The claimant was a member of a local residents group that objected to the installation of the turbines on the basis of the potential noise and effect on local ecology, especially bats. Planning permission had been granted by the Inspector on appeal and the claimant contended *inter alia* that the Inspector had failed to give proper consideration to the impact on bats and to consider the Conservation (Natural Habitats, &c.) Regulations 1994 (now the 2010 Regulations).

32. Frances Patterson QC sitting as a Deputy High Court Judge held that the inspector had clearly considered the possible effect on individual bats and the bat population. He had approached the evidence correctly taking into account national and local policy and there was no flaw in his reasoning. Whilst he did not expressly identify either the Directive or Regulations, he clearly had in mind the importance of the presence of a European protected species on the development site in reaching his decision. Importantly, her *obiter dicta* discussed the issue of the court's discretion to refuse relief. She said that even if the decision had been unlawful, she

would have exercised her discretion not to quash the planning permission.

33. These comments signal a qualification to the position adopted by Lord Hoffmann in his judgment in ***Berkeley v Secretary of State for the Environment*** [2001] 2 A.C. 63, in which it was said that the court had no discretion not to quash a decision made in breach of the EIA Directive. Francis Patterson QC distinguished the EIA and habitat regimes on the basis that the Habitats regime does not require public involvement in the same way as the EIA regime does:

> "88. The inspector had then substantially complied with the requirements of the regulations, albeit he did not attribute his conclusions to the letter of the regulations for the reasons I have set out earlier. The circumstances here are very different from an EIA case where the provision of an environmental statement is the cornerstone of that regime. There, the ES, including mitigation measures, is the basis of public consultation prior to a decision being made. Here there is a different statutory regime. The decision maker is not under a comparable consultation requirement based upon a single accessible compilation of the relevant information provided by the applicant at the start of the application process. He has to satisfy himself on the considerations set down in the regulations. Reading the decision letter as a whole, the inspector here did so.
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> 89 In those circumstances, I do not have to go on to consider the issue of discretion but, for the sake of completeness, I deal with that matter and make it clear that, if I had had to consider it, I would have exercised it in favour of the defendants and upheld the planning permission.
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> 90 In ***Berkeley v Secretary of State for the Environment*** [2001] 2 AC 63, Lord Bingham emphasised that the discretion of the court to quash a decision, even in the domestic context, was very narrow. In ***Bown v Secretary of State for Transport*** [2003] EWCA Civ 1170 Carnwath LJ emphasised that the speeches in Berkeley needed to be read in context. In ***Edwards v Environment Agency*** [2008] UKHL 22 Lord Hoffman agreed with that observation and considered that both the nature of the flaw in the decision and the ground for the exercise of discretion had to be considered. In the circumstances of Edwards when he carried out that exercise, Lord Hoffman agreed with the Court of Appeal and the judge below that it would be pointless to quash the pollution permit granted under the Pollution Prevention and Control Regulations 2000. Applying those principles here, the flaw in the decision would be one of form but not of substance. It would thus be another occasion where it would be pointless to quash the planning permission granted."

State liability in damages for breach of EU law

34. ***Cooper v HM Attorney General*** [2011] P.T.S.R. 1, is the first English case considering ***Köbler*** liability i.e. Member State liability in damages for a serious breach of Community law on the part of a national court of final appeal (see ***Köbler v Republik Österreich*** (Case C-224/01) [2004] QB 848). The complaint arose out of the failure to carry out EIA in relation to the development of a large shopping mall in White City (see ***Commission v United Kingdom*** (Case C-508/03) [2006] QB 764). The Court of Appeal considered that the breaches of Community law which had occurred, arising from the failure properly to understand the EU concept of "development consent" as developed in ***R (Wells) v Secretary of State*** C-201/02) [2004] ECR I-723, were not sufficiently serious or manifest to give rise to liability in damages. The decision suggests that, absent flagrant disregard of EC legislation or ECJ case law, in specialist areas

such as environmental and planning law it will be extremely difficult for claimants to establish a manifest breach on the part of the relevant national court of final appeal. Arden LJ noted in considering this question it was relevant to consider the applicable facts which included the lack of clarity on the consent issue:

> "110 Until the ***Wells*** case, the view that an EA was not required at the reserved matters stage was, in our judgment, a reasonable one even apart from Lord Hoffmann's support for it. Article 1(2) of the EIA Directive defined "development consent" as "the decision of the competent authority … which entitles the development to proceed with the project". This covers an entitlement to proceed subject to conditions, and it was well established in domestic law that the grant of outline planning permission creates the entitlement to proceed. In addition, article 2(1) of the EIA Directive made it clear that the obligation was on member states to adopt all measures necessary to ensure any project with significant effects on the environment was subject to an EA "before consent is given". It was reasonable to suppose that where the grant of outline planning permission adequately covered the full range of matters later determined in detail upon consideration of reserved matters no further requirement arose at the reserved matters stage. Indeed the Court of Justice accepted this point in part because it held in ***Commission v United Kingdom*** (Case C-508/03) [2006] QB 764 that, in a multi-stage consent case, the principal requirement to consider an EA was at the outline planning permission stage.
>
> 111 Subsequently numerous domestic courts reached the same view as this court in the present case. For example, in ***R (Barker) v Bromley London Borough Council*** [2002] Env LR 631 , paras 41 and 47 this court again refused to make a reference to the Court of Justice on this very question. Reference may also be made to the decision of the High Court in ***R v Rochdale Metropolitan Borough Council, Ex p Milne*** [2000] Env LR 1 . As already mentioned, Mr McCracken submits that the court is not entitled to look at the position in domestic law. We agree that domestic law cannot excuse a breach of Community law, but when the court is considering whether a breach is manifest, or sufficiently serious, the court is not restricted to asking itself whether there was a clear infringement of the case law of the Court of Justice. It is able to look at all the relevant considerations. One of those factors indeed includes whether the breach was intentional, by which what must be meant is that it was deliberately intended to cause a breach of Community law. In dealing with that point, it is relevant to consider whether the court's decision was in accordance with other decisions in its domestic law. Domestic case law will in particular carry weight where it purports to interpret and apply the relevant Community law."

Environmental Liability Directive

35. Case C-378/08 ***Raffiniere Mediterranee (ERG) SPA v Ministero dello Sviluppo economic*** (9 March 2010) is the first case on the interpretation of the controversial Environmental Liability Directive. The Directive requires the operator to have 'caused' the damage in question before liability can be attributed. In respect of pollution from petro-chemical plants, the Italian authorities had sought to make the plants' operators equally responsible for clean-up without attempting to distinguish between past and present pollution and without assessing the direct responsibility of each operator.

36. The ECJ held that Member States could introduce rules containing a presumption of causation, based on proximity of a site to the pollution, but there must be 'plausible evidence' justifying

such a presumption e.g. evidence that the particular plant in fact uses the pollutants. The Court did not require that where multiple polluters were involved, the authority should identify precisely the origins of each element of the pollution.

Practice and Procedure

Standing to challenge Secretary of State decisions

37. Section 288(1) of the Town and Country Planning Act 1990 provides that:

> "If any person–
> ...
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action, on the grounds –
>
> (i) that the action is not within the powers of this Act, or
> (ii) that any of the relevant requirements have not been complied with in relation to the action,
>
> he may make an application to the High Court under this section."

38. As is well know, the courts now give a very wide interpretation to who has "sufficient interest" to bring a claim for judicial review. However, the courts have not been willing to give such a generous interpretation to who is a person aggrieved for the purposes of a statutory challenge. In particular in ***Eco-Energy (GB) Ltd v First Secretary of State*** [2004] EWCA Civ 1566, Buxton L.J. laid down a very restrictive test. He concluded that there were three main categories of persons who qualified as persons aggrieved. They were:

(1) the appellant in the planning process; or

(2) someone who took a sufficiently active role in the planning process--that is to say, probably a substantial objector, not just somebody who objected and did no more about it; or

(3) someone who has a relevant interest in the land.

39. The past 12 months have shown that there is still uncertainty as to the correct meaning of the expression 'person aggrieved'. In ***William Ashton v. Secretary of State & Coin Street Community Builders Ltd*** [2010] J.P.L. 1645, the applicant was a local resident who had taken no part in the objections to a 43 story building near Waterloo Bridge, but whose dwelling was 260m away from the proposed tower.

40. The Deputy Judge (HH Judge Mole QC) had held that Mr Ashton was not a "person aggrieved". He considered that Buxton L.J. did not mean that the person challenging had to be an objector but rather that he or she had to have taken a "sufficiently active role in the planning process",

which could be as an active objector or possibly an active interested person. Mr Ashton was not a "person aggrieved" as not only had he not objected but he had not taken an active role. HHJ Mole also noted that although Mr Ashton would be adversely affected by the development, his grounds for challenge had nothing to do with the impact on him personally.

41. The Court of Appeal upheld HHJ Mole QC's judgment. Pill LJ giving the judgment of the court summarised (at [53]) the key principles governing standing in s.288 appeals.

42. First, Pill LJ emphasised that "wide access to the courts is required under section 288". He explained that the English courts had for many years sought to facilitate access to justice, for example in ***Attorney General of Gambia v N'Jie*** [1961] AC 617, at 634, Lord Denning held that:

> "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

43. Pill LJ added that access to justice is now recognised and mandated at the European Union level. In cases such as ***Ashton*** where an EIA has been conducted, domestic requirements on standing must conform with Article 10a of the Environmental Impact Assessment Directive (85/337/EEC) which provides:

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concern:
>
> (a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires of a precondition,
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
> ...
> What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2),[2] shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article."

44. Secondly, Pill LJ held that "normally, participation in the planning process which led to the decision sought to be challenged is required. What is sufficient participation will depend on the opportunities available and the steps taken". However, "there may be situations in which failure to participate is not a bar". A further factor to be considered "is the nature and weight of the person's substantive interest and the extent to which it is prejudiced". The sufficiency of

[2] Article 1(2) provides that non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest under Article 10a.

the interest "is to be assessed objectively" and "there is a difference between feeling aggrieved and being aggrieved". Moreover "what might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under section 288".

45. Further, Pill L.J. noted that "the participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person's interest if he has not participated in the planning procedures". As he explained at [55], where an applicant's interest is said to derive from a loss of amenity it will be necessary for that interest to be established as a matter of fact at inquiry because the court hearing the s.288 application is in no position to assess the extent of the applicant's alleged loss:

> "Moreover, the absence of representations before or at the Inquiry about the loss of amenity at his property, either personally or by [the Waterloo Community Development Group], deprived [the developer] and the local planning authority of the opportunity to test the extent of the alleged loss and to call evidence in response. That being so, the inspector, the fact-finding tribunal, was not in a position to assess the extent of the loss and whether it amounts to a sufficient interest. This court cannot make good that deficiency."

46. Finally, "while recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required, and the interest relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings". Pill LJ cited and approved of the following comments of Advocate General Kokott in Case C-427/07 ***Commission v Ireland*** (16 July 2009):

> "However, in order to determine what constitutes a sufficient interest to bring an action, a balance must necessarily be struck. Effective enforcement of the law militates in favour of wide access to the courts. On the other hand, it is possible that many court actions are unnecessary because the law has not been infringed. Unnecessary actions not only burden the courts, but also in some cases adversely affect projects, whose implementation can be delayed. Factors such as an increasing amount of legislation or a growing litigiousness of citizens, but also a change in environmental conditions, can affect the outcome of that balancing exercise. Accordingly, it cannot automatically be inferred from more generous access to the courts that was previously available that a more restrictive approach would be incompatible with the objective of wide access."

47. On the facts, the applicant was held not to be a person aggrieved because his participation in the planning process had been minimal. He was not an objector to the proposal and did not make representations at the inquiry. His mere attendance at parts of the hearing, and his membership of a group which had objected to the proposals at inquiry, were held to be insufficient to confer standing.

48. The decision in ***Ashton*** appears to place much weight on the policy reasons for restricting access to court and only pay lip service to the importance of facilitating access to justice. It will certainly not be the last word on the subject.

Time Limits

49. CPR rule 54.5 states that a judicial review claim must be filed "*promptly and in any event not later than three months of the date when grounds for making the claim first arose*". It is well established that this time limit runs from the date when grounds of challenge arose and not from the date when the claimant first learned of the decision under challenge: see e.g. ***R v. Secretary of State for Transport, ex p Presvac Engineering Ltd*** (1991) 4 Admin L.R. 121.

50. So far as the domestic courts are concerned, the requirement for "promptness" means that a claim brought within three months of the contested decision may nonetheless be out of time. Due to the need for speed and certainty and the relevance of third party interests, it is not uncommon for planning/environmental judicial review claims to fail because of a lack of promptness: see e.g. ***R (Finn-Kelcey) v. Milton Keynes Council*** [2009] Env. L.R. 4.

51. However, in ***R v Hammersmith and Fulham LBC ex p Burkett*** [2001] Env LR 684, Lord Steyn doubted whether the promptness requirement was sufficiently certain to satisfy the ECHR. He made the following observations:

> "53. This case has not turned on the obligation of a judicial review applicant to act 'promptly' under the rules. In these circumstances I confine my observations on this aspect to two brief matters. First, from observations of Laws J in *R v Ceredigion County Council, Ex p McKeown* [1998] 2 PLR1 the inference has sometimes been drawn that the three months limit has by judicial decision been replaced by a 'six weeks rule'. This is a misconception. The legislative three months limit cannot be contracted by a judicial policy decision. Secondly, there is at the very least doubt whether the obligation to apply 'promptly' is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty. Moreover, Craig, Administrative Law, 4th ed, has pointed out, at p 794:
>
> > 'The short time limits may, in a paradoxical sense, increase the amount of litigation against the administration. An individual who believes that the public body has acted ultra vires now has the strongest incentive to seek a judicial resolution of the matter immediately, as opposed to attempting a negotiated solution, quite simply because if the individual forbears from suing he or she may be deemed not to have applied promptly or within the three month time limit'.

52. Similarly Lord Hope stated**:**

> "59. I share my noble and learned friend's doubt as to whether the provision in CPR r 54.5(1) that the claim form must be filed 'promptly' is sufficiently certain to comply with the right to a fair hearing within a reasonable time in article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) and, in that respect, also with European Community law. But, as his point may have some implications for the law and practice of judicial review in Scotland and as the current state of the law and practice in Scotland might be of some interest if rule 54.5(1) were to be reformulated, I should like to add these comments.

> 60. The principle of legality, which covers not only statute but also unwritten law, requires that any law or rule which restricts Convention rights must be formulated with sufficient clarity to enable the citizen to regulate his conduct: *Sunday Times v United Kingdom* (1979) 2 EHRR 245 , 270-271, paras 47, 49. He must be able, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The problem is that the word 'promptly' is imprecise and the rule makes no reference to any criteria by reference to which the question whether that test is satisfied is to be judged."

53. These warnings have now been proved to be accurate. Two recent cases call into question whether it is permissible for a claim to be dismissed during the currency of the three month time limit for a lack of promptness and whether the time limit should begin to run from the date of the impugned decision rather than the date on which the claimant knew/ought to have known of it.

54. First, the European Court of Justice has ruled that the requirement to bring public procurement proceedings "promptly and in any event within three months" offends against the procurement legislation. The decision is in C-406/08 ***Uniplex (UK) Ltd v NHS Business Services Authority*** concerned reg. 47(7)(b) of the Public Contracts Regulations 2006 which applies the usual judicial review timescale to the bringing of proceedings by disappointed tenderers. Directive 89/66 requires effective review of procurement decisions. The decision clearly has important implications for applications for judicial review generally, at least where European Union law is concerned, as with Environmental Impact Assessment.

55. The ECJ held that:

> "Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly."

56. This was because:

(1) the effectiveness of the public procurement regime can only be realised if the periods for bringing proceedings start to run from the date when the claimant knew, or ought to have known, of the alleged infringement; and

(2) the ability of the Court to dismiss a claim brought within 3 months on the basis that it was not brought *'promptly'* was contrary to the principle of certainty, which is enshrined in EU law.

57. The ECJ's reliance on general principles of EU law (effectiveness and legal certainty) in reaching these conclusions suggested that it might well take the same approach to CPR r 54.5 in the context of planning/environmental judicial review claims involving directly effective EU law

such as the EIA directive.

58. Should the decision in ***Uniplex*** spill-over into judicial review it is important to note the restrictive way in which ***Uniplex*** has been applied in the public procurement context. The leading case is ***Sita UK Limited v Greater Manchester Waste Disposal Authority*** [2011] EWCA Civ 156 which establishes four key points:

(1) The court should exercise its discretion so as to ensure that time runs for three months starting with the date on which the claimant knew, or ought to have known, of the alleged infringement;

(2) time starts running when the claimant has knowledge of the infringement: it is not necessary for him to have knowledge that loss or damage has been caused;

(3) the claimant need only know the details of the infringement in the "broad sense" for time to start to run;

(4) the court retains a discretion under the Public Contracts Regulations 2006 to extend time beyond the 3 month time limit.

59. Thus even if the judicial review time limits require modification so that the time limit starts from the date of knowledge, or presumed knowledge, claimants will still need to act swiftly because ***Sita*** suggests that relatively little knowledge of the infringement will be required to start the clock.

60. The second important development in relation to time limits and delay occurred in September 2010 when a similar position was taken by the Aarhus Convention Compliance Committee in its draft findings in respect of the Port of Tyne communication. At paras. 136-137, the Committee observed that:[3]

> "136. The Committee finds that the three months requirement specified in Civil Procedure Rule 54.5(1) is not as such problematic under the Convention, also in comparison with the time limits applicable in other Parties to the Convention. However, the Committee considers that the courts in E&W have considerable discretion in reducing the time limits by interpreting the requirement under the same provision that an application for a judicial review be filed 'promptly' (see paragraphs 111-114). This may result in a claim for judicial review not being lodged promptly even if brought within the three months period. The Committee also considers that the courts in E&W, in exercising their judicial discretion, apply various moments at which a time may start to run, depending on the circumstances of the case (see paragraph 115). The justification for discretion regarding time limits for judicial review, the Party concerned submits, is constituted by the public interest considerations

[3] See further http://www.unece.org/env/pp/compliance/C2008-33/DRF/C33DraftFindings.pdf.

> which generally are at stake in such cases. While the Committee accepts that a balance needs to be assured between the interests at stake, it also considers that this approach entails significant uncertainty for the claimant. The Committee finds that in the interest of fairness and legal certainty it is necessary to (i) set a clear minimum time limit within which a claim should be brought, and (ii) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.
>
> 137. As was pointed out with regard to the costs of procedures (see paragraph 31 above), the Party concerned cannot rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications meet the requirements of article 9, paragraph 4. On the contrary, reliance on such discretion has resulted in inadequate implementation of article 9, paragraph 4. The Committee finds that by failing to establish a clear minimum time limit within which a claim may be brought and to set a clear and consistent point at which time starts to run, i.e. the date on which a claimant knew, or ought to have known of the act, or omission, at stake, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable."

61. It can be confidently predicted that it will not be long before these decisions are be relied upon by a claimant in High Court judicial review proceedings when faced with an assertion by the defendant that his claim was not brought promptly.

62. Nevertheless, there is no indication that the courts are taking a more relaxed approach to environmental challenges that are brought out of time. In ***R(Waste Recycling Group Ltd) v Cumbria CC*** [2011] EWHC 288 (Admin), where a claim for judicial review of a decision to grant planning permission for a waste transfer facility was renewed outside the 3-month period for challenge, the court refused to extend time, even though there had been an arguable breach of the EIA Regulations in failing to subject the proposal to EIA. The Court did not consider that the breach led to any harm to the public interest. Moreover, the Court gave particular weight to the fact that granting permission to renew out of time would cause substantial prejudice to the developer, who had started work on the site and had paid a substantial amount for steelwork on the basis that the challenge had not been renewed.

Costs, access to environmental justice and PCOs

63. This past year has produced several extremely important judgments concerning PCOs in planning and environmental cases. To recap the basic position, it is for the court, in its discretion, to decide whether it is fair and just to make a PCO in the light of the following considerations articulated by this Court in ***R(Corner House Research) v Secretary of State for Trade and Industry*** [2005] 1 WLR 2600:

(1) The issues raised are of general public importance;

(2) The public interest requires that those issues should be resolved;

(3) The applicant has no private interest in the outcome of the case;

(4) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and

(5) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

64. Previous LGG updates have considered post-Corner House decisions. However, the question of the interaction of the Aarhus principles and PCOs came before the Court of Appeal in ***R (Garner) v Elmbridge Borough Council*** [2010] EWCA Civ 1006; [2011] 1 Costs L.R. 48 - which concerned a judicial review challenge to the grant of permission for development opposite Hampton Court Palace (which recently failed - [2011] EWHC 86 (Admin)). The claimant was not a local resident, but he had a long-standing connection with the Palace, having worked for Historic Royal Palaces and objected to earlier versions of the approved development. He was refused a PCO by Nichol J at first instance because (i) the issues were not of general public importance; and (ii) Mr Garner had not provided any evidence of his financial resources and it was therefore impossible to conclude whether it would be fair and just to make a PCO.

65. The Court of Appeal allowed Mr Garner's appeal and modified the ***Corner House*** requirements in cases involving the EIA Directive. This was necessary because of Article 10a of the EIA Directive which gives effect to the Aarhus Convention. Article 10a provides that:

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> (a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
>
> Member States shall determine at what stage the decisions, acts or omissions may be

challenged.

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

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

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

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

66. Sullivan LJ held that:

(1) The ***Corner House*** principles were settled, but the Court of Appeal had not had to consider whether those principles complied with the requirements of Article 10a [32];

(2) The EIA directive was directly effective and could require modification of the costs rules in English law [32];

(3) the impugned planning permission was for EIA development, therefore Article 10a was applicable. Accordingly it was necessary to modify the ***Corner House*** principles, but only in so far as necessary to secure compliance with the Directive [33];

(4) the requirement to show that the case was one of general public importance, or that the public interest required resolution of the issue, was not compatible with the Aarhus Convention or the Directive because these were based on the premise that it was in the public interest that there should be effective public participation in cases involving environmental impact assessment [40];

(5) the case raised an important point of principle, namely whether an objective or subjective test should be applied when determining whether or not the procedure was prohibitively expensive (i.e. whether the court should decide by reference to the costs that an "ordinary" member of the public would be able to pay, or by reference to the means of the particular claimant –or a combination of the two). Sullivan LJ did not decide what the precise test should be, but he held that Nichol J had been wrong to apply a purely subjective test because this would frustrate the intention of the directive [46]. Moreover, a purely subjective test requiring the claimant to disclose publicly his personal financial circumstances might have a chilling effect on the willingness of ordinary members of the public to challenge environmental decisions [51]-[52];

(6) the costs in the present case of £60,000 plus VAT would be prohibitively expensive because they would deter most ordinary members of the public given that they were twice the gross national average wage of £25,500 pa [50];

(7) a claimant wishing to obtain a PCO cannot have it both ways and expect not to pay costs if he loses and yet have unlimited recovery should he win [53]. A reciprocal costs would not necessarily be inconsistent with Article 10a, but whether to impose one should be decided on a case-by-case basis [54].

67. The effect of the Court of Appeal's decision in ***Garner*** is to modify the ***Corner House*** conditions when considering whether to make a PCO in environmental cases where Article 10a of Directive 85/337/EEC is engaged by:

(1) disapplying the requirement to show that the issues raised are of general public importance and/or that the public interest requires that those issues should be resolved; and

(2) modifying the requirement to have regard to the financial resources of the applicant and respondent(s) and to the amount of costs that are likely to be involved when considering whether it is fair and just to make the order by applying a test which is not purely subjective.

68. However, these modifications to the ***Corner House*** principles were made "... only in so far as it is necessary to secure such compliance [with the directive]": ***Garner***, at [33]. It appears (for the present) that if Article 10a is not engaged the ***Corner House*** conditions should be applied in their unmodified form.

69. In non-EU cases, the rules appear to remain those in Corner House as explained and modified by successive Court of Appeal judgments, subject to any change in the Rules of Court regarding costs: see ***R. (on the application of Compton) v Wiltshire Primary Care Trust*** [2009] 1 W.L.R. 1436; ***R (on the application of Buglife) v Thurrock Thames Gateway Development Corp*** [2009] Env. L.R. 18; ***Morgan v Hinton Organics (Wessex) Ltd*** [2009] Env. L.R. 30. In ***Morgan***, Carnwath LJ stated at [13] –

> "33 Since the grant of permission in this case, there have been two further judgments of this court dealing with the issue of protective costs orders in public interest cases: ***R. (on the application of Compton) v Wiltshire Primary Care Trust*** ... ; **R. (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp** ... . In both, reference was made to the Kay and Sullivan reports, and to their comments on the Aarhus Convention. The latter, as an environmental case, is more directly relevant to the scope of the convention. However, the Master of the Rolls (in the judgment of the court) agreed with Waller L.J. in ***Compton*** that there should be,
>
> > "…no difference in principle between the approach to PCOs in cases which raise environmental issues and the approach in cases which raise other serious issues and vice

versa " ([17]).

He also indicated that the principles stated in Corner House were to be regarded as binding on the court, and were to be applied "as explained by Waller LJ and *641 Smith LJ" ([19]). We take the last words to be a reference to the comments of Waller and Smith L.JJ. respectively that the ***Corner House*** guidelines were "not… to be read as statutory provisions, nor to be read in an over-restrictive way" (***Compton*** at [23]); and were "not part of the statute and… should not be read as if they were" ([74]). These comments reflect the familiar principle that:

> "As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule." (per Lord Lloyd of Berwick, ***Bolton MDC v Secretary of State for the Environment*** [1995] 1 W.L.R. 1176 at 1178; cited in ***Corner House*** at [27])."

70. ***Garner*** was followed by Wyn Williams J.'s decision in ***R(Coedbach Action Group) v Secretary of State for Climate Change and Energy*** [2010] EWHC 2312 (an appeal was heard on 29 November 2010), which clarifies the scope of the decision in ***Garner***. The claimant (CAT) was a private limited company with 26 members set up in order to object to 2 biomass generating stations that were proposed to be built in Carmarthenshire. At the inquiry for one of the biomass generating stations counsel for the developer referred in his opening speech to a decision of the Secretary of State granting consent under s.36 of the Electricity Act 1989 for a biomass generating station in Avonmouth. The Avonmouth decision was made on the basis that it was not necessary to consider the sustainability of biomass when granting consent. CAT sought to challenge the Avonmouth decision because of a fear that it would be a precedent and a material consideration in the appeals with which it was concerned. It also made an application for a PCO.

71. Wyn Williams J refused the application and concluded that the claimant did not have a sufficient interest to seek a judicial review because (i) it had not objected to, nor participated in the Avonmouth consent procedure; (ii) its aims and objectives were to protect the environment in the Carmarthenshire area; (iii) its sole purpose in challenging the Avonmouth decision was to prevent it being a material consideration in the planning appeals with which CAT was concerned; and (iv) CAT could challenge the Carmarthenshire decisions pursuant to s.288 TCPA 1990 if they were flawed.

72. In relation to the PCO he held that:

(1) The EIA Directive does not confer any rights of wide access to justice on every member of the public, but only those who have a sufficient interest or maintain an impairment of a right [12];

(2) since the claimant did not have a sufficient interest the EIA directive was not relevant to the PCO application [33];

(3) the proceedings were not prohibitively expensive. The total likely costs were approximately £70,000 which would not be prohibitively expensive either for a limited company, or for the members of the company if the costs liability were apportioned between them (£3,000 per head) [36-[37];

(4) in any event, a PCA was unnecessary because the claimant was a private limited company. As the Sullivan report on access to justice pointed out, PCOs and incorporation as a company are alternative means of facilitating economic access to justice [39]-[40].

73. An application for permission to appeal was refused on 29 November by Carnwath L.J. One interesting issue which the claimant sought to raise at the 11th hour was whether it was an NGO promoting environmental protection –and hence deemed to have standing automatically for any environmental challenge. There is no definition of an NGO in English law, let alone and NGO promoting environmental protection, but the EU Commission's *Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters* (COM 2003/0624 final) is instructive. The proposed directive would provide a right to review of procedural or substantive breaches of EU environmental law by public authorities. The standing of environmental interest groups is a crucial aspect of the proposal and the Commission proposes to implement the Aarhus Convention right of access for NGOs by using the concept of "qualified entities". Article 5 of the proposed directive deals with the standing of qualified entities:

> "**Article 5 Legal standing of qualified entities**
>
> 1. Member States shall ensure that qualified entities recognised in accordance with Article 9 have access to environmental proceedings, including interim relief, without having a sufficient interest or maintaining the impairment of a right, **if the matter of review in respect of which an action is brought is covered specifically by the statutory activities of the qualified entity and the review falls within the specific geographical area of activities of that entity**.
>
> 2. A qualified entity recognised in accordance with Article 9 in one Member State shall be entitled to submit a request for internal review in another Member State under the conditions of paragraph 1.
>
> 3. Applications for interim relief measures shall not be subject to compliance with the procedure laid down in Article 6. (emphasis added)"

74. Article 8 of the proposed Directive sets out 4 criteria for the recognition of qualified entities which are considered to be compliant with the above Aarhus Convention guidance:

> "**Article 8 Criteria for recognition of qualified entities**
>
> In order to be recognised as a qualified entity, an international, national, regional or local association, organisation or group shall comply with the following criteria:
>
> (a) it must be an independent and non-profit-making legal person, which has the objective to protect the environment;
>
> (b) it must have an organisational structure which enables it to ensure the adequate

> pursuit of its statutory objectives;
>
> (c) it must have been legally constituted and worked actively for environmental protection, in conformity with its statutes, for a period to be fixed by the Member State in which is constituted, but not exceeding three years;
>
> (d) it must have its annual statement of accounts certified by a registered auditor for a period to be fixed by each Member State, in accordance with provisions set out by virtue of paragraph 1 (c)."

75. In the continuing ***Edwards*** litigation, in ***R (Edwards) v Environment Agency & Other***s [2011] 1 W.L.R. 79, the Supreme Court considered a decision of the Supreme Court Costs Officers relating to the costs award in the main action ([2008] 1 WLR 1587) and notwithstanding the refusal of a PCO at the time, permission to appeal was granted by the House of Lords.

76. The claimant lost her case in the House of Lords and was ordered to pay the respondent's costs. After a hearing on 4 December 2009, Registrar Di Mambro and Master O'Hare determined 2 issues that had arisen during the detailed assessment of costs to be paid by the claimant in relation to Articles 10a of the EIA Directive and 15a of the IPPC Directive (which give effect to the Aarhus Convention).[4] The preliminary issues were:

(1) where a costs order has to be made, whether the court assessing those costs has any jurisdiction to implement the EIA/IPPC Directives; and

(2) if so, whether in the particular circumstances of the case, the costs officers should implement the directives.

77. In relation to the first issue the Costs Officers held that compliance with the directives was a relevant factor to take into account on the detailed assessment of costs in cases to which the directives applied, unless the court making the costs order had already taken them into account when making that order ([13]). Accordingly, in deciding what costs were reasonable for a party to pay it was appropriate to disallow any costs that the Costs Officers considered were prohibitively expensive ([17]).

78. Since there was no definitive test for what was prohibitively expensive, they adopted the test proposed in the Sullivan Report (which was updated in August 2010) and explained the assessment to be made in these terms:

> "19. That seems to us to require us to start by making an objective assessment of what costs are reasonable costs. However, any allowance or disallowance we make must be made in the light of all the circumstances. We presently take the view that we should also have regard to the following:-
>
> the financial resources of both parties;
>
> their conduct in connection with the appeal;

[4] The Environment Agency claimed costs of £55,810 ad the Secretary of State claimed £32,290.

the fact that the threat of an adverse costs order did not in fact prohibit the appeal;

the fact that a request to waive security money was refused and security was in fact provided;

the amount raised and paid for the Appellant's own costs."

79. The Costs Officers deferred assessment of what costs the claimant should pay pending an appeal, but they did say at [25] that "whilst it is difficult to imagine circumstances in which it would be appropriate for us to allow less than £25,000 if the Respondents' costs would otherwise reasonably exceed that sum, it is not in theory impossible that we should do so".

80. The Supreme Court, while holding that its costs officers had no jurisdiction to sets costs at nil, held that the issues were a matter for the Supreme Court itself and referred to the ECJ the question of what was meant by costs being "prohibitively expensive". Lord Hope DPSC considered the question of whether this issue should be determined on a subjective or objective basis and continued:

> "31 The importance that is to be attached to Sullivan LJ's observations in ***R (Garner) v Elmbridge Borough Council*** gathers strength when they are viewed in the light of the proposal in para 4.5 of Chapter 30 of the Jackson Review of Civil Litigation Costs (December 2009) as to environmental judicial review cases that the costs ordered against the claimant should not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, and the entirely different proposal in para 30 of the Update Report of the Sullivan Working Group (August 2010) that an unsuccessful claimant in a claim for judicial review should not be ordered to pay the costs of any other party other than where the claimant has acted unreasonably in bringing or conducting the proceedings. They have to be viewed too in the light of the conclusion of the Aarhus Convention Compliance Committee which was communicated by letter dated 18 October 2010 that, in legal proceedings in the UK within the scope of article 9 of the Convention, the public interest nature of the environmental claims under consideration does not seem to have been given sufficient consideration in the apportioning of costs by the courts and that despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements of the Convention: see paras 134–135. It is clear that the test which the court must apply to ensure that the proceedings are not prohibitively expensive remains in a state of uncertainty. The balance seems to lie in favour of the objective approach, but this has yet to be finally determined.
>
> 32 It is unclear too whether a different approach is permissible at the stage of a second appeal from that which requires to be taken at first instance. The question in ***R (Garner) v Elmbridge Borough Council*** was about the approach that was required to be taken at first instance. In this case Mrs Pallikaropoulos did not appear at first instance. She was given a protective costs order in the Court of Appeal, where her appeal was unsuccessful, because her liability in costs was capped at £2,000. By the stage when her appeal reached the House of Lords the question which she wished to raise had already been considered twice in the courts below without the second claimant having been deterred from seeking judicial review on grounds of expense. It is questionable whether the public interest is best served if a limit must be set on the amount of the costs payable to the successful party in the event of a second appeal as this will inevitably mean that, if the public authority wins, some of the costs reasonably incurred by it will not be recoverable.
>
> 33 It is plain from the reasons that were given by the House of Lords for its decision to refuse

> a protective costs order on 22 March 2007 that these difficult issues were not addressed at that stage. It took a purely subjective approach to the question whether a case for such an order had been made. No reasons were given for the costs order of 18 July 2008. But it is to be inferred from its terms that the House was not satisfied that a case had been made out for any modification of its approach. It must be concluded that here too the House took an approach to this issue which was a purely subjective one. It is to say the least questionable whether in taking this approach, which has now been disapproved by the Court of Appeal in ***R (Garner) v Elmbridge Borough Council*****,** it fulfilled its obligations under the Directives."

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

82. On 8 March 2011, the ECJ gave judgment in ***Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*** [C-240/09], a case in which the Ministry for the Environment in Slovakia had refused a request by an environmental association, established in accordance with Slovak law, to be a party to administrative proceedings relating to certain derogations from the Habitats Directive. An administrative appeal brought by the association against the refusal had also failed. The association contended that this was in breach of Article 9(3) of the Aarhus Convention, which provides:

> "3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

83. The ECJ was asked to give a preliminary ruling on whether *inter alia* the provisions of Article 9(3) had direct effect in EU law. The ECJ held that it did not, but added the following:

> "50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.
>
> 51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271,

paragraph 44, and Impact, paragraph 54)."

84. This appears to create a curious situation where the Aarhus Convention, though not directly effective, should essentially be used to construe national procedural provisions as far as possible to give effect to Aarhus principles, in the manner of the principle in ***Marleasing*** Case C-106/89 [1992] 1 C.M.L.R. 30. Whilst this was applied in the specific context of the Habitats Directive, there is no reason in principle why it should not apply in other EU environmental contexts and in respect of other provisions of the Aarhus Convention.

Agricultural law[5]

85. Two recent cases in this area which impact upon Common Agricultural Policy (**"CAP"**) subsidy payments made to farmers in the UK should be highlighted. The first is a decision of the Scottish Land Court in February: ***Oosterhof v Scottish Ministers*** (Application RN SLC 69/10). It concerned the application of penalties for failure to respect Statutory Management Requirements and Good Agricultural and Environmental Conditions. These so-called 'cross-compliance requirements' must be met by a farmer in order to receive CAP Single and Rural Development payments.

86. The Scottish Government's position, influenced by the findings of the European Commission audit of Wales in 2007, was that the failure to report the death of an animal was a breach of a 'permanent' nature. However, the Land Court preferred to focus on the effects of the breach, and found that as it is possible to correct the register, the breach should be classed as 'rectifiable' instead. Whilst disagreeing with the implications of the judgement, the Scottish Government has not appealed it.

87. The decision is of considerable practical significance. The effect of classing the breach as 'permanent' was that 3% of the overall amount of annual CAP subsidy due to the farmer would be lost. However, the Land Court's ruling led to a reduction of only 1%. There is understood to be some concern among UK competent authorities that EC auditors will consider a reduction of 1% to be too lenient, such that the UK could face disallowance of its CAP budget after a future audit. However, the competing risk is that if competent authorities continue to classify such breaches as 'permanent' in nature, resulting in the higher 3% penalty, multiple applications for judicial review seem highly likely.

88. The judgement of the Land Court may only be of persuasive value in other UK jurisdictions, but understandably, there is little appetite for seeing UK competent authorities acting differently

[5] I am most grateful to Chrishan Kamalan, Directorate of Legal Services, Welsh Government, for his assistance with this section.

on this issue. The position is not satisfactory, not least because the ECJ is unlikely to give a definitive ruling on this issue soon: the Land Court showed no inclination to refer the matter.

89. The second case of note concerned article 19 of Regulation 795/2004, which provides that errors in applications under the Single Payment Scheme can be corrected by a competent authority if they are "obvious". In ***Peter Strawson Ltd v Secretary of State for Environment, Food & Rural Affairs*** [2010] EWHC 3286 (Admin), it was held that the error made by the claimant farmer was obvious, notwithstanding the strict approach to be taken in the interests of preventing and reducing fraud. Judge Mackie Q.C., sitting as a Deputy Judge of the High Court, considered that the strictness of the approach did not necessarily require that an error had to be obvious on the face of the application itself, as each case had to be considered on its own facts.

90. The position of the UK competent authorities has consistently been that an error should be obvious on the face of the application itself if a correction is to be permissible. It is thought that EC auditors are unlikely to agree with the liberal approach of the ***Strawson*** case, but again, it will be for the ECJ to give a definitive ruling if the opportunity arises. In the meantime, UK competent authorities are stuck between a rock and a hard place: the unquestioning application of ***Strawson*** is unlikely to find favour with EC auditors, but anything other than that would almost certainly find the authorities back in the courts. Further litigation on this issue in the next year is highly likely.

Gwion Lewis

Landmark Chambers

19 September 2011