LEADING ENVIRONMENTAL CASES OF 2009

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Common Law

The common law torts continue to prove a fertile source of case law in the environmental field, both in terms of current nuisances and liability for past activities. Contractual issues also figure in the cases, in terms of insurance, conveyancing, and landlord and tenant. The question of costs is also prominent.

The Corby Litigation

In *Corby Group Litigation v Corby DC* [2009] EWHC 1944, the Technology and Construction Court held that a local authority had been in breach of its duty to take reasonable care to prevent the dispersal of mud and dust containing a range of contaminants from land reclamation sites which it owned or operated. Pregnant women in the local area had thereby been exposed to teratogenic substances which were linked to a cluster of children with birth defects consisting of shortened or missing arms, legs and fingers. The local authority was also liable for public nuisance in causing, allowing or permitting the dispersal of dangerous or noxious contaminants and was in breach of its statutory duty under the Environmental Protection Act 1990 s.34.

In group litigation, the claimants (CGL) alleged negligence, breach of statutory duty and public nuisance on the part of the defendant local authority in connection with the reclamation of an extensive industrial site to the east of the town of Corby. The claim related to birth defects said to have been caused to a group of children born between 1986 and 1999 consisting of shortened or missing arms, legs and fingers. It was CGL's case that the birth defects had been caused as the result of their pregnant mothers' ingestion or inhalation of harmful substances generated by the reclamation works and spread in various ways through many parts of Corby. The court was required to consider and address specific issues which were generic and common to CGL and pre-requisite to the determination of liability to any individual claimant.

Akenhead J, in a judgment running to almost 300 pages held that:

(1) In the management and execution of land reclamation contracts which involved toxic waste management, the local authority had owed a duty of care to CGL to take reasonable care to prevent the airborne exposure of CGL's mothers to such toxic waste before or during the embryonic stage of pregnancy. In practice, that duty involved taking reasonable care to prevent the dispersal of mud

and dust containing contaminants from the sites which it owned or operated. (2) The local authority had been in breach of that duty from 1985 until August 1997. The contaminants included cadmium, chromium. nickel, polycyclic aromatic hydrocarbons and dioxins. They had been present in mud and dust disturbed at the reclamation sites which was spread either by the wind or by lorries and vehicles and deposited on public roads in the Corby area. The local authority had failed to carry out the reclamation safely and in accordance with best practices at the time for the management and disposal of contaminated waste. (3) As a result of that breach of duty, CGL's mothers had been exposed to relevant teratogenic substances. Those contaminants had the ability to cause the limb defects suffered by all but two of CGL. That conclusion was supported by the evidence of a statistically significant cluster of birth defects to children born of mothers living in Corby in the period 1989 to 1998. It was reasonably foreseeable that the local population might be exposed to hazardous or contaminated substances as a result of the land reclamation programme and that pregnant mothers could inhale or ingest sufficient of the relevant contaminants that could lead to birth defects of the type complained of. (4) The local authority was liable for public nuisance in causing, allowing or permitting the dispersal of dangerous or noxious contaminants. It was also in breach of its statutory duty under the Environmental Protection Act 1990 s.34 to the same extent as its breaches of its duty of care in tort, as from April 1992. (5) The local authority was, accordingly, liable in public nuisance, negligence and breach of statutory duty, subject to it being established in later proceedings by individual claimants that their particular conditions were actually caused by the local authority's defaults.

Environmental insurance

In one of its final judgments, the House of Lords allowed an appeal against a finding by the Court of Appeal that contaminated land remediation costs incurred in the United States were covered by a reinsurance contract. In *Lexington Insurance Co v AGF Insurance & Wasa International Insurance Co Ltd* [2009] UKHL 40, a US aluminium company (Alcoa) incurred substantial expense in removing waste from, and remediating, a number of polluted sites. Alcoa sought to recover those remediation costs from its insurers. The respondent was one such insurer, which had provided property damage cover up to US $20 million per occurrence on Alcoa's sites between 1977 and 1980. Alco elected to bring proceedings against the respondent in the US and the trial judge found that there had been two occurrences on each site with damage increasing year by year in more or less a linear progression. On appeal, the Supreme Court of Washington State held that under the law of Pennsylvania, where Alcoa was incorporated and based, it could recover the full costs of remediation at any particular site provided only that some damage had 'manifested' at the relevant site during the years when the respondent was on risk, even though that damage had "occurred both before and during" that period. The respondent then settled the claim and looked to its reinsurers, which included the appellants, which had been on risk over the relevant period. The appellants declined to pay on the basis that, whilst the insurance had been an American policy, the reinsurance policy was governed by English law and that, as a matter of English law, the reinsurers could only be liable for the costs of remedying damage to property which actually occurred during the three year period of cover and could not be liable for the cost of remedying damage which occurred before or after that period. The reinsurance was on the same "terms and conditions as and to follow the settlements" of the original insurance. At first instance the Commercial Court found that the appellants were not liable to indemnify the respondent under the reinsurance contracts. The Court of Appeal found that the appellants were liable under the reinsurance contract, who then appealed to the House of Lords.

Lords Mance and Collins gave the main judgments, in allowing the appeal. Whilst it was common ground that under English law only damage which occurred during the period of cover would have been insured under the reinsurance contract, the appellants had not submitted that the decision of the Supreme Court of Washington had been perverse or wrong under the law of Pennsylvania. What was reinsured under a reinsurance contract was the insurer's own liability. Ultimately, the issue was one of construction of the particular reinsurance contract. In reinsurance contracts of the type in question, the starting point for construction was that the scope and nature of cover was coextensive with the cover in the insurance. In determining the governing law applicable to the insurance policy, it was clear that the Supreme Court of Washington State had done so in the context of covering a large number of independent insurances and claims, in establishing joint and several liability across all insurers, and so taken into account matters and events extraneous to the insurance policy and claims arising under it. As a result, the choice of law could not be regarded as in any sense predictable at the time when the reinsurance was placed or as following from the operation of the terms of the insurance as a contract independent of all the other insurance contracts held by Alcoa over several decades. The reinsurance was an independent contract, with its own terms which fell to be construed under English law, and there was no basis for interpreting it as covering any liability which might subsequently be held to arise under the insurance in any State whose law might, after disputes had arisen under it and other separate insurances, be applied by reference to factors extraneous to the particular insurance to which alone the reinsurance related. It followed that there was no basis for construing the two contracts as back to back in the present situation. There had been no identifiable system of law in 1977 which would have provided a basis for construing the reinsurance contract in a manner different from its ordinary meaning in the London insurance market. The US Courts had not developed their approach to joint and several liability for damage occurring outside policy periods at that time. The contract of reinsurance could not reasonably be construed to mean that it would respond to any liability which "any court of competent jurisdiction within the United States" would impose on the appellant irrespective of the period of cover in the reinsurance contract. It was elementary that an insurer took the risk of changes in the law, but in the present case there was no principled basis for treating the scope of the three year reinsurance contract as the same as the insurance.

Buncefield

In *Colour Quest Ltd& Others (Claimants) v (1) Total Downstream UK Plc (2) Tota lUK Ltd (3) Hertfordshire Oil Storage Ltd (Defendants): (1) Total Downstream UK Plc(2) Total UK Ltd (Part 20 Claimants) v (1) Chevron Ltd (First Part 20 Defendant/Third Party) (2) Hertfordshire Oil Storage Ltd (Second Part 20 Defendant) & Total Milford Haven Refinery Ltd (Fourth Party) & Hertfordshire Oil Storage Ltd(Second Part 20 Defendant)* [2009] EWHC Comm, the High Court found as a matter of fact that companies in the Total group had control of tank filling operations at the part of the Buncefield oil storage depot where an explosion occurred and were vicariously liable for the careless tank filling activities of their employees. One of the causes of the explosion was the failure to promulgate an adequate system to prevent overfilling of a tank.

The court was required to determine preliminary issues in proceedings arising out of explosions at the Buncefield oil storage depot. The cause of the explosions was the ignition of an enormous vapour cloud that had developed from the spillage of some 300 tons of fuel from a storage tank. The tank was part of the operations of the third defendant (Hertfordshire Oil Storage Ltd), a joint venture company between two oil companies (Total and Chevron) which owned 60 and 40 per cent respectively. There ensued a large fire which engulfed a further 20 fuel storage tanks. Apart from damage to a large proportion of the Buncefield site, significant damage was also caused to both commercial and residential properties outside the perimeter of the depot, in particular on the

adjacent industrial estate. The claimants consisted of companies, many situated on the industrial estate, and individuals resident in the vicinity of the depot and companies which owned the other storage facilities and a warehouse at the site. Summary judgment was given for the claimants in the light of admissions made by Total (T) and Hertfordshire Oil Storage Ltd (HOSL) that either one or the other was vicariously liable for various acts of negligence by the relevant supervisor on duty at Buncefield on the night of the explosions. The main preliminary issue was as to which of T and HOSL was vicariously liable for the faults in the operation of the site which were causative of the explosion: the relevant employee (N) was employed by Total and the issue was whether, having been seconded to HOSL, he was to be regarded as the employee of HOSL, thus rendering HOSL liable in place of Total. Total submitted that the effect of the relevant joint venture agreements was that, as between Total and Chevron (C), the site was to be operated by HOSL, the relevant employees worked under the immediate direction of the board of HOSL and HOSL retained ultimate responsibility for directing and controlling the manner of tank filling operations. Chevron submitted that HOSL discharged its obligations by delegating its functions to Total, such functions being performed by employees of Total both on and off site. The court held as follows:

1. The identity of the person vicariously liable for the careless tank filling activities of the employee was a question of fact. As a matter of fact Total had control of tank filling operations. T failed to establish that HOLS was responsible for the negligence of N. The activities of the on-site staff were under the control of Total and not HOSL.

2. One of the causes of the explosion was the failure to promulgate an adequate system to prevent overfilling of a tank. That was a fault of Total's head office staff.

3. Total was not entitled to a contractual indemnity as against Chevron or HOSL, because the relevant clauses were not intended to indemnify a party in respect of its own negligence.

4. T was liable to claimants outside the site under *Rylands v Fletcher*. It could not avoid liability under *Rylands v Fletcher* and in nuisance to those within the site on the basis that they had consented to the oil storage. Where there was negligence there was no defence available because the consent was vitiated.

5. The claimants, subject to proof of damage, had a claim in private nuisance. There could be liability in private nuisance for a single or isolated escape as opposed to a state of affairs where there was both unreasonable or negligent use of land and foreseeability of escape.

6. The explosion endangered the health and comfort of the public at large. Subject to establishing loss, there was a claim in public nuisance. The causes of action in public and private nuisance were not mutually exclusive. A claimant could recover damages in public nuisance where access to or from his premises was obstructed so as to occasion a loss of trade. There was no requirement that those who suffered special damage in proximity to the explosion had to show a proprietary interest before they could recover.

7. The claims of an oil company arising out of its inability to use the pipelines from the site failed. S did not have the necessary legal ownership of the pipeline or right to possession.

Liability for flooding

The incidence of serious floods seems worryingly on the increase, and it may be expected that this will result in affected parties and their insurers asking whether there is anyone who may be liable for the damage caused. It is therefore of interest that the Technology and Construction Court has found a housing developer and a local authority liable in negligence and nuisance for flooding, whilst rejecting a claim that the latter had indemnified the former against such a claim. In *Lambert v Barratt Homes Ltd (Manchester Division)* [2009] EWHC 744 (QB), the second defendant, a local authority, sold part of a redundant school playing field for housing development by the first defendant. The field sloped down towards the south east corner, with houses built in the 1930s backing onto the eastern boundary of the field. Surface water naturally drained towards and past the gardens of the houses to the south east corner where it fed into the sewer system through a drain. Following the construction of the new development on the lower part of the field, flooding of those gardens commenced. The claimants brought claims in nuisance and negligence, claiming damages and injunctive relief, on the basis that, prior to the development, the drainage system had been adequate to collect the water draining from the fields, which had been developed, and retained land, and to discharge it into a public drain. They alleged that that a ditch had been negligently filled in and fenced over during the development, with consequent flooding problems. They claimed that the local authority was liable in addition to the developer because it had allowed the water from the undeveloped land to continue to flow onto the developed land, and thence onto the properties, despite knowing of the problem. The claimants maintained that, even if the problem was not of the local authority's making, it became aware of it and knew or ought to have known that, if it took no steps to deal with the drainage problem, the properties would continue to be subjected to recurrent flooding from water discharging from the undeveloped land. That was argued to give rise to a measured duty of care which had been breached by continued inaction. The local authority submitted that it was entitled to drain its land onto lower lying land; that it had no duty to take any steps to alleviate the position for the claimants; and so it could not be liable for continuing failure to do so.

HH Judge Grenfell found that the building of houses did not constitute the creation of a special hazard such as to be an extraordinary use of land, so that the rule in *Rylands v Fletcher* had no application. The first defendant had been negligent in constructing the eastern boundary of its development in such a way as to restrict the natural flow of water from the south eastern corner of the retained land past the original houses. It had been reasonably foreseeable that the resulting restricted gap would not cope with the volume of water that could flow from the retained land, particularly after heavy rain; that the water would encroach into the claimants' and other properties; and that damage would result. Such encroachment resulted from an unreasonable use of the land which the first defendant had purchased from the second and constituted a nuisance, the effects of which would continue until abated. It followed that the first defendant was liable to the claimants in negligence and nuisance for loss and damage caused by the flooding, to include the cost of necessary remedial work including the cost of abating the nuisance. As to the case against the second defendant, the owner of higher land did come under a measured duty of care of the kind established in *Leakey v National Trust* [1980] 1 All ER 17, if he became aware that even naturally draining water from his land was causing damage to a lower owner. Such was the case following the second defendant's knowledge of the flooding problem, as from December 1998. It had been foreseeable that, unless the nuisance caused by the obstructed water path was abated, damage would continue to occur as a result to the claimants' land. The measured duty of care had to be considered in the light of the factors that any scheme to abate the nuisance required action on the second defendant's part. Whilst the claimants had no power to enable the drainage scheme to be completed, the second defendant had throughout owned the land where the water arose; had sold

the land for development; failed to follow through the concerns in respect of drainage which were expressed at the time of the sale; and owned the land on which work had to be undertaken in order to provide a solution. In failing actively to co-operate in such a solution, the second defendant appeared to have maintained that it was not under a duty to abate a naturally occurring nuisance. That was a mistaken stance. It followed that the second defendant had been in breach of their measured duty of care in failing to abate the nuisance, albeit that the primary cause of the nuisance was first defendant's obstruction of the water path. In the light of my finding that the first defendant had been, or at least ought to have been, aware of the existence of the water path along the whole eastern boundary of the development, the relevant clause did not operate to indemnify it against the claimants' claims against them.

Biosecurity and economic loss

The case of *Pride & Partners v Institute of Animal Health* [2009] EWHC 685 (QB) considered claims in damages for negligence, nuisance and *Rylands v. Fletcher* by farmers who suffered from restrictions imposed on the movement of livestock following an outbreak of foot and mouth disease, when the virus escaped from the defendant's premises.

The Institute of Animal Health as defendant applied to strike out the claims for damages by the farmers under CPR rule 3.4.2(a) or, alternatively, for summary judgment under CPR Rule 24.2 against the farmers. The Institute and others were companies concerned with the diagnosis, prevention and cure of animal diseases, including foot and mouth disease. Following the outbreak of the disease around their facilities, animals were culled, a restricted zone across the whole of Great Britain was declared, and a ban on exports of animals into the European Union was imposed. The farmers suffered losses as a result of being unable to move livestock, including the losses incurred as a result of pigs being oversized and so lower in value once the ban was lifted, extra labour costs and consequential losses. The Institute of Animal Health argued that the loss and damage claimed were not recoverable, as they could only be classified as pure economic loss, not consequential upon any physical damage. It further argued that, under the exclusionary rule, farmers could not recover for loss resulting from damage done to property which was not theirs, but which belonged to a third party.

The Court held that:

(1) If the breach of a relevant duty of care resulted in produce passing the stage of natural development at which it could be marketed, there was a real prospect of a court accepting that deficiency as physical damage. Therefore, those farmers who alleged that oversized pigs had gone to the abattoir had a real prospect of succeeding in the contention that there was physical damage, and so of recovering the loss of profit truly consequential upon that fact, but not any other economic loss. However, they also had to have a real prospect of proving the other elements in a cause of action they relied on. Subject to that observation, all the damage claimed by some of the farmers, and much of the damage claimed by the others, was pure economic loss.

(2) The farms were not polluted by the disease. Causation was of no more than the "but for" kind: but for the outbreak of the disease, the loss of the farmers' cattle and pigs would not have occurred. If the farmers were to succeed, they had to have a real prospect of establishing at trial that the duty of care was owed to them in respect of indirect physical loss and indirect pure economic loss.

(3) The farmers should not have been a uniquely prominent class in the Institute's contemplation. There was not a clear limiting factor beginning and ending with livestock farmers in possession of

susceptible animals. Furthermore the farmers were not an identifiable class, membership of which was capable of ascertainment at the time when the defendants were performing their work at or in respect of the facilities concerned.. There was no connecting link in that there was nothing connecting livestock that was infected, or was suspected of being infected and so liable to be slaughtered, with livestock that was not liable to be slaughtered. Therefore, there was no real prospect of the farmers succeeding in establishing a duty of care that related to any of the loss or damage referred to.

(4) The farmers had no prospect of succeeding with their claims of nuisance or under *Rylands v. Fletcher* as they were similarly subject to the exclusionary rule. Nothing from the Institute's land encroached on any land of the farmers. Any interference with their enjoyment of the land arose from the imposition of the restrictive measures by a third party (DEFRA) acting under statutory powers and not the Institute.

For these reasons, the Court concluded that the Claimants had no real prospect of succeeding on any of their claims, and that the claims were therefore to be dismissed under CPR Part 24.

Nuisance and conveyancing

The High Court has considered whether rights to bring nuisance proceedings can be restricted by the conveyance of property forming the basis for those rights. In *Thornhill v Sita Metal Recycling Cambridge Ltd* [2009] All ER (D) 162, the first claimant's husband had purchased properties from the British railways Board situated to the east of a railway line. The terms of the conveyance provided that:

> "There are not included in the Conveyance: - any easement or right of light or support or other easement or right which would restrict or interfere with the free use by the Board or any person deriving title under them for building or any other purpose of any adjoining or neighbouring land of the Board (whether intended to be retained or to be sold by them)".

The first claimant inherited the properties and transferred some to the second and third claimants by way of a deed of gift. The Board granted a tenancy of land situated to the west of the railway line, to a third party company, which assigned that to another company. The Board later sold the land to the first defendant company which occupied the land through its sister company, the second defendant. The claimants then brought proceedings against the defendants, alleging that their operations at a scrap yard situated on the land amounted to a noise nuisance. The defendants accepted that their operations had amounted to a nuisance but submitted that the effect of the 1969 conveyance was to deprive the claimants of the right to bring a claim for nuisance. The basis for this was that the conveyance had operated to restrict the passing of rights which would otherwise pass to the purchaser, which would enable him to interfere with the free use of the adjoining land, and that the words, 'deriving title under' were apt, in the context, to include not only successor in title, lessees, mortgages and assigns, but also licensees and those in lawful occupation of the adjoining land. The claimants contended that the right to complain about a nuisance did not arise by a conveyance or transfer but by the law of tort.

The Court found that the right to bring a claim for nuisance was not a commodity which could be bought or sold, and did not arise by a conveyance or transfer but by the law of tort. Whilst the law of contract concerned voluntary relationships, where the role of the court was to enforce relationships which parties had entered into or to award compensation for a breach of contract, the law of tort

did not concern voluntary relationships. Its focus was on providing remedies. The authorities clearly demonstrated that the foundation for the right to bring a claim for nuisance was exclusive possession of land. Moreover, the defendants' submissions failed on the construction of the clause. It was clear by the introductory words of the clause that it had not been concerned with limiting the rights of the first claimant's husband and even if, theoretically, it was possible to traffic the right to bring a claim for nuisance, that had not been intended to be encompassed by the clause.

Leases and contaminated land

The High Court has granted a declaration that the provisions in a commercial lease did not permit the landlord to enter the premises in order to undertake an environmental survey. In *Heronslea (Mill Hill) Ltd v. Kwik-Fit Properties Ltd* [2009] EWHC 295 (QB) the landlord gave notice that it wanted to undertake an environmental investigation survey, including the drilling of a number of boreholes. The survey was for the assessment of possible land and groundwater contamination from the extant and historic uses of the site, which included use as a petrol station and motor repairs and servicing. The tenant refused to consent, and on an application by the landlord to the County Court, the claim was refused and a declaration granted that the landlord was not permitted to enter the premises for the purposes sought. The relevant clause in the lease, which was agreed in 2000, provided that:

> "Upon reasonable prior written notice (except in an emergency when no notice need be given) the Tenant shall permit the Landlord and those authorized by it at all times to enter (and remain unobstructed on) the Premises for the purpose of:
> …
> 13.1.2 making surveys or drawings of the Premises …"

On appeal to the High Court, the landlord submitted that the context of the provisions in the lease, which included definitions of matters such as "Environment", "Environmental Law", and "Environmental Liability" demonstrated that the word "surveys" was intended to have a wider meaning than simply the making of drawings or plans; that the word "surveys" was not limited in any way; and that an environmental survey was a type of survey which would have been known to the parties at the time of execution of the lease; and that environmental survey was an expression used by lawyers at that time. The landlord also criticised the approach taken by the County Court in taking into account irrelevant considerations, such as the motive of the landlord, the impact of a survey on the tenant, and holding that in 2000 the word "survey" had a normal meaning by reference to dictionary definitions. The tenant submitted that word "survey" had been limited to a land survey and that no specific provisions had been made regarding environmental surveys by the landlord, and no compensation provisions included in relation to the breach of the covenant for quiet enjoyment which would result.

Sharp J found that there was no reason why the court should not derive assistance from the dictionary definitions where a word was in doubt or dispute. These gave a meaning which was consistent with that suggested by the tenant and did not correspond with the width of definition contended for by the landlord. The words of the clause suggested that the survey was to be 'of', rather than 'under' the land. Although the lease addressed environmental matters what mattered was how those matters were addressed. Whilst the issue of contamination was likely to have been in the parties' minds, the scheme of the lease seemed to have been to leave those issues until shortly before its expiry, when it was the tenant who was obliged to carry out investigations. The tenant's covenant for quiet enjoyment would also be undermined significantly by the landlord's interpretation of the provisions. The reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at

the time the lease was executed would not have thought that the provisions in the lease entitled the landlord to enter the premises for the purpose of drilling boreholes and taking samples. The County Court had not erred in concluding that the landlord did not have the right to enter the premises to drill boreholes and take samples by virtue of the lease provisions.

Costs and Aarhus

Morgan and Baker

In the case of *Morgan & Baker v Hinton Organics (Wessex) Ltd & CAJE (Intervenor)* [2009] EWCA Civ 107, the Court of Appeal considered the relevance of the Aarhus Convention in domestic private nuisance claims. Morgan and Baker were two residents in a rural hamlet. Hinton Organics (H) operated a composting site near their properties. They had complained about smells from the site. Although some enforcement action was taken by the authorities based on conditions in the licence, the problem was not been resolved and the claimants began proceedings in private nuisance with a view to obtaining an injunction and damages. An interim injunction was granted pending trial. However, following representations by the local authority and the Agency, the injunction was discharged and Morgan/Baker were ordered to pay Hinton's costs. At the costs hearing, M did not raise any issue as to the relevance of the Aarhus Convention on costs in environmental proceedings. Separately, on the first day of trial, Morgan/Baker objected to the evidence of Hinton's odour expert on the grounds of bias, because the expert was an employee of a company which had advised the local authority on waste planning matters. The judge ordered that the evidence was inadmissible because the expert had lacked the independence required of an expert. Hinton was ordered to pay the claimants' costs thrown away.

A judge permitted Hinton to appeal against that order and directed that it be heard with the claimants' adjourned application to appeal against the interim costs order. The claimants had been left with a potential costs bill of £25,000, but had legal insurance only to £50,000 so that their ability to pursue their claim to trial was alleged to be at risk. The claimants submitted that the costs order contravened the principle of the Aarhus Convention that costs in environmental proceedings should not be prohibitively expensive, and that the requirement to comply with the Convention was an obligation of the court which should have been considered by the judge of his own motion. The claimants argued that the costs order was flawed, even on conventional principles. Hinton contended that the judge had applied the wrong test when ruling on the inadmissibility of the company's expert evidence. The Court of Appeal held that *t*he principle of the Aarhus Convention that costs should not be prohibitively expensive, which was capable of applying to private nuisance proceedings, was, at most, a matter to which the court might have regard in exercising its discretion. There was no legal principle which would enable the court to treat a pure treaty obligation, even one adopted by the European Community, as converted into a rule of law directly binding on the English court. In the instant case, it was unnecessary to consider the application of the Aarhus Convention in detail because the claimants had not raised the point before the judge and they should have provided submissions and the factual basis to enable the court to decide whether the order was prohibitive. In fact, subsequent events showed that the claimants had not been deterred from proceeding to trial. Carnwath L.J. did however indicate that where EU Directives had incorporated Aarhus principles into the Directive and thus given the Aarhus principles direct effect in domestic law, the usual general discretion of the domestic courts as regards the award of costs may not be an adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.

Carnwath L.J. noted that:

> "…the authorities to which we have been referred reveal considerable uncertainty in relation to what we have already identified as a controversial element in the *Corner House* guidelines, that is the requirement (1)(iii) that 'the applicant' should have no private interest in the case. Although the court must be cautious in offering guidance on matters not directly in issue, we think that, pending further clarification by the Rules Committee, it would be helpful for us to give our view as to where the law now stands".

He went on to note that the private interest requirement had been strictly applied in *R (on the application of Goodson) v HM Coroner for Bedfordshire and Luton* (2004) EWHC Admin 2931, (2006) 1 W.L.R. 432. However, it was necessary also to take account of how the issue had been addressed subsequently. He considered various case law and judicial reports on protective costs, before concluding:

> "On a strict view it could be said Goodson remains binding authority in this court as to the application of the private interest requirement. It has not been expressly overruled in this court. However it is impossible in our view to ignore the criticisms of this narrow approach referred to above and their implicit endorsement by this court".

He went on to say that pending a ruling by the Rules Committee, there was a need for a flexible approach to all aspects of the Corner House guidelines including the private interest requirement. Carnwath L.J. was content to proceed on the basis that the Convention is capable of applying to private nuisance proceedings, despite the fact that counsel for Hinton sought to distinguish actions to vindicate general public rights to a clean environment from actions for private nuisance designed to protect property rights. Counsel also argued that whatever the intended scope of the Convention itself, in the context of Community law it should be regarded as more strictly confined. Although the EU has built Aarhus rights into Directives on public law, environmental assessment and pollution control, it has not ventured into the field of private law claims for environmental harm. The judge concluded on this that:

> "These arguments raise potentially important and difficult issues which may need to be decided at the European level. For the present we are content to proceed on the basis that the Convention is capable of applying to private nuisance proceedings…"

The Court of Appeal held that the merits of the interim costs application had been so closely tied up with the merits of the case overall that the judge should have considered the desirability of leaving issues of costs to the trial judge. The correct order would have been to reserve Hinton's costs of the interim application to the trial judge.

Pallikaropoulos

It may be noted that the issue of Aarhus also figures in the costs matters following on from the decision of the House of Lords in *R (Edwards and Pallikaropoulos) v. Environment Agency*. Mrs P took over the appeal in this EIA/PPC case in the Court of Appeal in somewhat unusual circumstances with the benefit of an ad hoc PCO which limited her exposure to £2000. Having lost she appealed to the House of Lords and failed to obtain a PCO. Having lost, a standard award of costs was made against her and the Environment Agency sought costs of some £55,000 and DEFRA some £32,000. On detailed assessment, two preliminary issues arose for determination by Mrs Registrar Di Mambro and Master O'Hare (15 January 2010). The first was whether a costs judge was entitled to apply Aarhus principles at that stage, or whether this was the function of the court awarding costs. It was held that compliance with the relevant EU law was a matter to be taken into account on assessment, unless the court awarding costs had already done so. This fell naturally within the normal criterion of reasonableness. The test suggested in the Sullivan report of 2008 (would the costs reasonably

prevent an "ordinary" member of the public from embarking on the challenge) was adopted. It was also held that the fact that the House of Lords had (a) not made a PCO and (b) not waived the provision as to security for costs, was not regarded as precluding that approach. £25,000 had been paid in security. The costs judges indicated that it was difficult to imagine circumstances in which the award of cost would be less than that, but this could not be ruled out, and it was within their discretion to decide that costs should be nil or no more than a nominal amount.

Jackson

Lord Justice Jackson has published his final report following a fundamental review into the costs of civil litigation. He was appointed by the Master of the Rolls to undertake the review, the terms of reference of which were to carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. His recommendations which are of particular relevance to environmental cases include the following:

- No win no fee agreements: conditional fee arrangements of which 'no win no fee' agreements are the most common species have been the major contributor to disproportionate costs in civil litigation in England and Wales. There are two key drivers of cost under such agreements being i) the lawyer's success fee and ii) after the event insurance (ATE) insurance premium that is usually taken out when a CFA is entered into (to cover the claimant against the risk of having to pay the defendant's costs). Both the success fee and the ATE insurance premium are presently recoverable from the unsuccessful defendant.
- Success fees and ATE insurance premiums should cease to be recoverable from unsuccessful opponents in civil litigation. If this recommendation is implemented it will lead to significant costs savings whilst still enabling those who need access to justice to obtain it. It will be open to clients to enter into "no win no fee" (or similar) agreements with their lawyers but any success fee will be borne by the client not the opponent.
- Qualified one way costs shifting in environmental judicial review claims ATE insurance premiums add considerably to the costs of litigation. Litigation costs can be reduced by taking away the need for ATE insurance in the first place. This can occur if qualified one way costs shifting is introduced, at least for certain categories of litigation in which it is presently common for ATE insurance to be taken out. Qualified one way costs shifting means that the Claimant will not be required to pay the defendant's costs if the claim is unsuccessful but the defendant will be required to pay the claimant's costs if it is successful. Jackson LJ identified judicial review as an area where qualified one way costs shifting would be beneficial. "Qualified one way costs shifting would ensure compliance with the Arhus Convention in relation to environmental judicial review claims".
- Nuisance Statutory nuisance proceedings in the magistrates court provide affordable redress for many claimants. Jackson LJ recommended a greater take up of before the event (BTE) insurance, particularly for households. This would help to meet the costs of private nuisance litigation in the civil courts. Jackson LJ indicated that he would not support the use of qualified one way costs shifting for nuisance claims but that others may take a different view.
- Appeals Any changes to the costs rules affecting appeals should await (and follow) changes to the costs rules affecting lower courts. Having said this, one interim measure which was recommended is that where an appeal comes from a court or tribunal in which there is no costs shifting, the appellate court should have the power to order (i) that each party bears its own costs of appeal or (ii) that recoverable costs be capped at a specified sum.

Statutory nuisance

Statutory nuisance remains an important area for dealing with local environmental problems such as noise and odours. It is also, despite the plethora of guidance from the courts, a thorny area where local authorities still get it wrong.

Drafting abatement notices

In *Elvington Park Ltd (2) Elvington Events Ltd v York CC* [2009] EWHC 1805 Silber J, sitting in the Queen's Bench Division of the High Court in Leeds considered the validity of a noise nuisance abatement notice served some four years previously and, quashing it, held that if a noise abatement notice required steps to be taken to abate a noise, then those steps had to be specified or else the notice would be invalid.

The appellants (EPL & EEL) appealed by way of case stated against a decision of the Crown Court dismissing their appeal against the imposition of two noise abatement notices. EPL & EEL had occupied an airfield surrounded by private residences and farms. Although the airfield was used for light aircraft activity it was also used for various motor sports and related activities that were extremely noisy. The local authority issued two noise abatement notices, stating that the carrying on of various motor racing and testing activities at the airfield constituted a statutory nuisance contrary to the Environmental Protection Act 1990 s.79(1). The notices not only required EPL & EEL to abate the noise from the motor sport activities but also "take steps necessary to prevent noise". The notices did not specify what steps EPL & EEL should take to prevent the noise. The questions for determination were whether (i) the abatement notices should have specified the steps to be taken by EPL & EEL; (ii) whether it was irrational not to have set out those steps.

Silber J held that:

(1) If an abatement notice required not merely the abatement of noise but also required steps to be taken, then such steps should be specified. If, as in the instant case, no steps were specified, then the notices would be invalid, *Sterling Homes (Midlands) Ltd v. Birmingham City Council* (1996) Env LR 121 DC*, R v Falmouth and Truro Port HA Ex p South West Water Ltd* (2001) QB 445 CA (Civ Div)*, Camden LBC v. London Underground Ltd* (2000) Env LR 369 DC and *Camden LBC v. Easynet Ltd* (2002) EWHC 2929 (Admin), were applied, ands *Sevenoaks DC v Brands Hatch Leisure Group Ltd* (2001) Env LR 5 was considered. If steps were not required to be specified then the recipients of such notices would not know what they had to do to avoid criminal sanctions.

(2) The second question was academic in view of the finding on the first. However, dealing with it briefly, if a notice was valid even though it did not require any steps to be taken by the recipients, then it was difficult to see why it would be irrational if it mentioned that steps were to be taken without particularising them, see *Budd v Colchester BC* (1999) Env LR 739 CA (Civ Div). Moreover, where the steps to be taken were difficult to assess or unquantifiable, a local authority was not irrational if it failed to specify the steps to be taken in a notice.

Correcting notices

In another case, the Administrative Court has dismissed an appeal against decisions by the magistrates' court regarding powers to allow the amendment of an abatement notice under reg.

2(3) of the Statutory Nuisance (Appeals) Regulations 1995 (S.I. 1995/2644). In *Waveney District Council v Lowestoft (North East Suffolk) Magistrates' Court* [2008] EWHC 3295 (Admin) the appellant had served an abatement notice pursuant to s.80 of the Environmental Protection Act 1990 regarding noise nuisance from a paint factory. The operator of the factory was a subsidiary and tenant of the company which owned the factory site and the company named in the notice was the parent/landlord. In its appeal against the notice, the parent company included the ground that the notice should have been served on some other person (the subsidiary/tenant) as the person responsible for the nuisance. The magistrates were asked to decide a number of preliminary points and found that the notice had been served on the wrong company and that the incorrect identification of the person responsible for the nuisance was a material defect invalidating the notice. Regulation 2(3) provides:

> "(3) If and so far as an appeal is based on the ground of some informality, defect or error in, or in connection with, the abatement notice, or in, or in connection with, any copy of the notice served under section 80A(3), the court shall dismiss the appeal if it is satisfied that the informality, defect or error was not a material one."

On appeal, the questions before the Administrative Court were: whether the magistrates had erred in law in concluding that they had no power to allow the amendment of an abatement notice under regulation 2(3); in concluding that the defect in the notice had been a material one; and regarding the costs order made. The Administrative Court found that both companies had known all about the proceedings, but the magistrates had not erred in finding the error to be a material one as the change was needed because of a material defect in the notice as served. Although the Appeals Regulations permitted variation of the abatement notice to take effect as if it had originally been served on somebody else in substitution or addition to the person named in it, that power (under reg.2(5)) arose in relation to the final order at the end of a full hearing, not in relation to a preliminary point at the start of the hearing.

Statutory nuisance and PPC/environmental permits

The relationship between specialist environmental regulation and local environmental powers is potentially a fraught one. Installations regulated by the Environment Agency under environmental permitting procedures may well have the capability to cause serious local amenity problems by noise, odours, dust, etc. An obvious example which springs to mind is composting and other biowaste facilities. The permits for such installations will usually contain conditions to prohibit offensive offsite odours, as well of course as specific and general conditions on point source emissions, fugitive emissions and matters of general good housekeeping in accordance with the principle of best available techniques. However, it is generally the local authority to whom local residents' complaints will be directed. Commonly, local environmental health departments will be more visible and accessible, and will have officers who can attend in response to complaints of nuisance outside normal working hours.

Local authorities are obliged by law, if they are satisfied that a statutory nuisance exists, to serve an abatement notice requiring abatement of the nuisance or the taking of specified steps to do so. This is a valuable power to respond locally, through a relatively straightforward procedure, to local problems. It is a democratic procedure in that those ultimately responsible for enforcement decisions are the elected councillors. However, for many years most commentators assumed that this procedure was not available in respect of premises controlled under the environmental permitting regime, and its predecessors, PPC and IPC and waste management licensing. This is because section 79(10) of the Environmental Protection Act 1990 prohibits the commencement of

"summary proceedings" by a local authority without the prior consent of the Secretary of State, where proceedings could be instituted through other means, including environmental permits.

However, that commonly held view has now been overturned. In *R (on the application of Ethos Recycling) v Barking & Dagenham Magistrates' Court* [2009] EWHC 2885 (Admin), the local authority served an abatement notice on Ethos Recycling in relation to dust causing nuisance to neighbours of its waste recycling plant. The plant had an environmental permit with a condition requiring the installation of a dust suppression system, and the Environment Agency had previously issued a warning regarding the amount of dust from the site. The company appealed against the abatement notice, claiming that it was a nullity, which was rejected by the Magistrates' Court. There the District Judge held that if Parliament had intended to prevent the local authority from taking any action in the form of an abatement notice, section 79(10) would have stated expressly that it should not serve any notice under section 80 without the consent of the Secretary of State, and that by using the words "summary proceedings" Parliament had prevented double jeopardy in the criminal sense by leaving the final decision on enforcement to the Environment Agency, but without preventing the local authority from taking the preparatory steps to allow it to institute summary proceedings if necessary.

There was an appeal from this decision to the High Court. On the appeal, Scott Baker LJ considered the provisions of the 1990 Act, the legislative history of these provisions, and the principle of avoiding duplication of enforcement. The local authority had received complaints and was under a duty to serve abatement notices where appropriate, and the court found it wholly artificial in such circumstances to require it to first obtain consent from the Secretary of State. The recipient could appeal against the notice, and it was in the court's view entirely logical, practical and in keeping with published policy that the consent should be required prior to enforcement proceedings for failure to comply with a notice, rather than the earlier stage of service.

Accordingly, it is now the case that a local authority, faced with complaints of nuisance from a regulated process which it finds to be justified can – indeed strictly speaking, must – serve an abatement notice. It must however then seek permission from the Secretary of State before it prosecutes for breach of the notice, but in practice the companies in receipt of such notices will not ignore them. They will often appeal against the notice on the basis that they were using best practicable means to avoid a nuisance. This may involve arguments that the company was complying with the terms of the permit. However, that may not necessarily mean that best practicable means were being used. There may well be interesting arguments in that regard as to the adequacy and comprehensiveness of the permit conditions. As the tolerance of society towards odours and other matters, which might in the past have been viewed as inconvenient facts of life, diminishes, so this area is likely to grow in importance.

Planning and EIA

Alternative sites

In *(1) Derbyshire Dales DC (2) Peak District National Park Authority v (1) Secretary of State for Communities & Local Government (2) Carsington Winder Energy Ltd* [2009] EWHC 1729 (Admin) Carnwath LJ, sitting in the Administrative Court, held that a planning inspector had not erred in law by deciding that he did not need to consider alternative sites for a wind turbine development. The

matter was one of statutory construction and there was nothing in the relevant legislation or policies that expressly or impliedly required him to consider alternative sites.

The applicant local authorities applied to quash part of a decision of the first respondent Secretary of State by his planning inspector. The second respondent company (CWEL) had applied to the first applicant for planning permission for four wind turbine generators, a substation, access tracks and ancillary equipment, all to be erected on a site that would arguably affect a national park and conservation areas. The application was refused. On appeal, a planning inspector considered the impact of the proposal on the surrounding landscape and on the enjoyment of the countryside by the public, the issue of the possibility of alternative sites, and the potential contribution of the proposals on regional and national strategic targets for renewable energy generation. He allowed the appeal and granted planning permission subject to conditions. He decided that consideration of alternative sites was not necessary, either as a matter of law, or on the merits of the proposal, and that the proposal would make a valuable contribution to strategic targets for renewable energy generation. The local authorities challenged his decision on those two issues. The local authorities submitted that (1) the inspector had made a clear finding that the proposal conflicted in some respects with the development plan. Relying on *R (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* (2008) EWHC 2538 (Admin), they argued that he had made a fundamental error in holding that it was not necessary as a matter of law or policy to consider whether the need on which CWEL relied could be met on some alternative site that would cause less harm to development plan policy; (2) the inspector had misinterpreted para.16 of policy statement, "Planning and Climate Change: Supplement to Planning Policy Statement 1", which stated that strategic targets for renewable energy generation should not be applied directly to individual planning applications.

Carnwath LJ held that:

(1) *Bovale* did not lay down any general rule, and the issue in that case was whether the inspector had erred in law by having regard to alternative sites, and not, as in the instant case, whether he had erred by failing to do so. *Bovale* was distinguished. There was a difference between saying on the one hand that consideration of a possible alternative site was a potentially relevant issue so that a decision-maker did not err in law if he had regard to it, and saying on the other hand that it was necessarily relevant so that he erred in law if he failed to have regard to it, see *Trust House Forte Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293. To uphold the latter statement, one had to find a legal principle that compelled, and not merely empowered, him to do so. It appeared that it was not enough that, in a judge's view, consideration of a particular matter might realistically have made a difference, *Secretary of State for the Environment v Edwards* (1995) 69 P & CR 607 CA (Civ Div), *Bolton MBC v Secretary of State for the Environment* (1991) 61 P & CR 343 CA (Civ Div), Creed NZ v Governor General [1981] 1 NZLR 172 and *Findlay, Re (1985) AC 318 HL* considered. Short of irrationality, the question was one of statutory construction. It was impossible to say that there was anything in the Town and Country Planning Act 1990 s.78, or in the relevant policies, that expressly or impliedly required the inspector to consider alternative sites, especially as none had been identified. The emphasis of s.78 was on consideration of the particular application in question. The statutory provisions and policies relating to the National Park required special regard to be paid to their protection, but they fell short of imposing a positive obligation to consider alternatives that might not have the same effects. That was left as a matter of planning judgment on the facts. That was how the inspector had approached it, and he had been entitled to do so.

(2) It was common ground that the thrust of national renewable energy policy was a matter to be balanced against any harm the proposal might cause. The local authorities had accepted that, within the bounds of reasonableness, the interpretation of policy was a matter for the inspector, and that

their interpretation produced a surprising, even irrational, result. It was common ground that there was a shortfall of renewable energy sources judged by reference to regional targets, and also that the energy output from the instant development had to be given significant weight. The inspector had adopted what he saw as a rational reconciliation of the apparent conflicts in the policy statements. There could be no legal objection to that approach.

SEA

The East of England plan regional spatial strategy was the subject of a successful judicial review application, based upon a failure to comply with Strategic Environmental Assessment legislation. In *'Hertfordshire CC v Secretary of State for Communities and Local Government'* (Queen's Bench Division (Administrative Court), 20 May 2009), the applicant local authorities applied to quash policies contained within the plan, which had been published by the respondent. The respondent had carried out a draft revision to the strategy allocating housing development to four towns identified as being key centres for development and change. That revision was adopted and implanted in the plan through the introduction of various planning policies. The applicants contended that no proper environmental assessments, in particular regarding encroachment into the green belt that would result from housing development being allowed, had been carried out before the revision to the plan had been adopted, contrary to Directive 2001/42/EC and the Environmental Assessment of Plans and Programmes Regulations 2004 (S.I. 2004/1633).

Mitting J granted the application, finding that Article 5 of the Directive, and reg. 12 of the Regulations, required that reasonable alternatives to development should be described and evaluated before a choice was made as to how a plan should be modified. Whilst the policies read alone did not justify encroachment into the green belt, the information that accompanied the policies made clear that although significant areas around the towns were designated as green belt, in exceptional circumstances, such as the need for sustainable development, encroachment would probably be necessary. No reasonable alternatives to development which might affect the green belt had been identified or examined in relation to three of the towns identified as key centres. Accordingly, a decision had been made to erode the green belt without reasonable alternatives being properly considered through means of environmental assessments compliant with the Directive and the Regulations. It was clear that development around the fourth of the key centres had been properly considered through an iterative process.

As a sequel to the case, the government submitted to judgment in a similar challenge to policies in the South East RSS by CPRE and various local authorities, and withdrew the emergent South West RSS for further consideration.

EIA and access to justice

In an important decision the ECJ has considered the requirements for access to justice regarding EIA procedures, and the application of EIA obligations to private road projects, and found Ireland to be in breach of these. In *Commission v Ireland* (Case C-427/07) the Commission brought proceedings under Art. 226 EC claiming that Ireland had failed to fulfil its obligations under Directive 85/337/EEC by failing to adopt measures to ensure that projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II were made subject to a requirement for development consent and the EIA procedures. The Commission also claimed that Ireland had failed adopt the provisions necessary to comply with obligations regarding public participation and access to justice in Directive 2003/35/EC (implementing the Aarhus Convention).

National measures provided that EIA was required in respect of certain projects where the thresholds specified were exceeded, but private roads development was not identified as a discrete category of project. The Commission registered a complaint against Ireland concerning damage to a coastal wetland caused by a private road project without a development or prior EIA, despite the sensitivity of the site. The Commission considered that the construction of a private road constituted an infrastructure project that fell within point 10(e) of Annex II to the EIA Directive and so that Ireland was bound in accordance with Art. 2 to ensure that such projects were made subject to an EIA before consent was given if it was considered that they were likely to have significant effects on the environment. Ireland submitted that such projects almost invariably formed an integral part of other developments which were subject to the requirement of an EIA where likely to have significant effects on the environment, but that it intended to amend national legislation so as to include road development as a stand-alone category.

On the public participation claims, the Commission argued that domestic legislation treated the concept "the public concerned", more narrowly than Directive 2003/35, with the rights of NGOs not sufficiently guaranteed in particular. The Commission also submitted that the obligations that judicial review procedures required by art. 10a of the EIA Directive (inserted by Art. 3(7) of Directive 2003/35) be 'timely', not prohibitively expensive, and to make available to the public practical information on access to administrative and judicial review procedures, had not been complied with. The criterion of "substantial interest" required for seeking judicial review was also argued to be stricter than that of "sufficient interest" in Directive 2003/35.

The ECJ found that although Member States had a measure of discretion in specifying certain types of projects which would be subject to an EIA, or to establish the criteria and/or thresholds applicable, the limits of that discretion were to be found in the obligation set out in Art. 2(1) that projects to have significant effects on the environment were to be subject to an EIA. The Court had already held that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an EIA would exceed the limits of that discretion unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment. By subjecting private road construction development to an EIA only if it formed part of other developments subject to the EIA obligation, the Irish legislation meant that any private road construction development carried out in isolation could avoid an EIA, even if the development was likely to have significant effects on the environment. The scope of the new definition of "the public concerned" introduced by Directive 2003/35 could be assessed only with regard to all of the rights which that directive accorded to "the public concerned', since those two aspects were indissociable. The Commission had not established to what extent "the public concerned", understood as the public affected or likely to be affected by, or having an interest in, environmental decision-making procedures, did not have the rights which it was deemed to enjoy under the amendments introduced by Directive 2003/35. As the Commission had stated that it had called into question only failure to transpose provisions, not incorrect or incomplete transposition, the question of whether "substantial interest" corresponded to that of "sufficient interest" did not need to be answered. The domestic courts were required to determine applications as expeditiously as possible consistent with the administration of justice, which, given the limits on the Commission's claims, meant that the complaint as to transposition of the timeliness obligation could not be sustained.

As to costs, the Commission's argument was based upon the lack of an applicable ceiling to those which an unsuccessful applicant could be ordered to pay. Although it was common ground that the Irish courts could decline to order an unsuccessful party to pay costs and order expenditure incurred by the unsuccessful party to be borne by the other party, that was merely a discretionary practice, which could not be regarded as a valid implementation of the obligations in Art. 10a.

One of the underlying principles of Directive 2003/35 was to promote access to justice in environmental matters, along the lines of the Aarhus Convention. In that regard, the obligation to make available to the public practical information on access to administrative and judicial review procedures amounted to an obligation to obtain a precise result which the Member States must ensure was achieved. In the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions could not be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned was in a position to be aware of its rights on access to justice in environmental matters. Ireland had also failed to notify the provisions necessary for compliance with the relevant obligations to the Commission adequately.

Interpretation of Schedule 2

The case of *R (Wye Valley Action Association Limited) v Herefordshire District Council* [2009] EWHC 3428 (Admin) considered the definition of 'semi natural area' in the EIA Regulations. The claimant company applied for judicial review of a decision of the defendant local authority to grant planning permission for the erection, removal and re-erection of polytunnels on a 337 ha site, situated in an area designated as an area of outstanding natural beauty and adjacent to an area designated as a special conservation area. In reaching its decision the local authority had found that the polytunnel development did not require an environmental impact assessment (EIA) because it was not a development listed in Schedule 2 of the Regulations, as the development involved the rotation of polytunnels for the purposes of growing soft fruit on the ground and on land that was already cultivated. The claimants contended that the local authority erred in determining that the development was not development listed under Schedule 2 . The Court restated the general position that it was a matter of law whether a development fell within a Schedule of the EIA Regulations unless the language used was so imprecise that different conclusions could properly be reached. Ultimately, the only candidate for the development under the Regulations was under Schedue 2, para.1 (a) of the Regulations namely, "Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes". Accordingly, the primary issue was whether the development site fell within the category of a "semi-natural area".

Whilst there was no definition of "semi-natural area" in the Regulations, it was apparent from guidance published by the European Commission, namely Interpretation of definitions of certain project categories on Annex I and Annex II of the EIA Directive, *European Commission 2008-022* (2008), and guidance pertaining to natural habitats, which was not directly in point, that a "semi-natural area" had a wide scope and broad purpose and could include landscapes where there had been some human interference, as most landscapes had been subject to the hand of man denaturising his landscape, but the landscape's natural qualities continued alongside that interference and remained clearly visible, see *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* (C-142/07) (2009) Env LR D4 ECJ. Through the passage of time the human intervention itself could become part of the natural landscape, as with archaeological remains. Whilst the fact that land had been cultivated was relevant to whether an area was a "semi-natural area", it was not determinative of the issue, as it was clear that the term included cultivated land, given that the preceding category of land in Sch.2 para.1(a) was uncultivated land. In the instant case the development site was located in an area of outstanding natural beauty and adjacent to a special area of conservation. Such a site clearly came within the definition of a "semi- natural area", as it was apparent that it was located within a high quality natural environment. Further, the local authority had erred in not considering that the development was a substantial intensification of the

existing use of the land. Accordingly, the local authority had erred in not finding that an EIA was not required before granting planning permission for the development.

Screening

In an interesting decision, Collins J. in *R. (Baker) v Bath & North East Somerset Council (Defendant) & (1) Secretary OF State For Communities & Local Government (2) Hinton Organics (Wessex) Ltd* [2009] EWHC Admin 595 has held that The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 reg.4(8) and Sch.2, para.13, col.2 did not adequately transpose the provisions of Directive 86/337 as respectively they did not provide members of the public with an adequate means of seeking an environmental impact assessment, and set too low a threshold for the requirement for an environmental impact assessment for further development on approved development.

The claimant applied for judicial review of a decision of the defendant local authority to grant planning permission to the second interested party waste disposal company (Hinton Organics) for further development of a waste disposal facility. Hinton had been granted planning permission for a waste disposal facility that managed, through composting, "green" waste, namely cuttings from gardens. The process gave off unpleasant odours which resulted in a number of complaints to the local authority from individuals who, like the claimant, lived close enough to the facility to be affected by it. The local authority subsequently granted Hinton three planning permissions for the further development of the facility. The main aspect of that development was that the use at the primary site at the facility would be intensified and that compost would be transported and processed from the primary site to a secondary site. No environmental impact assessment was made before those grants of planning permission were made. The claimant argued that contrary to Directive 86/337 the local authority had failed to consider the possible effect on the environment of granting the three planning permissions. The Secretary of State contended that: (1) the grants of planning permission were modifications to an already authorised development so that the further development did not cross the threshold contained in the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 Sch.2, para.13, col.2, which implemented the Directive, so that there was no need for an environmental impact assessment before planning permission was granted; (2) the provision for the screening of development contained in reg.4(8) of the Regulations provided the necessary protection for the environment, and the interests of the public, as by reg.4(8) it was open to the Secretary of State to direct that any development was development that required an environmental impact assessment before being approved and a member of the public could make an application to the Secretary of State to make such a direction.

Collins J. held that:

1. The issue to be determined was whether the Regulations adequately implemented the Directive. It was clear from art.4 of the Directive that projects that were likely to have a significant effect on the environment had to be subject to an environmental assessment before being approved. Annex II to the Directive identified those projects, such as waste development as in the instant case, that allowed a Member State to adopt a case-by-case approach or set a threshold. However, it was clear from Annex II para.13 to the Directive that:

> "Any change or extension of projects listed in Annex II, already authorized which may have significant adverse effects on the environment" required a fresh consideration of whether an environmental impact assessment was necessary.

It was plain that it would be wrong if regard was only had to the effect of the change of an approved project itself rather than the cumulative effect that change would have, see *Abraham v Region Wallonne* (C-2/07) (2008) Env L.R. 32 ECJ (2nd Chamber) and *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* (C-142/07) (2009) Env.L.R. D4 ECJ . Accordingly, Sch.2 para.13, col.2 to the Regulations did not properly implement the Directive as it sought to limit the application of the threshold to the further development rather than assess the cumulative effect that that development would have on the development as a whole: see *Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV* (C-397/01)(2004) ECR I-8835 ECJ. In the instant case it was clear that no consideration had been given as to what effect the intensification of the development would have on the environment.

2. Article 10a of the Directive required that members of the public concerned with a development should have "access to a review procedure before a court of law or another independent and impartial body ... to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive in order to further the effectiveness of the provision of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures." It was clear from that article that there was an obligation on the Secretary of State to make clear to members of the public concerned with an application for planning permission that was likely to have an adverse effect on the environment that they had a right to make an application to the Secretary of State to consider whether it was appropriate for there to be an environmental impact assessment before the development was approved. Any decision to grant planning permission should await the decision of the Secretary of State as to whether an environmental impact assessment was appropriate. The procedure provided for by the Regulations did not comply with Art.10a of the Directive as there was no requirement or obligation provided for concerned members of the public to be informed of their right to address the Secretary of State. Accordingly, it was appropriate to quash the grants of planning permission to Hinton.

Screening opinions

The case of *Friends of Basildon Golf Course v Basildon District Council & Basildon Golf Centre Ltd* [2009] EWHC Admin 66 contains an interesting discussion about screening opinions in the context of environmental impact assessment. The claimant organisation (Friends of Basildon Golf Course (F)) applied for judicial review of a decision by the defendant local authority granting conditional planning permission for the development of a golf clubhouse with ancillary facilities and associated landscaping work. The local authority, which had owned and operated the land in issue as a golf course for a number of years, entered into an agreement for lease of the land with Basildon Golf Centre (B), who proposed to develop it. B subsequently applied for full planning permission. It was understood between the parties that some of the engineering works applied for involved the remodelling of areas of the course and would result in waste material being deposited on it. When the application was submitted, the local authority produced a screening opinion as required by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations that concluded that an environmental impact assessment (EIA) was not required and, despite the claimants' opposition and an objection by Natural England, a statutory adviser on nature conservation matters, conditional planning permission was granted.

The claimants argued that: (1) the local authority's manager of planning services (S) had erred in his approach to whether an EIA was required because he considered only whether the application fell within Sch.1 or Sch.2 to the 1999 Regulations and not whether the application, taken together with

the further development contemplated for the future, required the provision of an EIA, and the local authority should have considered the screening opinion afresh in light of the response from Natural England; (2) the local authority's failure to consult the county planning authority and to consider the policies relating to waste within the Statutory Development Plan (SDP) rendered the grant of planning permission unlawful.

Wyn Williams J noted that it was common ground between all the parties that the officer had to address his mind not just to whether the application before him was such that an environmental statement was necessary. He also had to consider whether or not the application taken together with the further development which was contemplated at the golf course required the provision of an environmental statement. It was clear from the terms of the planning officer's opinion that he had considered not only the planning application already submitted but also the overall development contemplated at the golf course, as his opinion referred specifically to remodelling work which would be the subject of a subsequent application. Moreover, the opinion referred to "all phases of the development", which was clear and unambiguous evidence that the officer had considered all aspects of the proposed development.

The officer had correctly concluded that no Sch.1 development was proposed, and had concluded that the proposed development was unlikely to fall within Sch.2 because: (a) the material to be brought onto the site was inert waste, and (b) the total amount of inert material to be brought onto the course would be less than 50,000 tonnes per year for all phases of the development. Although the officer subsequently acknowledged that the latter assessment was erroneous, that error did not vitiate his conclusion because he had also based his opinion upon the inert nature of the material. The officer had therefore been entitled to conclude that the bringing of inert material onto the course was not an operation that was likely to require an EIA. In reaching that opinion, the officer had had regard to sufficient information, including a plan showing all the proposed alterations, to allow him to form a proper planning judgment. Wyn Williams J. relied on the judgment in *Younger Homes (Northern) Ltd v First Secretary of State* (2003) EWHC Admin 3058, (2004) J.P.L. 950, in which Ousely J. found that the question of whether a planning authority has sufficient information to reach a proper judgment on its screening opinion is a matter for the relevant decision-maker whose view is challengeable only on normal judicial review grounds.

The claimants sought to argue that an objection from Natural England received after the publication of the screening opinion as part of the consultation on the planning application meant that the planning authority should have considered afresh its screening opinion. Wyn Williams J. held there could be no basis in case law to conclude that the local authority was under a duty to revisit the opinion. In coming to this view Wyn Williams J. relied on the judgment of Richards J., as he was then, in *R. (on the application of Fernback) v Harrow LBC* (2001) EWHC Admin 278, (2002) Env.L.R .10. An expression in the case of *R (on the application of Anderson) v York City Council* (2005) EWHC Admin 1531, (2006) Env. L.R. 11 to the effect that a screening opinion was final was to be read in the context of the analysis in *Fernback*.

On the evidence, the local authority had addressed itself to whether the application should be considered by the county planning authority and had been entitled to conclude that it, and not the county authority, had jurisdiction over the application. In those circumstances, the local authority was under no obligation to consult the county authority. The local authority had also been entitled to conclude as a matter of planning judgment that the SDP policies relating to waste operations were not relevant, given its prior conclusion that the application was for the improvement of a golf course.

Unusually, the court heard evidence from the planning officer who had drafted the opinion.

Reasons

The European Court of Justice has given judgment in *R (Mellor) v Secretary of State for Communities and Local Government* C-75/08. The decision has created uncertainty as to the practical implications of the ruling. A screening direction by the Secretary of State in relation to a secure hospital unit in North Yorkshire, that an EIA was not required for the planning application was challenged on the basis that reasons had not been given (and that any reasons were inadequate). The Secretary of State's screening direction had said:

> "in the opinion of the Secretary of State and having taken in to account the selection criteria in Schedule 3 to the 1999 Regulations and the representations made by Mr C Mellor on behalf of Residents for the Protection of Nidderdale, the proposal would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

The Court of Appeal referred the case to the ECJ. Advocate General Kokott considered that the Member State had to make available to the public the reasons for a decision and the decision must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening carried out in accordance with the requirements of the Directive 85/337. In particular, she said, there must be a sufficient demonstration of the reasons why legal and factual aspects which have already been raised in the procedure do not show that there is a possibility of significant effects on the environment.

However, the European Court took the view that:

> "56. It does not follow, however, from Directive 85/337, or from the case-law of the Court, in particular, from [*Commission v Italy* C-486/04], that a determination not to subject a project to an EIA must, itself, contain the reasons for which the competent authority determined that an assessment was unnecessary.
>
> 57 It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.
>
> 58 Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.
>
> 59 In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15).

> 60 That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.

Their formal ruling was:

> "1. Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an environmental impact assessment, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.
>
> 2. If a determination of a Member State not to subject a project, falling within Annex II to Directive 85/337 as amended by Directive 2003/35, to an environmental impact assessment in accordance with Articles 5 to 10 of that directive, states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information which the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision."

The effect of the ECJ judgment appears therefore to limit the requirement of reasons to the onset of litigation, which seems a narrow basis on which to rest a requirement for reasons. Practical problems which could arise include a situation where litigation takes place some time after the screening decision (eg a challenge to the planning permission). It is conceivable that local planning authorities may find themselves having to generate reasons for a screening decision some years after the decision was taken, at which point it may well be almost impossible to recall the reasons for the decision.

The remaining issues for the Court of Appeal were therefore whether to make any declaration and how to deal with costs. The Court decided that a declaration was not required, but that previous UK case law on reasons (particularly *Marson*) had now to be looked at in the context of *Mellor*. The *Marson* approach that reasons did not have to be given for negative screening decisions had been rejected by the ECJ which considered that reasons had to be provided on request. Although they did not have to decide the point now, the Court doubted that the very short reasoning in the 2006 screening direction was adequate. They considered that the Secretary of State was the loser.

Following the ECJ judgment, the Secretary of State had produced a two page reasoned assessment which had been produced by an officer in the relevant Government Office at the time of the original screening direction. The Court considered that this should have been produced in 2006 in response to Mr Mellor's complaint that the screening direction contained no or inadequate reasoning. This would have avoided the litigation. Consequently the Secretary of State was ordered to pay Mr Mellor's costs.

EIA and enforcement

Ardagh Glass

The Administrative Court has granted a mandatory order for enforcement action to be taken by a local planning authority in order to prevent immunity being achieved. In *Ardagh Glass Ltd v Chester City Council & Another* [2009] EWHC 745 (Admin), the claimant was a company which sought the grant of a mandatory order for enforcement action against the interested party, and also prohibiting the grant of planning permission. The interested party had commenced development of a very large glass container factory without planning permission 2003, but applied for permission when the plant was already under construction in 2004. The Secretary of State called in those applications in 2005, by which stage much of the plant was functioning. The Secretary of State accepted an Inspector's recommendation that planning permission should not be granted, and refused planning permission in 2007. At the beginning of 2008, the interested party submitted a retrospective planning application, accompanied by an environmental impact statement. The Secretary of State issued a direction to the defendant local authority not to grant planning permission without express authority. The two questions considered by the Administrative Court were whether the defendant should be required to take immediate enforcement action and whether planning permission could lawfully be granted for the development. It was common ground that the development was currently unlawful and that if effective enforcement action was to be taken the enforcement notices had to be served within four years of the substantial completion of the development, the main issue being when the operations were 'substantially completed'. It was also common ground that the development could not be lawfully granted planning permission without an Environmental Impact Assessment. The main issue here was whether retrospective 'development consent' was lawful in such cases. The claimant contended that to grant retrospective planning permission would undermine the preventive objectives of the Directive, of which the principal one was that effects on the environment should be taken into account at the earliest possible stage and before works were carried out (relying upon *Commission v Ireland* (C-215/06)) The defendant submitted that retrospective planning permission might properly be granted as, on its true interpretation, Community law did not preclude the regularisation of existing environmental impact assessment development in exceptional cases.

HH Judge Mole QC found that it would be a betrayal by the defendant of its responsibilities and a disgrace upon the proper planning of the country if the development were to achieve immunity because enforcement action was not taken in time. The defendant had made errors of law in their consideration of when a large and complex development, made up of several distinct, though physically and functionally connected, elements was 'substantially complete', and so whether it was expedient to issue an enforcement notice. Accordingly, a mandatory order would be made to the defendant requiring it to issue within 14 days of the judgment an enforcement notice in respect of the unlawful development requiring the removal of the buildings and works, and cessation of activities.

On a literal analysis, Article 2(1) of the Directive did not appear to rule out the possibility of retrospective development consent, provided it was preceded by a full and genuine opportunity for the public to understand the proposals, express their views, and have them taken into account. Whilst that may be much harder to achieve where the development in question was an accomplished fact, it was not impossible and not beyond the reach of a fair-minded decision-maker. The enforcement procedures under English law were effective and well able to take into account and protect the fundamental objectives of Directive 85/337/EEC. Whilst English law did leave open the possibility that a pre-emptive developer might achieve immunity without any proper EIA, a purposive interpretation of Article 2 (1) strongly suggested that for the defendant to permit the

development to achieve immunity, whether by a positive decision not to take enforcement action or by mere inaction, would amount to a breach of the UK's obligations under the Directive. There was a distinction to be drawn between the Irish statutory provisions and procedures that were the subject of the *Commission v Ireland* case and those in England. Retrospective planning permission could lawfully be granted, as long as the competent authorities paid careful regard to the need to protect the objectives of the Directive. The procedures adopted were a matter for the State and once an enforcement notice was issued, the existing procedures were able to ensure compliance with Directive 85/337/EEC.

By way of postscript, it is understood that the Secretary of State has now given retrospective planning permission.

Hinton Organics

A further chapter in the continuing saga of Hinton Organics was *R (Baker) v Bath & North East Somerset Council* [2009] EWHC 3320 (Admin). The latest case concerned an application by Mrs Baker for a mandatory order requiring the local authority to take effective enforcement action against Hinton Organics or, alternatively, for a declaration that the local authority's failure to take effective enforcement action was unlawful. The local authority had granted Hinton Organics a ten year planning permission to use a field as a waste composting site in 1999. The permission was temporary to enable the local authority to review the impact of the development and to maintain the openness of the Green Belt. Various other planning permissions had been granted and subsequently quashed by the Court on the basis that the local authority had failed to comply with the environmental impact assessment regime, in particular, the local authority had failed to carry out a screening process for the development as required by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 reg.4 . Hinton Organics continued to operate the site despite the fact there was no extant planning permission other than the original 1999 permission. Mrs Baker submitted that there had been a three-year delay in carrying out a screening process in order to decide whether an environmental impact assessment was necessary and there is a continuing breach of planning law as no planning permission has been granted. She relied on *Ardagh Glass* to the effect that the discretion of a local planning authority to take enforcement action is a narrow one where EIA development is involved. Accordingly, enforcement action against Hinton was necessary. In arguing that the Court should not exercise its discretion to make an order the Council argued that the Ardagh case could be clearly distinguished on the facts. There was no doubt in that case that the glass factory was clearly EIA development and therefore required an assessment. The factory was about to become immune from enforcement action and therefore lawful in terms of planning control.

Birtles HHJ in the High Court expressed the view that the ArdaghGlass Limited case clearly contemplates that the development (i) will continue in existence while the assessment process takes place; and (ii) may well continue for good. The development will continue for good if either the developer submits a retrospective application with an environmental statement and the local planning authority decides to grant permission or the local planning authority serves an enforcement notice, the developer makes an appeal accompanied by an environmental statement and he Secretary of State allows the appeal. He declined to exercise his discretion to make a mandatory order on the basis that the case did not concern a site which at any time had been found to be an environmental impact assessment development. The screening process had not taken place but it was likely to do so in the near future. Until the screening opinions had been obtained it would be impossible for the local authority or the court to say that it was an environmental impact assessment development. The delays that had occurred in the granting of planning permission for

the extension of the site were understandable and did not justify the making of a mandatory order or a stop notice against the local authority to take enforcement action.

Consultation

The issue of consultation remains a vitally important one in environmental law, particularly in controversial areas such as airports policy, nuclear power, etc. Getting it wrong can have serious consequences, both in terms of common law requirements and statutory requirements such as the duty in respect of sites proposed as suitable or potentially suitable for specified types of development in an NPS, under ss. 7 and 8 of the Planning Act 2008. It is therefore helpful that the Court of Appeal restated the requirements on fairness in consultation in The Court of Appeal in *R (Easyjet Limited) v. Civil Aviation Authority* [2009] EWCA Civ 1361. Easyjet appealed against a first instance decision dismissing its application for judicial review of a decision of the CAA modifying limits on the charges levied on airlines at Gatwick Airport. The relevant principles stated by the Court of Appeal are as follows:

(1) The court was inclined to accept that, if CAA had not embarked on a process of consultation which went beyond what was required of it by legislation, it would not have been obliged to do so.

(2) However whether or not consultation was a legal requirement, if it was embarked upon, it had to be carried out properly, in accordance with *R v North and East Devon Health Authority, ex p Coughlan* (2001) QB 213 CA.

(3) Having decided to expand the consultation process, it was not open to the CAA to take refuge in the limited scope of its legislative obligation. It was incumbent on the authority to carry out the consultation properly and fairly.

(4) The consultation that was undertaken was adequate to meet the requirements of fairness.

(5) There was a procedural irregularity within the legislative requirements for consultation but Easyjet had participated in the consultation process and had not taken the point and it was now too late to do so.

Habitats

Plans and projects

In *Boggis and Easton Bavents Conservation v. Natural England & Waveney District Council* [2009] EWCA Civ 1061 the Appellant, Natural England (NE) appealed against a decision of the High Court quashing the confirmation of part of a Site of Special Scientific Interest, and the respondents cross-appealed. The SSSI was located along, and inland from, the Suffolk coast between Southwold and Lowestoft. The site included areas protected under Directive 92/43/EEC on the conservation of habitats and species. At the southernmost end of the SSSI were cliffs which were being eroded by the sea. Residents whose properties were near the cliff edge, including the first respondent Mr Boggis, formed the second respondent organisation which constructed a sacrificial sea defence, but without planning permission or consent under the coastal protection legislation. NE's predecessor decided to adjust the boundary of the SSSI to reflect the erosion of the cliffs, thereby including the property of Mr Boggis and other residents. Mr Boggis objected to the notification of the SSSI because he feared that if confirmed it would prevent them from continuing to replenish the

sacrificial sea defence. NE's predecessor considered the objections to the notification of the SSSI and confirmed the designation.

The respondents challenged that decision on the grounds that it was wrongly based on the approach that "the process of exposure" of the cliffs was a geological feature of special interest. The judge at first instance (Blair J) rejected that ground of challenge, but accepted that the notification and confirmation of the SSSI in respect of the sea defences constituted a "plan" for the purposes of art.6(3) of the directive giving rise to an obligation to make an assessment which had not been carried out. He therefore concluded that the SSSI was unlawful so far as it applied to the coastline area.

The Court of Appeal held that:

(1) NE had not wrongly thought that the act, or process, of exposure of the cliffs was a geological feature. NE did not say that the act or process of exposure was a geological feature, but that the geological features of special interest were not confined to the fossils and sediments behind the cliff face, but included the exposure of them. A geological exposure, as in the case of an exposed cliff or quarry face, was a geological feature. The submission that NE's approach, to allow the natural process of coastal erosion to proceed freely, would result in the destruction rather than the conservation of the geological features was based upon two misconceptions: that the geological features in question were confined to the sediments and did not include the exposure; and that "conservation" in context meant preservation of the status quo. Conserving the geological exposures was not about preventing erosion but allowing their continued evolution. Even on the assumption that "conservation" in the Wildlife and Countryside Act 1981 s.28G(2) meant "preservation", allowing nature to take its course would "preserve" the exposure, while hindering those processes that would harm it by obscuring it. Therefore the respondents' cross-appeal was dismissed.

(2) The High Court judge was right that the notification and confirmation of the SSSI did not constitute a "project" within the meaning of Art. 6(3). Nor did they constitute a plan within Art.6(3). Notification of an SSSI was not itself a plan, but a means of ensuring that land use and other plans took proper account of environmental features of special interest. In any event, even if the notification of the SSSI was a plan or project for the purposes of Art. 6(3), there was no breach of that article because there was no evidence that there was any real risk to the special protection area which required an assessment. Even if there had been a breach of the directive, it would have been appropriate for the court to exercise its discretion not to quash the confirmation of the SSSI considering that the expert evidence was that maintaining the sea defences would have no significant physical effects; the purpose of the proceedings was not to secure the protection of the special protection area, but to enable the continued replenishment of the respondents' sacrificial sea defences; and the construction of those defences and their continued replenishment were not lawful.

In the judgment of the Court, Sullivan LJ stated:

> “I am not unsympathetic to the plight of Mr Boggis and the other residents who can see the cliff face remorselessly approaching the boundaries of their properties” but nonetheless overruled the judgment of Blair J in finding that notification of an SSSI was “most certainly not” a “plan or project” for the purposes of the Habitats Directive and that the Court should not be willing to grant the claimants relief which was “in reality intended to facilitate the retention of works that are unlawful.

Whilst Sullivan LJ encouraged the submission of a fresh planning permission in respect of the sea defences, it is understood that the claimants are seeking permission to appeal to the Supreme Court,

principally on the grounds that Sullivan LJ's judgment is inconsistent with the effective implementation of the Habitats Directive in the UK.

Mitigating and offsetting conditions

The case of *R. (Helford Village Development Co Ltd) v Kerrier District Council* [2009] EWHC Admin 400, involved a challenge to the grant of planning permission for the construction of a new jetty and an access road on foreshore designated as a Special Area of Conservation and Site of Special Scientific Interest. An environmental statement indicated that in order to militate against significant potential adverse environmental effects, the existing access route over the mid to lower foreshore should be released from regular traffic disturbance. In order to facilitate the de-commissioning of that access route, it was proposed that the access route to the new jetty should be located on a slipway by the side of a public house. The planning committee, having the benefit of a planning officer's report, determined to grant permission subject to a number of conditions including a condition that the access road alongside the foreshore should only be accessed from the slipway at the side of the public house. The claimants argued that the planning committee failed to take account of a number of matters amounting to material consideration.

The claimant argued that the planning committee had failed to have regard to whether the condition as drafted could achieve the stated aim of offsetting the loss of one area of foreshore by the gain of an equivalent area, and as a result had failed to consider the difficulties caused by the fact that fishermen and members of the public could still gain access to the mid and lower foreshore even with the condition in place, and the fact that the slipway was not in the applicant's control and access had been refused by the owner. The claimant also argued that it had failed to have regard to the Secretary of State's policy in Planning Circular 11/95 that planning conditions should not be imposed if they could not be enforced. The local authority argued that if there were breaches of the relevant condition, there could be enforcement proceedings by way of prosecution or injunction against the parish council.

H.H. Judge Michael Kay Q.C. set out the relevant law on planning conditions and material considerations. The Town and Country Planning Act affords a planning authority considerable discretion as to the range and width of conditions that it can impose, subject to the restrains summarised by Lord Hoffman in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759. Case law establishes that the question of whether something is a material consideration is a question of law but the weight to be given to any particular material consideration is a question of planning judgment for the planning authority. Provided the planning authority has regard to all material considerations and provided it does not act irrationally or unreasonably in the *Wednesbury* sense, the planning authority can give whatever degree of weight it considers appropriate to the relevant material considerations. One of the material considerations is Government policy and a planning authority must give clear reasons for departing from lawful Government policy.

The court held that the material before the planning committee of the local authority had not properly addressed or exposed for consideration the difficulties and complexities in achieving the critical environmental objective of off-setting any environmental damage caused by the proposed extension of a jetty into land designated as a Special Area of Conservation and Site of Special Scientific Interest by re-instating an equivalent area as natural habitat. The absence of such consideration invalidated the decision of the committee to grant planning permission.

H.H. Judge Kay Q.C. also considered the issue of alternative sites and whether they should have constituted a material consideration. The Judge cited the case of *R. (Mount Cook) v Westminster City Council* that it is only in exceptional circumstances that alternative proposals for sites would amount to a material consideration. He also addressed whether the environmental statements for the environmental impact assessment contained too little information. The decision of Sullivan J. In *R. v Rochdale MBC Ex p. Milne* established that the question as to whether the information in an assessment is sufficient is one of the local planning authority to decide, subject to review on *Wednesbury* grounds. The Judge also cited Sullivan J. in *R. (Blewett) v Derbyshire County Council [2003] EWHC 2775* that an environmental statement need not contain full information and that any deficiencies in information must be sufficiently serious that the document cannot be described in substance as an environmental statement for the purposes of the EIA regulations.

Judicial review

Strategies and targets

The Administrative Court decision *Friends of the Earth v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 2518 (Admin) addressed the question of the status of statutory duties to implement strategies and meet targets . The Court of Appeal has now dismissed an appeal in *R (on the application of Friends of the Earth and others) v Secretary of State for Energy and Climate Change* ([2009] EWCA Civ 810). The appellant had sought a declaration that the respondent were unlawfully failing to perform their duties under ss. 2(5) & (6) of the Warm Homes and Energy Conservation Act 2000 and implement the fuel poverty strategy. The purpose of the Act was to "require the Secretary of State to publish and implement a strategy for reducing fuel poverty; to require the setting of targets for the implementation of that strategy; and for connected purposes".

Section 2 provided:

> "2(2) The strategy must - (a) describe the households to which it applies, (b) specify a comprehensive package of measures for ensuring the efficient use of energy, such as the installation of appropriate equipment or insulation, (c) specify interim objectives to be achieved and target dates for achieving them, and (d) specify a target date for achieving the objective of ensuring that as far as reasonably practicable persons in England or Wales do not live in fuel poverty.
> ...
> 2(5) The appropriate authority shall take such steps as are in its opinion necessary to implement the strategy.
>
> 2(6) The appropriate authority shall - (a) from time to time assess the impact of steps taken under subsection (5) and the progress made in achieving the objectives and meeting the target dates, (b) make any revision of the strategy which the authority considers appropriate in consequence of the assessment, (c) from time to time publish reports on such assessments."

The strategy set a target that the government "as far as reasonably practicable" would seek an end to fuel poverty by certain dates. Programmes under the Strategy initially reduced fuel poverty levels significantly, but numbers then rose, meaning that the targets would not be met, as a result of very substantial increases in fuel prices. The challenge was to an alleged failure to implement it, rather than to the strategy itself. The Administrative Court found that the words "as far as reasonably practicable" and other phrases meant that the wording of the strategy was language of effort to achieve targets rather than of a guarantee that they would be reached. It also found that, whilst there was insufficient evidence on the point, if an approach was taken of referring to resources of specific government departments, rather than of the whole government, when determining steps that were reasonably practicable, that could be a potential breach of statutory duty.

The appellant submitted that: (i) other features of the statutory language supported the view that under s. 2(2)(d), the respondent was under a duty to achieve a result by the target date, subject to a test of reasonable practicability; (ii) that departmental budgets had to follow statutory duties so that the duty was to achieve the objective except to the extent that the costs involved in doing so would be grossly disproportionate to the benefits, referring to other statutory public law duties; and (iii) that the Administrative Court should have found the a breach of duty in light of the reference to specific departmental budgets. The respondent argued that there had been no further steps which would have been reasonably practicable within departmental budgets, given overall Government spending priorities, and that the Administrative Court had erred in finding that there had been a potential breach of duty.

Maurice Kay LJ found that properly construed, the essential legal obligation was correctly described in terms of effort or endeavour. It was not appropriate to read across from previous legislation of the kind indicated in order to define the extent of a public law duty such as that imposed by s. 2. Case law demonstrated the relevance of current resources were relevant when considering reasonable practicability, whilst acknowledging that there was a minimum standard below which an authority must not drop. The Administrative Court had been correct in finding that the respondent had been permitted to approach the question of reasonable practicability by referring to current budgetary constraints. The cost of eradicating fuel poverty was dependent upon factors beyond the direct control of the respondent, in particular the cost of energy, and Parliament could not have intended to impose an obligation to meet that cost without reference to the discretion which would usually be accorded in fixing spending priorities and allocating resources. The reasonably practicable test did not bear the same meaning in all contexts, and particularly as between tortious and public law applications; the meaning of such a test could vary between one statutory context and another. As both a result of authority and a matter of principle, the "grossly disproportionate" approach did not apply in the instant case. The Administrative Court had made no error in approaching the question of the "minimum standard" required under the statutory duty, finding that this was the implementation of the strategy's express provisions. Having regard to the unanticipated scale of the increase in fuel prices, the respondent had not been in error if he had considered reasonable practicability at least to some extent by reference to departmental budgets.

The duties under s. 2 were imposed on the respondent, and not upon the Treasury of the government as a whole.

Authorisation of pesticides and risk

The Court of Appeal has recently offered guidance on the application of Directive 91/414 concerning the planning of plant protection products on the market in UK law, in *Secretary of State for the Environment, Food and Rural Affairs v Georgina Downs* [2009] EWCA Civ 664. The Court, reversing a

decision of Collins J which has been highly controversial, held that the Directive required Member States to establish that a pesticide had no harmful effect on human health by applying the uniform principles in Annex VI: if, applying those principles, authorisation of a pesticide might be granted, the authorisation would be in compliance with Art. 4.1 of the Directive. Where the government's approach to controlling the spraying of crops with pesticides had complied with the requirements of Annex VI, it had thereby complied with the Directive and there was no necessity for it to amend its policy in that respect.

The Secretary of State appealed against a decision of the judge granting the respondent (GD) a declaration that the secretary of state's approach to controlling the spraying of crops with pesticides did not comply with the Directive and ordering him to reconsider and as necessary amend his policy in that respect. GD lived in a house adjoining fields which had been sprayed regularly with pesticides. She claimed that exposure to the pesticides had caused her to suffer ill-health. The Royal Commission on Environmental Pollution (RCEP) had undertaken a study to examine the scientific evidence on which government decisions on the risks to people from pesticide exposure had been based. The study concluded that there could be a link between the exposure of residents and bystanders to pesticides and chronic ill-health and recommended the introduction of no-spray buffer zones around agricultural land to protect rural residents from the use of pesticides by farmers. The secretary of state, acting on the advice of the Advisory Committee on Pesticides (ACP), rejected that recommendation.

GD applied for judicial review of that decision on the grounds, inter alia, that (i) there had been no risk assessment capable of identifying and properly guarding against the effect on residents as opposed to bystanders; (ii) the secretary of state had failed to comply with the obligations imposed by the Directive in that the domestic regime did not provide for the necessary protection of public health. GD contended that the Directive created an overriding principle that no pesticide should be authorised for use unless it was established that it had no harmful effect on human health. The secretary of state argued that compliance with the principles set out in Annex VI of the Directive was sufficient to meet the art.4 criteria. The judge allowed GD's application, having found that, in part on reliance on the RCEP study, she had scientifically justified her allegation that the model used to assess risk was inadequate and produced cogent evidence to indicate that the Secretary of State's approach did not adequately protect residents. He further found that the Secretary of State's policy was in breach of the Directive because compliance with Annex VI would only be sufficient where it adequately covered the risks to bystanders and residents.

The Secretary of State contended that the judge had erred in (1) rejecting his submission that compliance with the uniform principles in Annex VI was sufficient to ensure that there was compliance with the requirements of art 4.1(b); (2) substituting his own evaluation of the available evidence for that of the Secretary of State.

The Court of Appeal held that:

(1) The Directive required member states to establish that a pesticide had no harmful effect on human health by applying the uniform principles in Annex VI, and if, applying those principles, authorisation of a pesticide might be granted, the authorisation would be in compliance with art.4.1. The "uniform principles" were a comprehensive code. If each member state was free to adopt its own principles or policies for the purpose of establishing that a pesticide had no harmful effect on human health, the underlying purpose of the Directive, harmonisation of authorisation procedures enabling mutual recognition by member states of each other's authorisations, would be frustrated, Case C-303/94 *European Parliament v Council of the European Union* (1996) ECR I-2943 ECJ was applied. As the Secretary of State had applied the principles of Annex VI, in particular in having regard to expert opinion, his crop-spraying policy had complied with the Directive.

(2) The judge had substituted his own evaluation of the available evidence for that of the secretary of state. Whether the evidence reasonably raised doubts as to the safety of those pesticides that have been authorised by the secretary of state under the current approvals process, or whether it amounted to no more than hypotheses that had not been scientifically confirmed was, in the first instance, for the secretary of state to decide, having taken advice from the ACP. While the Secretary of State's decisions in that respect were not immune from judicial review, the hurdle of "manifest error" in such a highly technical field was a formidable one which D was not able to surmount. As there was an absence of a scientific consensus between the RCEP and the ACP, the judge ought to have applied the "manifest error" test, and would then have been bound to conclude that there was no manifest error in the secretary of state's approach to the crop-spraying policy.

Safety and delay

Health and Safety Executive v. Wolverhampton City Council and Victoria Hall Limited [2009] EWHC 2688 (Admin) is a striking case on a number of levels. Permission had been granted for the construction of four block of flats for student accommodation as part of regeneration of the Canalside area of Wolverhampton. Within 100 metres was an LPG facility which had been there for 30 years. An error was made by the planning authority in entering data into the HSE's computer programme used to assess risk. The mistake only came to light after permission had been granted. Almost 12 months after permission HSE applied to quash the permissions. By then 3 of the 4 blocks had been built. HSE sought an injunction against the developers to restrain the construction of the fourth and prevent occupation of the others.

Collins J held:

1. The requirement in para. A5 of Circular 04/2000 that a planning authority which proposed to grant planning permission against the advice of HSE should give HSE 21 days' notice is a mandatory requirement.

2. There was also a breach of Art. 22(1) of the GDPO requiring a summary of the reasons for the grant of permission to be given. These requirements had been explained in *R (Tratt) v. Horsham DC* [2007] EWHC 1485 and it was about time that planning officers were aware of it. The public should have been informed about the safety issue and a highly relevant planning policy.

3. It could not however be said that the decision to grant permission was perverse.

4. Despite the flaws, the HSE had not moved promptly when they discovered them and the quashing of the permissions would have caused serious hardship to the interested party. The judge's concerns as to the public safety implications were assuaged by the fact that the HSE's delay would indicate that it did not regard the risk as unacceptable, at least in the short term.

5. This delay could not be circumvented by challenging a refusal by the planning authority to revoke the permission. This was impossible in view of the fact that the block had been built, and would be unreasonable in view of the effect on the developer.

6. There was no basis for granting an injunction as sought against the developer. The court was concerned with claims against public bodies, and the ability to grant injunctions against private parties was limited to interim orders to ensure the court could deal properly with a claim.

7. Not for the first time, the court complained about the volume of material provided, five lever arch files of evidence when as the court said, only one was needed. Whole documents were copied when only extracts were needed, and much of the material went to the factual merits of the case rather than the legal issues. In addition there were four lever arch files of authorities, which, as the judgment showed, was "ridiculous".

Criminal law

Abuse of process

Abuse of process is often an argument that aggrieved clients want their lawyers to run. It usually ends in tears. In a recent example, the Administrative Court has allowed an appeal against the termination of waste duty of care prosecution for abuse of process. In *London Borough of Wandsworth v Rashid* [2009] EWHC 1844 (Admin), the local authority had brought proceedings under s. 34 of the Environmental Protection Act against the manager of a sports shop for failure to take all reasonable measures to prevent the escape of waste, in that a pile of about 12 refuse sacks of trade waste was found on the highway. When the bags were observed on the pavement outside the shop, the defendant appeared not to know what the arrangements for collection of refuse from the store were. It became apparent that the bags had been there for a period of time, and it appeared later that problems had been caused by severe flooding in the store. When the waste was not collected there had been insufficient space to bring the bags back into the shop. The magistrates refused to amend the information laid so that it was clear that the producer of the waste was alleged to be the sports shop, rather than the defendant, and found that the authority had abused the process of the court in bringing the prosecution. A case was then stated asking four questions:

> "(a) In the light of the guidance in *New Southgate Metals Limited v London Borough of Islington* [1996] Crim LR 334, were the bench correct to refuse to amend, whether on the basis on which they did refuse, or at all?
>
> (b) Did the Bench misdirect itself in finding that they had heard no explanation for the fact that the London Borough of Wandsworth had decided to prosecute rather than offer education and/or oral or written warnings in the circumstances of this case?
>
> (c) Were the Bench wrong in law to substitute their own view for that of the Prosecutor as to which of the 'options' under the Waste Enforcement Policy was appropriate in this case?
>
> (d) Were the Bench wrong in law in their finding that the prosecution was an abuse of process because it was contrary to the Waste Management Enforcement Policy?"

Pill LJ found that it was clear that the amendment to the information should have been permitted under s. 124 of the Magistrates' Court Act 1980 as it had the merest technical effect. The magistrates had also been wrong to find an abuse of process on the evidence in the case. In considering whether there had been an abuse, what the magistrates should have taken into account was the evidence available to the prosecuting authority when the information was laid and only that evidence. They should not have taken into account the late suggestion that there had been flooding and other mitigating factors which worked against prosecution. Those factors could be relied on as showing that the court should not find the information proved, but the justices were wrong in taking them into account in relation to the offence itself. The test applied also demonstrated an error of law; a finding that it would have been reasonable for the claimant, in line with the enforcement

policy, to take another course of action, did not necessarily lead to a conclusion that the course of action they took amounted to an abuse of process. Nor were the prosecution required to go through each other possible course of action *seriatim* in order to justify a decision that the course of action they took was a lawful course of action. The policy referred to a number of sanctions but made clear that the option of prosecution was available for all offences. The alleged offence, if established, did have elements of seriousness. Whilst other options might lawfully have been taken, in the circumstances of the case it was wholly unwarranted to decide that, in taking the course it did, the claimant was behaving oppressively towards the defendant or abusing the process of the court. This was a case in which the magistrates exceeded the powers which the abuse process conferred upon them.

Escapes of waste

In another case, the Administrative Court has allowed an appeal against a finding of no case to answer regarding a waste prosecution. In *Milton Keynes Council v Leisure Connection Ltd* (Queen's Bench Division (Administrative Court), 5 June 2009) the appellant local authority appealed against that decision by a magistrates' court in respect of a charge brought under section 34(1)(b) of the Environmental Protection Act 1990 against the respondent leisure centre operator. In the prosecution, the appellant's environmental protection officer had reported that there was a large quantity of rubbish, waste and detritus around a rubbish compactor located to the rear of the respondent's leisure centre. There was no dispute that the rubbish had been produced by the respondent and that it was "escaping" for the purposes of section 34(1)(b), and the manager of the leisure centre admitted liability under those provisions. Whilst the respondent had provided a means of waste disposal, in the form of a compactor, there had been no evidence that it had taken any underlying measures to prevent the escape of controlled waste. On that basis, the magistrates held that no reasonable tribunal properly directed might infer a failure on the respondent's part to comply with its statutory obligations and therefore, that there was no case to answer. In the Administrative Court, the appellant submitted that despite the dearth of evidence, it had been clear that the respondent had failed to discharge its statutory duty of care to prevent the waste escaping, and that the admittance of liability by the manager of the leisure centre supported the appellant' argument that the respondent had been vicariously liable as employer. The Court found that there was nothing in the evidence to suggest that the escape of waste could not have been prevented by the respondent if it had taken reasonable precautionary measures. The provision of a compactor was not, of itself, sufficient to discharge that statutory obligation and there was no evidence to suggest that the respondent had done any more than provide one. On that basis, the only reasonable inference open to the magistrates had been that the appellant had established a prima facie case against the respondent, namely that it had failed to take all reasonable steps to prevent the escape of controlled waste. The fact that one of its employees had pleaded guilty to an offence under section 34(1)(b) was relevant to the question of whether the respondent had, itself, failed to take all reasonable steps to discharge its statutory obligation to provide underlying measures to prevent the escape of controlled waste.

Multiple counts

In *R. v Trafalgar Leisure Ltd* [2009] EWCA Crim 217, the Court of Appeal considered two charges under the Environmental Protection Act and whether the jury should have been directed to acquit on the second count which was based on facts resulting from the rejection of the prosecution's main count. The court held that the jury should have been directed to acquit as there was a danger that in calling evidence to defeat the first count, a case could have been created for the prosecution on the

second count. The appellant company (Trafalgar Leisure (T)) appealed against its conviction for failure to control or prevent the escape of waste contrary to the Environmental Protection Act 1990 s.34(1)(b) and (6). T operated a public house. The pub dealt with its waste by hiring a large green bin that was kept on the street, and had a contract with a waste management company to empty the bin and dispose of the waste.

A local authority enforcement officer saw several bags of rubbish and cardboard boxes next to the bin. He examined their contents, which contained material that had clearly come from the pub. He had the bags removed and destroyed. The officer did not look inside the green bin or question the pub's staff. The officer wrote to B requiring an explanation for the offending behaviour. No reply was received and following another letter, proceedings were commenced and T, the company, was indicted on two counts. The prosecution's main count was that the pub's staff had put the bags and cardboard on the pavement outside, contrary to s.33(1)(a)) and (6). It also alleged that, in the alternative, other persons had removed the pub's waste from the green bin, probably in order to put their own waste in it, and that in failing to lock the bin the company had failed to take all such measures as were reasonable to prevent the escape of waste from its control, contrary to s. 34(1)(b) and (6).

The jury acquitted T on the first count, but found it guilty on the second. T submitted that there was no evidence on which a jury could properly convict of an offence under s.34(1)(b). The Court of Appeal held that the recorder should have directed a verdict of not guilty on the second count at the close of the prosecution case. On the jury's acquittal on the first count, a case could have arisen on the second count only on the assumption that the staff had put the rubbish in the green bin. The second count was therefore based on facts that involved a rejection of the prosecution's main count. On the evidence at the close of the prosecution case, there was nothing to suggest a failure to take reasonable measures to prevent the escape of the waste from the bin. On the first count, the company was virtually obliged to call evidence to defeat the inference of the staff depositing rubbish in the street. The jury's attention should thereafter have been confined to that count. There was a danger that in calling evidence to defeat the first count, a case could have been created for the prosecution on the second count. Accordingly, it was unfair to proceed on count two, and that conviction was unsafe.

Evidential issues

The High Court has also considered evidential issues in relation to prosecutions for water offences. In *Environment Agency v Drake* [2009] All ER (D) 30, the respondent pleaded not guilty to three offences arising out of a single incident: (1) obstruction of the appellant's officers; (2) knowingly causing silt or suspended solids to enter controlled waters; and (3) removing silt or suspended solids from the waters. At the start of the hearing, the appellant agreed not to rely on tests that had been carried out. The respondent was subsequently convicted of the first offence, but the district judge stayed the second and third offences as an abuse of process, stating that a fair trial was not possible on the basis that: (a) samples taken by the appellant had been lost, tested to destruction, or been disposed of without a proper explanation; (b) statements taken by the appellant had not been relied on; (c) the respondent had not been given an opportunity to test the samples which had seriously prejudiced him, and that in any event it would be difficult to reconcile the samples; and (d) the appellant's decision not to rely on scientific evidence made the whole nature of the case that the respondent had to defend different.

The appellant appealed against that decision, submitting that there was no information or evidence upon which the district judge could properly have concluded that the respondent would be exposed to serious prejudice as a result of the loss or destruction of the samples. The High Court allowed the

appeal, finding that there had been no duty on the appellant to take samples of water. There had been ample evidence in the form of DVD footage, photographs and eye witness testimony of the appellant's officers that the river had been polluted on the day in question by way of silt. The results of the tested samples of water were not essential for proving the case on the second and third offences. In the instant case, the prosecution had properly reached its decision to abandon its reliance on the corroborative evidence (the testing of the samples of water) and to rely on the DVD footage, photographs and eye witness testimony. The respondent had not been faced with allegations on a different basis to what had been anticipated. The fact that the prosecution had abandoned reliance on samples meant that the defendant actually had to face the case on a reduced basis, which worked to his advantage. In all the circumstances, no prejudice had been caused by reason of the matters relied on by the district judge, who had erred when deciding that serious prejudice had been caused to the respondent by reason of the loss and/or destruction of the samples.