Developments in environmental law in 2012-2013

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Overview

1. This paper considers material developments in environmental law in 2012 and 2013. Topics covered include: nuisance; environmental permitting; environmental judicial review; environmental impact assessment; habitats; strategic environmental assessment; transfrontier shipment of waste; inspectors, expert evidence and reasons; references to the European Court as well as a digest of other cases.

Nuisance

2. The most significant case of the year was the Court of Appeal’s decision in Barr v Biffa [2012] EWCA Civ 312 in which Carnwath LJ (as he was then) made clear that nuisance is to be assessed according to the traditional 19th century principles (no absolute standard; assess by the character of neighbourhood) as opposed to a new 21st century approach whereby nuisance is considered in the context of statutory regulation of the site. In addition the Judge’s assessment that an environmental permit is not strategic enough to change the character of the area is noteworthy.

3. Whilst the legal principles may be clearer there are still practical problems associated with resolving group litigation cost effectively. Technical modelling appears to be assuming a greater importance in this respect. Anslow v Norton [2012] EWHC 2610 was the first case post Barr and Biffa. The judgment marks a new chapter in the story on quantum of damage awards by providing for a range of awards assessed according to odour modelling which had been done to establish the likely odour impact on a range of Claimants.

4. The decision of the Supreme Court in Coventry v Lawrence [2012] 1 WLR 2127 is awaited and could herald another significant development in nuisance law about the relevance of planning permission for an activity which is alleged to give rise to a nuisance.

5. In the parallel field of statutory nuisance, challenges continue to the drafting of abatement notices despite the plethora of previous cases, and the Administrative Court
in *R (Fullers Farming Limited) v. Milton Keynes Council* [2012] Env LR 17 is another in the line which rejects legalistic points of challenge (in this case the failure to specify whether the odour nuisance in question was prejudicial to health or simply a nuisance).

**Environmental permitting**

6. The case of *London Borough of Newham v John Knights (ABP) Limited* is an interesting case study in enforcement under the Environmental Permitting Regulations. The company were prosecuted for alleged breaches of an environmental permit and in particular the odour conditions. The company ran an abuse of process argument that a Planning Inspector and not the Criminal Courts should consider complex matters like BAT for odour control. The abuse argument was rejected. The company was convicted and fined £120,000, plus £68,000 costs, plus compensation orders of £250 each to affected residents. This is the largest fine yet obtained by a local authority under the environmental permitting regime (the second largest being the £75,000 imposed on the same company in February 2011).

7. In *R (oao European Metal Recycling Ltd) v Environment Agency* [2012] EWHC 2361 (Admin) the Administrative Court quashed a suspension notice on the basis the Environment Agency failed to specify in the notice the steps by which the operator was to eliminate a risk of serious pollution by noise.

**Environmental judicial review**

*Intensity of review*

8. The courts have tended to adopt a relatively “hands off” deferential approach to environmental decision makers like the Environment Agency and Natural England, interfering only where the decision-maker can be shown to have acted irrationally in the traditional *Wednesbury* sense. However Lang J in *R (Manchester Ship Canal Co Ltd & Peel Holdings Ltd) v Environment Agency* [2012] EWHC 1643 took an interventionist approach to the interpretation of the Environment Agency’s flood defence policies. The Environment Agency has permission to appeal on the basis the Court’s approach was too interventionist.

9. In *Bowen West v Sec of State* [2012] EWCA Civ 321 Laws LJ declined to rule on an argument that the Courts should adopt a more intensive scrutiny to questions of
European law which often arise in environmental judicial review. Nonetheless the point remains pertinent given the prevalence of EU law in environmental law.

Discretion

10. The case of Berkeley v Sec of State remains the high point for Claimants seeking to argue that the Court has no discretion not to quash a defective environmental decision. Lord Carnwath has however been mounting a steady campaign to limit its boundaries, the latest expression of which is in Walton v The Scottish Ministers [2012] UKSC 44 at [124]-[140]. The Courts will scrutinise the nature of the breach and the statutory context in deciding how to exercise their discretion.

Promptness

11. It has been a central requirement of Judicial Review that a claim should be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose. Following C-406/08 Uniplex; R. (Buglife) v Medway Council and R (U & Partners (East Anglia) Ltd) v The Broads Authority, it is clear that promptness is disapplied in environmental cases which raise EU law. However, the Court of Appeal’s decision in Berky v Newport City Council [2012] EWCA Civ 378 is now the leading case in the domestic context albeit that all the observations on promptness were strictly obiter and each Judge took a different view on whether and how Uniplex applied in the purely domestic context. It remains to be seen how long it remains the position that there are different timing requirements for making a claim according to whether the claim raises matters of EU law or not.

Costs in discontinued and compromised claims

12. The default position had been that in the absence of a clear view as to how the litigation would have resolved itself there would be no order to costs (the Boxall guidance). However the number of instances in subsequent cases in which claimants were deprived of their costs led some to question the default rule. The more nuanced position is apparent in Court of Appeal’s decision in M v London Borough of Croydon [2012] EWCA Civ 595 in which the Court emphasised that the general rule is that the successful party is entitled to his costs, so the defendant would need to justify another order but also emphasising that the Court is not in a good position to
ascertain who might have won and on what terms where a matter settles as opposed to where a case is heard.

Costs protection

13. Costs and funding can raise significant practical obstacles for claimants who are often interest groups or local residents. As a consequence, environmental judicial review is leading the way in developing jurisprudence on costs protection, drive in large part by the Aarhus Convention. The Courts have also led the way and it is now difficult for defendants in environmental judicial reviews to resist some form of PCO. The issue is often the terms of the Protective Costs Order. The main issue which has occupied the domestic Courts in recent times is whether the Aarhus requirement that litigation is not “prohibitively expensive” is to be decided on an 'objective' basis (by reference to the average citizen) or on a 'subjective' basis (ie the Claimant in question). The position is uncertain.

14. Further developments in costs jurisprudence are likely. The European Commission has commenced infraction proceedings against UK in respect of costs in environmental JR cases under the PP Directive. The Supreme Court referred the question of costs to the European Court in the case of C-260/11 Edwards v Environment Agency and judgment is awaited.

15. Meanwhile, the Ministry of Justice has proposed a costs regime for judicial review cases falling within the scope of the Aarhus Convention and the EU Public Participation Directive. A PCO would limit the liability of a claimant to pay a defendant’s costs to £5,000, and £10,000 in the case of an organisation. It would limit the liability of a defendant to pay the claimant’s costs to £35,000.

Consultation

16. R (Friends of the Earth & Others) v Secretary of State for Energy and Climate Change [2012] EWCA Civ 28, is authority for the proposition that, exceptionally, a challenge to a potential decision can be brought during a consultation period on the decision. The Ministry of Justice Consultation Paper entitled “Judicial Review Proposals for Reform” Ministry of Justice, Consultation Paper CP25/2012 is arousing a great deal of concern among environmental groups.

References to the European Court
17. Our domestic judiciary are reluctant to refer cases to the European Court. Despite the prevalence of EU law in environmental law only 10 cases were referred from 2007 to 2012. Two are currently pending before the European Court – *R (Edwards) v Environment Agency* and *Fish Legal v The Information Commissioner, United Utilities, Yorkshire Water and Southern Water* which was referred in 2012.

18. Where given, the judiciary’s reasons for refusing an application to refer demonstrate a variety of reactions ranging from irritation to rewriting the constitutional relationship between the EU and domestic Courts (Lord Brown in *Morge* characterising the European Court as an unhelpful assistant to the Supreme Court). During the course of 2012 (in the face of repeated applications for a reference from Richard Buxton Solicitors) there have however been indications that the Judiciary consider it prudent (maybe to avoid a *Kobler v Austria* damages claim) to better explain their reasons for refusing references. The reasons given by the Supreme Court in *Bowen West* for refusing the application for a reference are fulsome in comparison with earlier cases.

**Administrative decision making and expert evidence and reasons**

19. Inspectors, who are experts in their own right, are finding it tricky to know how much they need to explain the view they take of expert evidence before them. The Courts also appear to be finding it difficult. In *Macarthur v Secretary of State for Communities and Local Government* [2013] EWHC 3 (Admin) Lang J made clear that she thought the Court of Appeal in *RWE v N Power* had got it wrong with the consequence that ‘an unsuccessful party will usually not know, in any detail, why the evidence of an expert has been accepted or rejected by the Inspector and therefore will not be able to discern whether the Inspector has correctly understood and applied the evidence of the expert’. She was however bound to follow the Court of Appeal and did so. It looks like this issue has further to run.

**Transfrontier shipment of waste**

20. *R v Ezeemo [2012] EWCA Crim 2064*, saw the Court of Appeal consider the Transfrontier Shipment of Waste regime¹ for the third time² in 12 months. The Court decisions arose from the large scale high profile prosecutions by the Agency in

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¹ EU Regulation 1013/2006 and UK TFS Regulations (2007)
² The other cases are *KV & Othrs v R* [2011] EWCA Crim 2342 and *R v Ideal Paper Co* [2011] EWCA Crim 3237
relation to the shipping of televisions and paper to Africa and South Korea. Whilst the prosecutions have been hugely expensive for the Agency and the fines low, the Agency will nonetheless be pleased that all defendants pleaded guilty or changed their plea over the course of 18 months as the Court of Appeal successively rejected their defences.

21. In short, the three cases establish the following about the regime: 1) the criminal offence of transporting hazardous waste to a country that is not a member of the OECD is one of strict liability and is not ultra vires the EU parent Regulation or disproportionate. 2) Art 36 of the EU Reg (exports for recovery to non OECD countries is prohibited ) contains 2 simple but key concepts a) waste must be destined for recovery b) export is the action of waste leaving the EU. 3) Waste can be destined for foreign parts long before it gets anywhere near the English/Welsh docks but it is a question of fact to determine when it is ‘destined’ for another country. 4) The breadth of activities caught by the regime is wide – anyone involved in the transport of waste (by road, rail, sea) from point of origin where waste is collected/stored to the point it is delivered to the foreign country. 5) Whether household waste has become paper waste is a question of fact for the jury. There appears to be a de minimis threshold for ‘contamination’ by other materials but this is a question of fact (but the CA thought the EA should produce guidance).

Environmental Impact Assessment

22. EIA is an area that continues to generate a significant proportion of environmental law litigation. This is likely to continue in the near future, although in the medium term it is possible that the volume of case law will be reduced by amendment to the EIA Directive.

Proposed amendment to the EIA Directive

23. The EIA Directive has been in existence for over 25 years and is considered by the European Commission to be in need of a "comprehensive overhaul". On 26 October 2012 the Commission published a draft Directive proposing various amendments to the current Directive (2011/92/EU). The most significant are:

a. Changing the definition of "project" in Art 1 to make it clear that demolition works are included.
b. Amending Art 2(3) to introduce an EIA "one-stop shop" to allow for the coordination of assessment procedures under the EIA Directive and other EU legislation.

c. Amending Art 4 to streamline the screening procedure and to seek to enhance the consistency of Member States' approaches to ensure that EIAs are required only when it is clear that there are significant environmental impacts.

d. Amending Art 5 with a view to reinforcing the quality of information and streamlining the EIA process.

e. Amending Art 6(6) with a view to reinforcing the role of environmental authorities and defining concrete time-frames for the consultation phase on the environmental report.

f. Significant amendment to Art 8 including: (i) the setting of a requirement for a time-frame for the conclusion of the EIA procedure; (ii) a requirement for competent authorities to include in the development consent itself some items substantiating the decision; (iii) mandatory post-completion monitoring, but only for projects that will have significant adverse environmental effects, according to the consultations carried out and the information gathered (including the environmental report); and (iv) a requirement that the competent authority verify that the information of the environmental report is up to date before deciding to grant or refuse development consent.

g. An amendment to Art 9 to include a description of the monitoring arrangements in the information provided to the public when development consent is granted.

h. Various amendments to the Annexes including clarification of and addition to the Annex III criteria.

24. The draft Directive will now be considered by the European Parliament and the Council to be adopted through the co-decision procedure. It is expected to enter into force in March 2014, depending on the progress of the legislative process.
25. In *R (Loader) v SSCLG and others* [2012] 3 CMLR 29 the Court of Appeal gave important guidance on the proper test in screening. It rejected the Appellant’s suggestion that screening was required in all cases where the effect would influence the development consent decision (Pill LJ suggesting at [46] that such an approach would “devalue the entire concept”). In the Court’s view the test to be applied is: “is this project likely to have significant effects on the environment?” The criteria to be applied are those set out in the EIA Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The decision-maker must, however, have regard to the precautionary principle and the degree of uncertainty as to environmental impact at the date of the decision.

**Split projects**

26. Two recent cases concerning splitting are of note. The first is *Bowen-West v SSCLG* [2012] EWCA Civ 321 in which Laws LJ held that the question whether an environmental statement for the deposit of low level radioactive waste should have considered a larger scheme (a future expansion of the landfill in question intended to be achieved by 2026) within the context of “indirect, secondary or cumulative effects” (para.4 of Pt I of Sch.4 to the 1999 Regs) was an issue of fact and judgment. He rejected the Appellant’s contention that the question is one of law and declined to refer the matter to the ECJ.

27. The second is *R (Burridge) v Breckland DC* [2012] EWHC 1102 (Admin) in which HHJ Waksman QC considered the screening opinion requirements of the 1999 Regulations in the context of a renewable energy facility application which had been ‘split’ into two sites. He considered that Regulation 7 required the authority to consider the “application before it” and that the “development in question” referred only to the development in the individual application. His judgment has recently been challenged in the Court of Appeal on the basis that, although his construction accorded with domestic principles of construction, a broader purposive construction of the Regulations focusing on the proper ‘project’ was required under *Marleasing* principles. It is to be hoped that the Court of Appeal’s (hopefully imminent) judgment will give some much needed clarity in this tricky area.

**Screening directions**

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28. With his usual thoroughness, Lindblom J has given guidance on the Secretary of State’s power of direction under Regulation 4(8) of the 1999 Regulations (now replaced by Regulation 4(9) of the 2011 Regulations) in *Threadneedle Property Investments v Southwark LBC* [2013] Env LR 1. The judge emphasised the exceptional nature of the power, exceptional not just in the sense that it was reserved to the SSCLG but also in the sense that he would only use it in an exceptional case. The law in this area is likely to be addressed again in the upcoming Court of Appeal judgment in *Burridge*.

**Concept of ‘consent’**

29. In *Case C-121/11 Pro-Braine ASBL and others v Commune de Braine-le-Chateau* (19 April 2012) the Third Chamber of the ECJ held that a definitive decision relating to the carrying on of operations at an existing landfill site, taken on the basis of a conditioning plan, pursuant to Article 14(b) of the Landfill Directive (1999/31), does not constitute a ‘consent’ within the meaning of Article 1(2) of the EIA Directive unless that decision authorises a change to or extension of that installation or site, through works or interventions involving alterations to its physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to the EIA Directive and thus constitute a ‘project’ within the meaning of Article 1(2) of that Directive.

**Definition of ‘development’**

30. In the important case of *R (Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council* [2013] Env LR 8 Lang J found that the Council had erred in law in taking too narrow an approach to the meaning of ‘development’ in relation to some poultry units. On the basis of that error, the Council had not addressed itself to the question of whether the units fell within the scope of the EIA Directive or Regulations. Lang J found that the units were capable of coming under ‘intensive livestock installation’ under the Regulations and, as such, should have been considered by the Council for an EIA. Of particular interest in this case is Lang J’s view (see [113]) that the EIA Directive could only be effectively implemented in the UK if the definition of ‘development’ in section 55 of the TCPA was interpreted broadly so as to include projects which required an EIA under either the Directive or the Regulations.
Consultation

31. In *R (Halebank Parish Council) v Halton Borough Council* [2012] EWHC 1889 (Admin) HHJ Gilbart QC found that a decision not to extend a consultation period on an environmental statement amounted to a breach of Article 6 of the EIA Directive and a legitimate expectation the Parish Council had as to the conduct of the consultation process.

The role of inspectors

32. Judge Keyser QC has drawn attention to the limited role of Inspectors under Regulation 9(2) of the 1999 EIA Regulations (now Regulation 12(2) of the 2011 Regulations) in *Gregory v Welsh Ministers* [2013] EWHC 63 (Admin). If on a section 78 appeal there is a question as to whether the application is an EIA application: (i) a negative screening opinion from the local planning authority is not conclusive of the issue; and (ii) the Inspector’s role is to ask himself whether the application “may be” an EIA application; if he answers that in the affirmative he must refer the question to the Secretary of State and has no jurisdiction to determine the appeal (except by refusing planning permission) before he receives a screening direction.

Strategic Environmental Assessment

Alternatives

33. The key decision on alternatives in the last twelve months is *Heard v Broadland District Council* [2012] Env LR 23 in which Ouseley J adopted a broad and purposive approach to the issue under Article 5(1) of the SEA Directive and Regulation 12 of the SEA Regulations. He found that there was no express requirement in the directive or regulations for the selection of the preferred option, as distinct from the reasons for the selection of the alternatives, to be considered, but that “a teleological interpretation of the directive, to my mind, requires an outline of the reasons for the selection of a preferred option, if any, even where a number of alternatives are also still being considered” [69]. He also found that there was no express requirement that alternatives be appraised to the same level as the preferred option but he considered that the directive was best interpreted as requiring an equal examination of the alternatives which it is reasonable to select alongside the preferred option.
Another key case is *Cogent Land LLP v Rochford District Council* [2013] 1 P&CR 2 which is a good illustration of the fact that SEA is a process in which defects may be cured. In the *Cogent* case Singh J was inclined to accept that there had been errors in the assessment of alternatives at the preferred options stage. However, he found that an Addendum report which had later been produced was adequate and capable in law of curing any defects which had arisen.

**SEA of local development documents**

35. The scope of the SEA Directive is governed by Art 2 which provides that “*plans and programmes shall mean plans and programmes ... which are subject to preparation and/or adoption by an authority at national, regional or local level... and which are required by legislative, regulatory or administrative provisions*”. The meaning of ‘required’ in this context has been explained by the ECJ in the recent case of *Inter Environment Brussels ASBL and others v Region of Brussels (C-567/10)*. The ECJ rejected an argument that required meant ‘compulsory’ and held that “*plans and programmes whose adoption is regulated by national legislative or regulatory provisions which determines the competent authority adopting them and the procedure for preparing them must be regarded as ‘required’ within the meaning and for the application of Directive 2001/42 and accordingly subject to an assessment on their environmental effects in the circumstances which it lays down.***

36. This definition of ‘required’ was applied by the High Court in *R (Wakil) v Hammersmith and Fulham LBC* [2013] Env LR 3. In that case there was an issue as to whether the document was an SPD or a DPD. Neither sort of document is ‘compulsory’ but both are ‘required’ under the ECJ’s definition. On that basis both come within the definition of ‘plans and programmes’ in Art 2 (and also Regulation 2(1) of the SEA Regulations). On the document at issue in *Wakil* the High Court found that, whether it was an SPD or a DPD, it did fall under the description in Reg 5 of the SEA Regulations and so a determination under Reg 9(1) had been required on whether or not it was likely to have significant environmental effects.

**Scottish roads**

37. In *Walton v The Scottish Ministers* [2012] UKSC 44 the Supreme Court considered a challenge to the Ministers’ decision to authorise a new road. This was a development
consent authorising a project and as such had been subject to EIA. The principle basis for the appeal was an attempt to bring the project within the SEA Directive on the basis that a decision to enlarge the project was a modification of the regional transport strategy, an attempt which was comprehensively rebuffed by Lord Reed at [63]-[70]. For an English audience, the case is of principle interest for Lord Carnwath’s obiter discussion of discretion after Berkeley at [124]-[140] (discussed at para 10 above).

Habitats

Multiple authorities

38. **Cornwall Waste Forum St Denis Branch v SSCLG** [2012] Env LR 34 is an important decision on the allocation of responsibilities under the Habitats regime between the SSCLG and the Environment Agency. The case concerned a planning permission for a waste incinerator which had been granted on appeal following a local inquiry. The planning inspectorate had indicated that the Inspector would consider as part of his remit whether an appropriate assessment under the Habitats Regulations was needed. However, the Inspector had instead accepted the views of the EA, which indicated that it would grant a permit for the scheme as it considered that there could not be any adverse effects, so that appropriate assessment was not required. At first instance the planning permission was quashed, the High Court accepting that C had a legitimate expectation that the SSCLG would address whether an appropriate assessment was required and would act as the competent authority in undertaking it. The SSCLG appealed. Allowing the appeal, Carnwath LJ considered there to be three reasons why the LE argument did not avail CWF: (i) the SSCLG was the relevant competent authority and could not be bound by PINS or the Inspector to an election under Reg 65(2) or to the form of his decision; (ii) the representations made had not been binding; and (iii) the debate about responsibility under the Directive was of no practical significance since whether or not he was decision-maker under the Habitats Directive, he was entitled to rely on expert guidance from EA (and Natural England). It would only be if their guidance was flawed that his decision would be open to challenge. CWF had asserted that it was arguable that EA’s guidance was unlawful but had not challenged it, thus providing no basis for sending the decision back to the SSCLG for reconsideration.

IROPI
39. *Elliott v SSCLG* [2013] Env LR 5 concerned a challenge to the proposed “makeover” of Crystal Palace Park. There were five grounds of challenge, the fourth of which concerned bats and raised issues relating to “imperative reasons of overriding public interest” for the purposes of Regulation 62 of the Habitats Regulations. The Inspector had raised an issue as to whether the planned makeover might constitute IROPI but had not decided the point. The SSCLG did not spell out that he had considered IROPI but Keith J held that he must have done so. The point of wider interest in the case concerns Keith J’s assessment of the Claimant’s contention that the need to raise funds for a development could not as a matter of Community law constitute exceptional circumstances forming the basis of an IROPI. Keith J noted the passage in *Solvay v Region Wallonne* (C-182/10) where the ECJ stated at [76]-[77] that “[w]orks intended for the location or expansion of an undertaking [will] only in exceptional circumstances” satisfy the condition that the development “must be of such importance that it can be weighed up against [the] directive’s objective of the conservation of natural habitats ...”. But he went on to find that “you cannot get from that that if a particular feature of a set of proposals was included only because it would provide some of the funding for the development as a whole, and if it happened to be that aspect of the development which would have an impact on the conservation of natural habitats, there cannot have been imperative reasons of overriding public interest for permitting the development”. The Claimant therefore failed on the habitats ground and also failed on the other grounds. There is an outstanding appeal to the Court of Appeal including on the IROPI issue.

**Other Areas - Case Digest**

40. *Freedom of Information: Birkett v DEFRA* [2011] EWCA Civ 1606, a public authority that holds environmental information for the purposes of the Environmental Information Regulations 2004, and on a request for information made pursuant to the Regulations refuses to give disclosure and states its reliance upon one of the permitted exceptions in accordance with Reg.14(3), may then rely as of right upon a different exception or exceptions in proceedings before the Information Commissioner and/or the First-Tier Tribunal (General Regulatory Chamber) (Information Rights) so long as the new or additional exceptions are set out within the notice of appeal, or response to a notice of appeal.
41. **IPPC directive** - the meaning of sows in subheading 6.6(c) of Annex 1 *Møller v. Haderslev Kommune* (Case C-585/10). The expression ‘places for sows’, in subheading 6.6(c) of Annex I to Directive 96/61, has to be interpreted as meaning that it includes places for gilts.

42. **Waste: Scope of duty of care.** The Administrative Court has provided guidance on the scope of the Duty of Care for Waste imposed by virtue of section 34 of the Environmental Protection Act 1990. See *Mountpace Ltd v Haringey London Borough Council* [2012] EWHC 698 (Admin)

43. **Liability of parent for actions of subsidiary** *Chandler v Cape plc* [2012] EWCA Civ 525. In appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary’s employees. Those circumstances include a situation where, as in the present case: (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on it using that superior knowledge for the employee’s protection.

44. **Contaminated Land** The Administrative Court has granted a declaration that a grant of planning permission was unlawful because of failure to address contaminated land issues *R. (on the application of Gawthorpe) v Sedgemoor DC* [2012] EWHC 2020 (Admin)

45. **EU emissions trading and aviation** Case C-366/10, *Air Transport Association of America et al. v. Secretary of State for Energy and Climate Change*, the European Court upheld the validity of the application of EU emissions trading to passenger aircraft. The decision repays careful attention on various fronts, in particular the close analysis of the relevance of international agreements and public international law generally to the approach in considering Directives. In the event, no incompatibility was found between Directive 2008/01 and the international material, in particular the EU/US “Open Skies” Bilateral Agreement signed in Washington DC in 2007. The key point was that the EU ETS scheme was (a) non-discriminatory and (b) was not in the nature of an obligatory levy, duty, tax, fee or charge.
46. **Rylands & Fletcher and fire**: The Court of Appeal has handed down an important judgment considering the application of the rule in *Rylands v Fletcher* to cases involving the escape of fire. See *Mark Stannard (t/a Wyvern Tyres v Gore* [2012] EWCA Civ 1248.

47. **UK in breach of Urban Waste Water Treatment Directive.** The CJEU has found the UK to be in breach of its obligations under the Urban Waste water Directive (91/271). *Commission v United Kingdom* (Case C-301/10)

48. **UK Compliance with the Air Quality Framework Directive** In March 2013 the Supreme Court will hear the case of *R(oao ClientEarth) v Secretary of State for Environment Food and Rural Affairs* (UKSC 2012/0179). The issue arising is whether, as regards areas where compliance with nitrogen dioxide limits set out in Directive 2008/50/EC (the Air Quality Directive) cannot be achieved by 1 January 2010, the Air Quality Directive requires the Respondent to prepare an air quality plan which demonstrates compliance by 1 January 2015.