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environmental and planning law newsletter

In this issue we preview important research by Justine Thornton into the reasons why environmental cases are, or are not, referred to the Court of Justice of the European Union. Another contentious area is protective cost orders. The principles remain contentious and practice is complicated by delayed consideration of applications and satellite litigation. Rose Grogan looks at the Ministry of Justice's consultation paper on PCOs. The High Court's judgment on the *Sea & Land Power* windfarm case prompted a great deal of national media coverage. Richard Wald dusts himself down and discusses what the case was actually about. Unreasonable behaviour in a planning appeal may lead to a costs award. But what happens next? Caroline Allen, a member of our environmental and planning and costs teams, discusses how to maximise recovery or reduce liability.

Two Court of Appeal cases this year have re-written the jurisprudence on time limits for bringing proceedings. *R(Berky) v Newport City Council* considered the judicial review period in the light of European law. *Barker v Hambleton District Council* addressed the new statutory formulation of a period starting with an event and the absolute nature of statutory time limits for applications. These will not be the last word. Issues in *Berky* will be the subject of debate in future proceedings. After judgment was given in *Barker* the Supreme Court held in *Lukaszewski v District Court in Torun, Poland* [2012] UKSC 20 that in human rights cases the tight time limits for extradition appeals could be extended in exceptional circumstances. Permission to appeal is being sought in Barker on that basis. Richard Harwood (who is still covered in dust from *Berky* and *Barker*) has provided a table of time limits and procedural rules for planning High Court cases.

References to the European Court in environmental cases

Justine Thornton

Summary

The Judiciary are reluctant to refer questions of EU environmental law to the European Court. They appear to be extending the criteria for not doing so beyond that allowed by EU law. Their reluctance may be due to several factors, including a scepticism about the clarity and use of the European Court judgments and the inevitable delay in getting judgment from the Court. Nonetheless, the implications of not referring questions of EU environmental law are worthy of note. They include haphazard references and impacts on the development of environmental law.

Background

The relationship between the EU and our domestic courts is a reference based relationship.[1] Questions about the interpretation and validity of EU law arising in national courts are supposed to be referred to the European Court. EU caselaw has laid down stringent criteria for when a reference must be made.[2] The lower courts are granted a discretion whether to refer but a court of final resort must do so unless it has established that the question is irrelevant, that the EU provision in question has already been interpreted or that the correct application of EU law is obvious. The rationale for the strict approach is that EU law will develop uniformly throughout the EU if all national courts refer EU law questions to the European Court and the European Court can continually develop EU law.

References

Questions of EU environmental law are being referred by our lower and higher courts, but they are few in number considering the prevalence of

1 Article 267 of the Treaty of the functioning of the European Union

2 C-283/81 Cilfit v Ministry of Health

EU law in environmental law. There are only two ongoing references. Questions of cost protection in environmental cases have been referred by the Supreme Court (*R(Edwards) v Environment Agency*) and the Upper Tribunal has recently referred the question whether privatised companies are public authorities for the purposes of the freedom of information and Arhus regimes (*Fish Legal v Information Commissioner*). During 2007 – 2012, the European Court gave judgment in eight environmental cases referred by the domestic judiciary.

References not made

For every case where a UK court decides to refer, there are plenty of examples where referrals are not made. They include several of the seminal environmental law cases to be decided in the past 6 years, including *R (Morge) v Hampshire Council (nature conservation), Edwards v Environment Agency (pollution control),* and R(*Countryside Alliance) v Attorney General (hunting and animal welfare).* During this period domestic courts do not appear to have made a reference on their own initiative, absent a request by the party(ies).

In refusing to refer the domestic Courts are arguably extending the EU criteria for not referring beyond what is allowed by EU law.

Some cases do formally refer back to the EU sanctioned reasons for non-referral (such as the decision being within a lower court's discretion (*Loader v Secretary of State)*; the issue not being determinative (*R(Edwards) v Environment Agency*); or the question being one of fact rather than law (*Bowen West v Secretary of State*). However it is hard to escape the impression that these reasons can reflect or indeed mask the deep-seated uneasiness in the relationship with the European Court. The language deployed in *Loader* and *Bowen* suggests a wary attitude to the European Court. The wariness appears most prominently in the lower court rulings (*Loader; Bowen, and Condron v Merthyr Tydfil County Borough Council)* . The House of Lords, now Supreme Court, appears more circumspect in how it describes and evaluates the role of the European Court than the lower courts. This does not translate in a great eagerness to refer, but in a greater focus within House of Lords/Supreme Court case law on stretching the boundaries of the grounds for non-referral and subtle attempts to renegotiate its relationship with the European Court.

Still staying within the official boundaries for non-referral, some decisions are very quick to assume clarity, thus pulling potentially controversial questions within 'no need to refer' criteria. This happens where the court interprets a conflict away from adopting remarkably confident assumptions about how the European Court would decide the issue if invited (*See Edwards v Environment Agency and R(Countryside Alliance) v Attorney General)*.

Other cases reformulate the notoriously stringent criteria for referral into something altogether more flexible, such as there being insufficient doubt about the interpretation of EU law (*Condron*), or no authoritative indications that the European Court would decide differently from the national court (*Hargreaves v Secretary of State*).

Finally, certain judgments do not so much redefine the conditions but, arguably, the very purpose of the preliminary reference procedure. In R(*Morge) v Hampshire*, the assumption of a cooperative rather than hierarchical relationship manifests itself in unmistakable terms, with the Supreme Court qualifying the European Court's role as one of assistance, and refusing to refer because it does not see what 'value added' a European Court ruling could bring to its determination. This redefines the preliminary reference procedure beyond that allowed by EU law.

Understanding the reluctance to refer

The reluctance to refer may be explained by several factors. Firstly; by the delay in getting judgment from the European Court. In 2011 the average time taken to get judgment was 16. 4 months which is an improvement on earlier years. In addition there is a scepticism about the clarity and applicability of any answer from the European Court. Anyone who has had to argue about whether a particular material had ceased to be waste will have some sympathy with the comment of Carnwath LJ in *OSS v Environment Agency* that *"a search for logical coherence in the Luxembourg case-law is probably doomed to failure"* which underlay his decision not to make any further reference. It seems likely that the

same perception may have underlain Lord Brown's approach in *Morge*. Conversely however, the judgment of the European Court in C – 127/02 Waddenzee is central to habitats law.

Impacts of the reluctance to refer

What then are the impacts of the reluctance to refer? Firstly; domestic courts have, on occasions, failed to grasp or predict the possibility of an approach by the European Court that would be radically at odds with long enshrined domestic approach, as for example with Environmental Impact Assessment and staged planning permission cases (see *C-290/03 Barker)*. Secondly, a failure to refer may delay the final resolution of a legal issue at EU level. Consider, for example, the 10 year gap between the 1998 Court of Appeal decision in Marson, that a planning authority is not required to give reasons for a decision that environmental impact assessment is not necessary and the judgment of the European Court in C-75/08 Mellor that reasons are required. Thirdly, greater communication with the European Court could reduce domestic litigation. Would the apparently never ending stream of domestic environmental impact assessment litigation be reduced by more (good quality) judgments from the EU? Finally; a haphazard system of referrals reduces the ability of the judiciary to get the most useful judgments back from the European Court. Professor Takis Tridimas argues the European Court gives three types of judgment ranging from an answer so specific it assists only the parties to an answer in such general terms it effectively defers the decision to the national judiciary. Judgments providing guidance to the national courts are the most useful for future cases, but care is needed to select those cases for referral that lend themselves to such guidance from the European Court.

This article is based on a longer paper by Justine Thornton, Richard Drabble QC[3] and Dr Veerle Heyvaert,[4] presented at the Bar European Group Conference in Portugage in May 2012 and to be published as a article in the summer of 2012.

3 Barrister at Landmark Chambers

4 Senior Lecturer in Law London School of Economics

Environmental Costs Update

Rose Grogan

The Ministry of Justice's consultation on costs protection for litigants in environmental judicial review claims continues. Consultation on the proposals ended on 18 January 2012 and a response is still awaited.

Despite the government's enthusiasm for codifying protective costs orders (PCOs), the feeling amongst practitioners is that PCOs do not go far enough in ensuring that environmental litigation is not prohibitively expensive. There is anecdotal evidence that despite the decision in *Garner*, the chilling effect is still very real and litigants remain concerned about costs risks even where they have the benefit of a PCO.

Claimant lawyers and campaigning organisations are still calling for qualified one-way costs shifting, and in some cases unqualified one-way costs shifting. These calls are likely to fall on deaf ears, as the government is unconvinced that qualified one way costs shifting should be extended beyond personal injury claims.

Lord Justice Jackson has responded to the consultation and has proposed a compromise solution of a fixed costs regime as opposed to a costs cap. He describes unqualified one-way costs shifting as a "non-starter". The fixed costs regime adopts the government's suggested figures of £5,000 (for the Claimant's liability) and £30,000 (for the Claimant's maximum recovery), subject to an opt-out for Claimants. The proposals are very high-level but they are unlikely to attract support from either claimants or defendants. Unlike other fixed costs regimes, it will be nigh on impossible to fix costs as a proportion of the value of the case, leaving the figures seeming arbitrary.

As to the nuts and bolts of the proposals, there are likely to be two main complaints about the cap. First, £5,000 is still prohibitively expensive for some claimants. If the government accepts that the cap can be varied on application, we are unlikely to see the end of the costly and time-consuming satellite litigation which these proposals seek to avoid.

Second, a cap of £30,000 still leaves claimants with the potential for liability to their own legal

team that will act as a deterrent to bringing a valid claim. This does not address the requirement that litigation should not be prohibitively expensive. In addition, claimant lawyers will be forced to run litigation on tighter margins, which could have an impact on the types of cases they take on or the resources (such as seniority of counsel) available to run a case. The concern is that access to justice will be reduced because fewer lawyers will be available to take on a smaller number of cases and that the principle of equality of arms will be compromised as claimants will not be able to afford the irrecoverable costs of instructing senior lawyers.

In any event, the consultation is unlikely to have the last word on the cap, given that the CJEU has yet to answer the reference in *Edwards v Environment Agency* as to whether "prohibitively expensive" is an objective or subjective test. An element of subjectivity will make it difficult to set anything close to an automatic cap on defendant costs.

In addition to the detail of the proposals, there is a wider debate to be had about costs protection for claimants in cases which fall outside environmental judicial review. The proposals consider judicial review only, rather than private law environmental cases. For these cases, the current PCO regime will still apply and following the decision of the Aarhus Compliance Committee in *Morgan v Hinton Organics*, there is a serious issue over compliance with Aarhus in non-judicial review cases such claims in private nuisance.

The consultation responses show that the government still has a lot to think about in when it comes to codifying PCOs and its approach to Aarhus and access to environmental justice more generally.

Stephen Tromans QC, together with Stephen Hockman QC at 6 Pump Court and Gordon Wignall of No 5 Chambers, has produced a joint Opinion on the impact of the Aarhus Convention on costs and funding rules in environmental cases.

The Consenting of On Shore Wind Farms – Changing Landscape?

Richard Wald

At the end of May Mrs Justice Lang handed down judgment on the lawfulness of the decision of a local planning authority to refuse a renewable energy company permission for a wind farm on the Norfolk broads. The case, *Sea & Land Power & Energy Ltd v (1) SSCLG (2) Great Yarmouth Borough Council* [2012] EWHC 1419 excited very considerable media coverage, producing numerous pieces in national and local news, many of them describing the judgment as a "landmark ruling" … "a victory for the landscape preservation over renewable energy targets" and provoking the Campaign to Protect Rural England to comment "The High Court has quashed the idea that national targets have precedence over local concerns". On the other hand the representative body for UK wind, wave and tidal energy industries, Renewable UK, reacted to the judgment by stating, rather philosophically: "We're not unduly worried as we've always said every application for development needs to be considered on a case-by-case basis – some we win, some we lose."

Now that the media storm has subsided it is worth looking beyond the news and into the judgment to see, no matter the effect of the case on the Norfolk broads, what if any impact it has on the landscape of renewable energy scheme proposals.

The appeal was pursued on three principle grounds. First, that the Inspector had, in the throes of the confusion about the Coalition government's unsuccessful attempt at revoking regional spatial strategies, failed to have regard to the East of England Plan and the renewable targets contained therein, or failed to provide proper reasons. Second, that the Inspector had misapplied relevant landscape policy. And finally, that in the face of a conflict between local and national policy, she had failed to give primacy to national policy support for renewable schemes as required by paragraph 11 of the Supplement to PPS1.

Mrs Justice Lang dismissed the first two grounds by adopting the generous approach

afforded to Inspectors when exercising their planning judgment and when scrutinising the reasoning in their decision letters (see *Newsmith v SSETR* [2001] EWHC Admin 74 at [6], *South Bucks DC v Porter* (No 2) [2004] 1 WLR 1953 and *Clarke Homes v SSE* (1993) 66 P&CR 263 at 28). As for the third ground, Mrs Justice Lang rejected the argument that in the event of a policy conflict national renewable policy takes precedence over local plan policy finding instead that it forms but one of a number of policy considerations to be weighed in the balance. In sum, all of the Claimant's arguments were dismissed on traditional and rather case-specific grounds.

Then why all the brouhaha? Could it be that the media reaction to this case had more to do with ongoing popular and political debate about the wisdom of peppering our countryside with wind turbines than any new direction in the law relating to the protection of landscape character? At the beginning of the year 101 Tory MPs, led by Chris Heaton-Harris MP, signed a letter to the Prime Minister urging a review of policy relating to the consenting of on-shore wind farms. Amongst other things the letter gave voice to widespread fears that effective opposition to wind farm proposals would be made all but impossible under the new National Planning Policy Framework, in force since the end of March and generally considered a pro-developer compendium of planning policies. And during the week between hearing and judgment in the Sea & Land Power & Energy case, a widely publicised cabinet row erupted over a plan by the Chancellor, George Osborne, to cut the subsidy for onshore wind farms by up to 25 per cent.

Whilst the *Sea & Land Power* judgment may leave the legal landscape behind renewable energy development unchanged, the nature and extent of the media response to it seems to suggest that the political tectonic plates are on the move.

Richard Wald appeared in Sea & Land Power.

Introduction to costs proceedings

Caroline Allen

1. Costs are assuming a position of increasing importance in planning appeals: Planning Inspectorate statistics record that in recent years, costs applications have been made in about 20% of hearing cases and 25% of inquiry cases, with awards made in about 40% of those cases. Unfortunately, as many planning professionals will be painfully well aware, it can be a surprisingly tortuous process from receiving an award of costs to the cheque arriving from the other side: this article is intended to provide a brief guide to the steps to be taken where an award of costs has been made, but swift settlement of those costs has proved elusive.

2. The best starting point, of course, is negotiation, and the best aid to negotiation a reasonable schedule of costs. In preparing a costs schedule, or indeed in reviewing another party's schedule, it may be advisable to seek the advice of a costs draftsman or costs counsel, who will be able to review the papers and form a view as to those costs which are likely to be recoverable. The following points should be borne in mind in any event:

- Only costs related to the appeal itself are recoverable. Any costs incurred prior to the appeal being lodged are not;
- The statutory power to award costs contained at s.250(5) of the Local Government Act 1972 limits recovery of costs to those necessarily and reasonably incurred in the appeal process. The proportionality of the costs claimed is also a key consideration: proportionality is a central principle to any assessment of costs by the courts, should matters progress that far, and ought to be focused upon from the outset.
- For an appellant, costs necessarily and reasonably incurred will typically be those of employing an agent to submit the appeal and provide representation throughout the process; additionally, costs may include the use of a range of professional experts to

provide detailed technical advice, including counsel. Similarly, planning authorities will be able to recover costs incurred in resisting appeals and defending their decision or stance in a 'failure to determine' case;

- Should it come to a detailed assessment of costs, specific matters to be considered by the court will include: the conduct of the parties before and after proceedings; any efforts made to resolve the dispute; the amount or value of any money or property involved; the importance of the matter to the parties; the complexity of the matter and the novelty or difficulty of any matters raised; the skill, effort, specialised knowledge and responsibility involved; the time spent on the case, and the place where and the circumstances in which the work or any part of it was undertaken (CPR 44.4).

3. If negotiations fail, the party awarded costs ("the receiving party") can refer the matter to the Senior Courts Costs Office for a detailed assessment. Before doing so, the receiving party must arrange to have the costs award made an order of the High Court. This is done by writing to the Administrative Court Office at the Royal Courts of Justice, enclosing the original order of the Secretary of State or the Inspector awarding costs, and referring to s.250(5) of the Local Government Act 1972, which sets out the statutory power to award costs. The court will send through guidance on the detailed assessment process together with the order.

4. From the date of the order, the receiving party has 3 months to commence detailed assessment proceedings. The relevant procedure is set out in detail at Part 47 of the Civil Procedure Rules and the attendant Costs Practice Direction, both of which are available online at: www.justice.gov.uk/courts/procedure-rules/civil In brief, proceedings are commenced by serving on the paying party the bill of costs and the notice of commencement, together with relevant fee notes and evidence of any disbursement over £500. There are precedent bills available online, annexed to the costs practice direction, but as they are relatively fiddly to prepare it may often be safer and more cost-effective to hire a costs draftsman. (Counsel never prepare bills of costs; solicitors rarely prepare bills other than their own.) The paying party then has 21 days from the date of service to produce points of dispute, objecting to matters within the bill, and the receiving party may then serve optional replies to the points of dispute within 21 days of service, which may help to narrow the issues between the parties. If points of dispute are not served, the receiving party may file a request for a default costs certificate, pursuant to CPR 47.11.

5. If agreement still cannot be reached after service of all of the appropriate documents, the receiving party has 3 months from the end of the period for commencing proceedings (i.e. 6 months from the date of the High Court order) to request a detailed assessment hearing. The hearing would ordinarily be carried out for the parties by a costs draftsman or by counsel. If costs are agreed, either party may apply for a final costs certificate (see CPR 47.10).

6. There is a rebuttable presumption that the receiving party will be awarded its costs of the detailed assessment proceedings, though the court may make another order, having regard to all the circumstances. Costs offers may well be made in advance of the hearing by either side, pursuant to CPR 47.19. If a receiving party fails to beat a costs offer made by the paying party, it is very likely to be liable to be liable for the paying party's costs of assessment. Careful consideration should therefore be given to any offers made by the paying party, and a paying party should give equal consideration to any offers it makes in advance of an assessment hearing.

THE MAIN HIGH COURT TIME LIMITS AND PROCEDURES IN PLANNING CASES

Decision	Mode of challenge	Civil Procedure Rules provision	Time limit	Notes on time limit
Secretary of State/Inspector decision on section 78 planning appeal or section 77 call-in; grant of planning permission on an enforcement notice appeal	Application under Section 288 Town and Country Planning Act 1990	Part 8, Practice Direction para 22	6 weeks from date on decision for filing and service (if dated Monday, challenge on Monday)	Time for filing cannot be extended; time for service can be (Corus v Erewash BC [2006] EWCA Civ 1175)
Costs decision on a section 78 appeal or call-in decision	Judicial review (North Kesteven DC v Secretary of State for the Environment [1989] JPL 445; Golding v Secretary of State for Communities and Local Government [2012] EWHC 1656 (Admin))	Part 54	Promptly and within three months.	Court can extend
Determination of planning enforcement appeal	Appeal under section 289 TCPA	Part 52, Practice Direction para 22.6C	28 days after receipt of decision by the applicant; proceedings must be served before filing	Court may extend time for service and filing
Costs decision on an enforcement appeal	Appeal under section 289 TCPA (Botton v Secretary of State for the Environment [1992] 1 P.L.R. 1)	Part 52, Practice Direction para 22.6C	28 days after receipt of decision by the applicant; proceedings must be served before filing	Court may extend time for service and filing
Grant of planning permission by a local planning authority	Judicial review	Part 54	Promptly and within three months Promptness does not apply to European Union grounds: R(Berky) v Newport City Council [2012] EWCA Civ 378	Court can extend
Adoption of development plan document	Application under section 113 Planning and Compulsory Purchase Act 2004	Part 8	6 weeks of date of adoption for filing and service (if adopted Tuesday, challenge on Monday): Barker v Hambleton DC [2012] EWCA Civ 610	Time for filing cannot be extended (subject to Barker appeal); time for service can be (Corus v Erewash)
Adoption of supplementary planning document	Judicial review	Part 54	Promptly and within three months	Court can extend
Decisions on neighbourhood development orders	Judicial Review	Part 54	Six weeks beginning with the event (section 61N Town and Country Planning Act 1990)	Cannot be extended
Adoption of National Policy Statement	Judicial review	Part 54	Six weeks beginning with designation or publication (section 13 Planning Act 2008)	Cannot be extended
Development consent order	Judicial review	Part 54	Six weeks beginning with publication of order or reasons (section 118 Planning Act 2008)	Cannot be extended
Making or confirmation by Secretary of State of a compulsory purchase order	Application under section 23, Acquisition of Land Act 1981	Part 8, Practice Direction para 22	Six weeks from publication of notice of making or confirmation	Cannot be extended

CONTRIBUTORS

Richard Harwood specialises in planning, environmental and public law. His recent Court of Appeal cases include *Ashton v Secretary of State, R(Mellor) v Secretary of State, R(Friends of Hethel) v South Norfolk Council, R(SAVE Britain's Heritage) v Secretary of State, R v O'Grady, Hirose Electrical v Peak Ingredients, Dale Farm, R(Berky) v Newport CC and Barker v Hambleton DC.* He was awarded "Environmental/Planning Junior of the Year" at the Chambers Bar Awards 2011. A case editor of the Journal of Planning and Environmental Law, he is the author of *Historic Environment Law* to be published by the Institute of Art and Law in September 2012. To view full CV please click here.

Justine Thornton specializes in environmental and planning law and is rated by Chambers and Partners as "one of the finest juniors in the field". Prior to joining 39 Essex Street, she worked for Allen & Overy LLP, Simmons & Simmons and the European Commission Environment Department. Justine is a member of the Attorney-General's Panel of Counsel, appointed to act for the Government and is appointed as an Advocate for the Welsh Assembly. She is (with Richard Wald) General Editor of Thompson's Encyclopaedia of Environmental Law and a contributor to Tromans on Environmental Impact Assessment Law and Practice. She is Case Law Editor of the Journal of Environmental Law. To view full CV please click here.

Richard Wald specializes in Planning, Environmental and associated areas of JR. He is (with Justine Thornton) General Editor of Thompson's Encyclopaedia of Environmental Law and a contributor to Tromans on EIA Law and Practice. He was appointed to the AG's B-Panel of Junior Counsel to the Crown in 2009 and is regularly ranked by the main directories in the areas of Environmental Law and Planning Law. Richard is a Council Member of UKELA. To view full CV please 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 please click here.

Caroline Allen specialises in planning law and has a growing environmental practice. She appears frequently at public inquiries and hearings on behalf of developers, local authorities and objectors in relation to a wide range of planning matters. She recently appeared in the Court of Appeal with Richard Harwood in *Smout v Welsh Ministers & Others* [2011] EWCA Civ 1750. Caroline is also a member of Chambers' specialist costs team and appears regularly in the SCCO in detailed assessment hearings and appeals for receiving and paying parties. She also undertakes regular advisory work. To view full CV please click here.

David Barnes Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson Senior Clerk
alastair.davidson@39essex.com

Andrew Poyser Practice Manager
andrew.poyser@39essex.com

Luke Diebelius Assistant Practice Manager
luke.diebelius@39essex.com

For further details on Chambers please visit our website: **www.39essex.com**

London	39 Essex Street, London WC2R 3AT	Tel: +44 (0)20 7832 1111	Fax: +44 (0)20 7353 3978
Manchester	82 King Street, Manchester M2 4WQ	Tel: +44 (0)161 870 0333	Fax: +44 (0)20 7353 3978