



## Overview

This month we consider the proposals from the Ministry of Justice for a costs regime in environmental judicial review claims. Other matters of note include the first ever case before the Environment Tribunal, the launch of Historic Environment Law by Richard Harwood and a complaint to the Aarhus Committee about access to justice in relation to nuisance cases.

## Environmental Costs – the Ministry of Justice’s proposals for a costs regime in environmental judicial review claims

The Government has published its response and outline proposals to the consultation on Cost Protection for Litigants in Environmental Judicial Review Claims. As many legal practitioners already it is clear from the responses that the current costs regime creates a chilling effect on potential environmental claimants. At worst, concerns about costs liability could deter up to half of arguable claims from going forward. This highlights the need for a system that ensures all costs, not just the costs of the other side, are not “prohibitively expensive.” It is however arguable that the proposed PCO regime falls short of providing this protection.

The Government’s proposals, which are to be submitted to the Civil Procedure Rule Committee for inclusion in the December 2012 amendments, are:

- The PCO regime will apply from the time the claim form is issued, provided that the claim form states that it is an Aarhus case and provides reasons. If the application for

permission is unsuccessful, liability for the Defendant’s *Mount Cook* costs<sup>1</sup> will be capped at £5,000.

- The recoverable costs under the PCO regime will be fixed at £5,000 for an individual claimant, £10,000 for an organisation and there will be a cross-cap on the Claimant’s recoverable costs of £35,000. These caps will not be subject to challenge or variation. In practice, this is a fixed-costs regime.
- When considering whether to grant permission for the claim to proceed, the Judge will consider what the appropriate level of cap should apply. This matches the proposals by Lord Justice Jackson for appeals in cases that have been subject to a fixed costs regime in the court below.

Less than one third of the 22 consultation responses supported a cap of £5,000. The £10,000 cap for organisations is also a new feature. The government has stated that it considers £5,000 to be a proportionate amount to ask individuals to pay, but this does not take into account any liability for their own lawyers’ fees, especially given the cross-cap of £35,000. The cross-cap will also affect the ability of lawyers to take cases on under a CFA because they run the risk of being unable to recover their full fees and uplift.

The consultation response does not include any proposals for environmental cases which are not brought by way of judicial review but the government does say that it is looking into this issue and may bring separate proposals in the future.

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<sup>1</sup> The costs of the Defendant incurred by filing an acknowledgment of service and summary grounds of opposition.



Potential claimants are still going to be deterred by the likelihood of liability for a significant proportion of their lawyers' fees in complex cases. Arguably, in a case where the claimant wins, the proceedings will now be more expensive because the defendant's contribution to costs is capped. Judicial Review is expensive and a claimant's costs are likely to exceed £35,000 in a significant number of cases. There is also no proposed exception for cases where the defendant unreasonably defends a claim or behaves unreasonably during the course of proceedings causing the claimant to incur further costs than would otherwise be the case. Such protection is available in other fixed costs regimes.

The proposals are unlikely to be received with open arms from those practising in the field. Although the responses were generally in favour of placing PCOs on a statutory footing, the government has not re-visited the suggestion from a number of quarters, including Lord Justice Jackson, that qualified one-way costs shifting provides better protection for litigants. Not surprisingly, the government was warned in the consultation responses that the PCO system is not compliant with Aarhus and a challenge may well be on its way.

**Rose Grogan**

### **First ever case before Environment Tribunal**

The First Tier Tribunal, General Regulatory Chamber (Environment) has decided its first case. The Tribunal was Mr Simon Bird QC. The Appellant, a private individual, appealed against a remediation notice served by the Marine Management Organisation pursuant to s.91 of the Marine and Coastal Access Act 2009. This was the first remediation notice of its kind, and the proceedings the first to come before the Environment Chamber of the Tribunal. Amongst other things, the appeal gave rise to issues under the Habitats

Regulations as the site the subject of the notice lay within and close to European and Ramsar protected sites. The Tribunal was the competent authority for the purposes of Reg.61. The outcome was a highly detailed order by consent, approved by the Tribunal following a Reg.61 screening exercise, which provided for a holistic package of works and dynamic mitigation at the site, all subject to monitoring by the MMO and partner organisations. The Tribunal's specialist experience proved invaluable in achieving and guiding the final order.

**Justine Thornton and James Burton appeared against each other in the case.**

### ***Launch of Historic Environment Law by Richard Harwood***

The Institute of Art and Law have published *Historic Environment Law* by Richard Harwood. The book covers the planning system and deals with the historic environment and the designation and control applied to listed buildings, conservation areas, scheduled monuments, archaeological areas, gardens, battlefields and World Heritage Sites. It addresses the removal of art and antiquities from site and buildings, including treasure and the consequences of unlawful removal. Discrete regimes are discussed, including the Church of England, military remains and wrecks.

Fully up to date, the book explains the development consent system for major infrastructure projects, along with the changes introduced by the Localism Act 2011. The National Planning Policy Framework and recent case law, not least the enlargement of planning control over demolition, are analysed. The book deals clearly with the increasing differences between English and Welsh legislation and policy and contains a wealth of statutory material. The book can be ordered for £58 at [www.ial.uk.com](http://www.ial.uk.com) or other booksellers.



### ***Complaint to the Aarhus Compliance Committee in respect of law restricting recovery of ATE premium in nuisance cases***

A complaint is being submitted to the Aarhus Compliance Committee in respect of the proposed withdrawal by s.46 of the Legal Aid and the Punishment of Offenders Act 2012 which will prevent a successful claimant in private nuisance cases from recovering their ATE premium. This will restrict access to justice. The Government argues that the ability to bring a claim in statutory nuisance under s.82 EPA 1990 is a substitute but this is disputed.

The communication is submitted by the Environmental Law Foundation (ELF), a UK charity that enables communities and individuals use the law to protect and improve their environment. ELF relies upon a national network of specialist environmental lawyers who provide initial advice and assistance on a pro bono basis. ELF submits that the UK has enacted primary legislation that will restrict access to justice in environmental matters and therefore is contrary to the Aarhus Convention. In particular, s.46 of the Legal Aid and the Punishment of Offenders Act 2012 (LASPOA 2012) amends earlier provisions in the Courts and Legal Services Act 1990 and provides for a new s 58C which states:

“A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).”

This means that the after-the-event (ATE) insurance which covers: (i) the costs of expenses such as court fees, expert reports, travel etc, and (ii) the exposure and risk of paying an opponent's costs can no longer be recovered if a claimant in legal proceedings is successful in a legal claim.

Stephen Tromans QC is advising ELF pro bono and in his capacity as Chair of ELF. The complaint is being submitted by Hugh James as agents for ELF, also acting pro bono (Neil Stockdale and Gareth Morgan) and supported by Richard Buxton (Paul Stookes).

### ***Appointment of Built Environment Experts by the Design Council***

The Design Council has launched a network of 250 Built Environment Experts (BEEs) who will support its work delivering high-quality designed places throughout England. The Council has drawn from a range of sectors to create the network which consists of a broad and flexible group of highly respected specialists. The BEEs will provide multi-disciplinary support to communities, local authorities and developers involved in built environment projects.

**John Pugh Smith is one of the experts appointed.**

### ***The Olympic Legacy***

The Olympic Legacy London Borough of Newham (Rathbone Market) Compulsory Purchase Order 2011 has been adopted. The order provides for 652 dwellings, 4,500 sq m retail, and 2,600 sq m offices on 1 ha over 13 storeys at Canning Town. The Secretary of State for Communities and Local Government confirmed the Order on 20th August 2012.

**Christiaan Zwart promoted the Order on behalf of Muse Developments.**

# CONTRIBUTORS



**Stephen Tromans QC** is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear power stations, and in high-profile incidents such as the Buncefield explosion and the Trafalgar case. To view full CV click [here](#).



**John Pugh-Smith** is an experienced and highly rated planning practitioner who has particular expertise in EIA, housing and related development plan work. He practises as a mediator and is a leading promoter of the use of mediation in the planning and environment fields. To view full CV click [here](#).



**Richard Harwood** specialises in planning, environmental and public law. His recent Court of Appeal cases include R(SAVE Britain's Heritage) v Secretary of State, Hirose Electrical v Peak Ingredients, Dale Farm, R(Berky) v Newport CC and Barker v Hambleton DC. Richard was awarded "Environmental/Planning Junior of the Year" at the Chambers Bar Awards 2011. He is the author of Historic Environment Law published by the Institute of Art and Law. To view full CV click [here](#).



**Justine Thornton** is rated by Chambers and Partners as "one of the finest juniors in the field". Previously, she worked for Allen and Overy LLP, Simmons and Simmons and the European Commission Environment Department. She is Co-General Editor of Thompson's Encyclopaedia of Environmental Law and Case Law Editor of the Journal of Environmental Law. To view full CV click [here](#).



**Christiaan Zwart's** practice includes: planning law, CIL, DCOs, infrastructure & CPO, environment & energy, commercial & construction, VAT & real property related direct tax, judicial review. His 22 years of property development industry experience & technical qualification adds value. The AG appointed him B Panel against "unprecedented" competition. He appeared at Hinkley Point C Nuclear Power Station DCO hearing for the Environment Agency & recently secured the Olympic Legacy Rathbone Market CPO. He acts for CLG & DEFRA, HMRC, LPAs & developers at all development stages. To view full CV click [here](#).



**James Burton's** environmental and planning practice covers a full range of work and appearances at all levels of tribunal, from public inquiries to appearances in the criminal courts/the environment chamber of the first-tier regulatory tribunal to administrative challenges in the higher courts. Energy work is a particular focus, along with waste and related nuisance (where James has complimentary experience of heavy group action litigation). For recent noteworthy cases. To view full CV click [here](#).



**Rose Grogan** joined chambers in 2011 following successful completion of her pupillage. She has experience in a wide range of environmental and planning matters from pupillage. Since being taken on has been instructed in Statutory Nuisance, Compulsory Purchase and Planning Enforcement matters as well as advising on Judicial Review and Statutory Appeals. She is currently assisting with an appeal to the Supreme Court in a compulsory purchase case and is acting for a third party in a three week inquiry on change of use and listed building consent. She also acts in the related fields of property and construction. To view full CV click [here](#).

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