EDITORIAL COMMENT

The Editorial Board

Happy New Year to all! After something of a break, the 39 Essex Newsletter is back with a new issue for 2018, which considers some important developments from the end of last year.

We begin this edition with an extended look by Stephanie David at the evolving protective costs order regime, the new rules for which has recently received detailed consideration from Dove J in *RSPB and others v Secretary of State for Justice and Anr* [2017] EWHC 2309 (Admin). Stephanie considers the question of whether the recent reforms, read in the light of the RSPB case, have enhanced or inhibited access to justice in environmental matters?

One of our co-editors, Jonathan Darby, examines the law surrounding planning conditions, which has been consolidated over the past couple of years. The courts have clarified the approach to take to the imposition of conditions just as the well-known tests, as set out at paragraph 206 in the NPPF, have been placed on a statutory footing in the Neighbourhood Planning Act 2017.

Stephen Tromans QC and Rose Grogan discuss a rare contaminated land case in the Court of Appeal – *Price and Hardwicke v Powys County Council* [2017] EWCA Civ 1133. Stephen and Rose appeared for the Council in a case which considered the scope of "liabilities" for the purposes of the Part IIA contaminated land regime.

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Finally, we conclude this edition with a plug for an indispensable new book on 'Planning Policy' to be published by Bloomsbury Professional by two of our own, Richard Harwood QC and Victoria Hutton, and which is coming out this month. Do go and buy a copy!

All the best for 2018!

"THE ENVIRONMENT CANNOT DEFEND ITSELF BEFORE THE COURT" [1]

Stephanie David

On 28 February 2017, the cost arrangements applicable to, broadly speaking, legal disputes concerning environmental law were changed.[2] The question is: **have those changes,** as interpreted by Dove J in *(1) The Royal Society for the Protection of Birds (2) Friends of the Earth Limited and (3) Client Earth v (1) Secretary of State for Justice (2) the Lord Chancellor [2017] EWHC 2309 (Admin)* **enhanced or inhibited access to justice in environmental matters?**

Previous cost arrangements

The previous cost arrangements limited the costs payable in Aarhus Convention[3] claims as follows:

- Where a claimant was ordered to pay the costs: if the claimant was an individual then the amount was limited to £5,000; whilst in all other cases, the limit was £10,000; and,
- Where a Defendant is ordered to pay costs, the limit was £35,000.

An *"Aarhus Convention claim"* was defined as *"a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the [Aarhus Convention] including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."* [4]

The purpose of these arrangements was to implement properly the requirements of the Aarhus Convention (as reflected in two EU Directives[5]) into domestic law.

The Aarhus Conventions and its purpose

The objective of the Aarhus Convention is ultimately *"the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being"* (see Article 1). That is achieved by each Party guaranteeing *"the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."*

Article 9 contains the provisions relating to access to justice. Key among them is that the procedures to challenge contraventions of national law relating to the environment *"provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive" [emphasis added].*

Case law of the CJEU and English courts has emphasised the following points in applying those provisions:

1. **Public interest:** When assessing whether proceedings are *"prohibitively expensive,"* due account must be given to public interest (and likewise the flip side private economic interest) in bringing the claim. That is because (1) of the importance of environmental protection for the health and well-being of present and future generations; and (2) that citizens or non-governmental organisations representing the environment should not be expected to bear the full risk of costs of judicial proceedings (see Advocate General Kokott in *R (Edwards and Another) v Environment Agency and Others* (No 2) (Case-260/11)).

2. **Objective and subjective assessment:** An assessment of whether proceedings are *"prohibitively expensive"* requires not only a subjective assessment of the claimant's means, but also a more objective approach, namely whether *"ordinary members of the public […] would be deterred from proceeding by*

1 *R (Edwards and Another) v Environment Agency and Others (No 2) (Case-260/11),* Opinion of Advocate General Kokott, paragraph 42

2 Civil Procedure (Amendment) Rules 2017 (S.I. 2017 No. 95)

3 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998

4 This is the definition from CPR r.45.41(2) in the previous arrangements. The definition was subject to criticism in *Secretary of State for Communities & Local Government v Venn* [2014] EWCA Civ 1539.

5 The Aarhus Convention was not incorporated into English law, but found effect through EU Directives.

a potential costs liability" (as per Sullivan LJ at para 50 in *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006).

3. **Possible chilling effect:** Sullivan LJ also observed the possible *"chilling effect"* on the *"willingness of ordinary members of the public"* challenging the lawfulness of environmental decisions, should an investigation into a claimants' means be intrusive (at paragraph 52).

4. **Limited discretion:** EU member states have a discretion as to how the results outlined in the Directives are to be achieved. But that discretion is limited – member states are still responsible for ensuring that the objectives of the Aarhus Convention are satisfied and observing the principles of effectiveness and equivalence and fundamental rights under EU law (see Advocate General Kokott in *R (Edwards and Another) v Environment Agency and Others* (No 2) (Case-260/11).

5. **Reasonable predictability:** The CJEU emphasised in *Commission v UK [2014] QB 988* that the valid transposition of a directive does not require *"the provisions of the directive to be enacted in precisely the same words."* But a judicial practice whereby the courts simply have a discretion to order the unsuccessful party to pay the costs *"is, by definition, uncertain and cannot be requirements of clarity and precision necessary to be regarded as valid implementation" (para 35).*

The 2017 Amendments

As a starting point, the definition of an *"Aarhus Convention claim"* is now broader to include reviews under statute.[6] The previous cost caps are retained, but the court now has a discretion to either vary those caps or remove them altogether.

That discretion can be exercised if the court is satisfied that to do so *"would not make the costs of the proceedings prohibitively expensive for the claimant"* (CPR r45.44(2)). In making that assessment, the court will have regard to r 45.44(3) and (4):

"(3) Proceedings are to be considered prohibitively expensive for the purpose of this rule if their likely costs (including any court fees which are payable by the claimant) either—

(a) exceed the financial resources of the claimant; or

(b) are objectively unreasonable having regard to—

(i) the situation of the parties;

(ii) whether the claimant has a reasonable prospect of success;

(iii) the importance of what is at stake for the claimant;

(iv) the importance of what is at stake for the environment;

(v) the complexity of the relevant law and procedure; and

(vi) whether the claim is frivolous.

(4) When the court considers the financial resources of the claimant for the purposes of this rule, it must have regard to any financial support which any person has provided or is likely to provide to the claimant. […]"

The claimant needs to state in the claim form that the claim is an Aarhus Convention claim (as before), but must now additionally file and serve a schedule of the claimant's financial resources (including third party financial support). The Defendant can then deny whether the claim is an Aarhus Convention claim in its acknowledgment of service.

RSPB and others v Secretary of State for Justice and Anr [2017] EWHC 2309 (Admin)

A judicial review challenge was brought in relation to these new arrangements on three grounds:

(1) The provisions of the rules which enable a variation of the costs limits at any point in the litigation are in breach of the requirements of EU law.

(2) It is unlawful for the 2017 Amendments to fail to provide for private hearings when a claimant or a third party supporter's financial details may be discussed and examined at such a hearing.

(3) In light of the CJEU jurisprudence, the claimant's own costs of bringing the litigation should necessarily be included within the assessment of the financial resources of the claimant for the purposes of evaluating whether or not costs protection should be afforded and whether or not the proceedings are *"prohibitively expensive."*

6 To address the point raised in *Secretary of State for Communities & Local Government v Venn* [2014] EWCA Civ 1539

First Ground

Regarding the first ground, Dove J determined that there were two key questions regarding whether the new arrangements provide *"the reasonable predictability necessary to ensure that there is sufficient precision and clarity in relation to the costs exposure of a claimant and avoid the chilling or deterrent effect on meritorious claims" (para 36).* Those are (para 36):

(1) Whether a determination of any variation in the cost cap would be at a sufficiently early stage of proceedings so that *"absent any other application the claimant would have reasonable predictability in relation to costs in the event of failure;"* and

(2) Whether the possibility of a *"later variation of the costs caps conflicts with the requirement that there should be reasonable predictability of the claimant's costs exposure."*

Dove J observed that the new rule *"effectively states that the default costs caps will apply unless the defendant has in the acknowledgment of service denied that the claim is an Aarhus Convention claim. (para 37).* He then noted that the defendant will have all the necessary material in the form of the schedule of financial information to determine whether the default costs cap should apply. Paragraph 2.7 of Practice Direction 23A requires that *"every application should be made as soon as it becomes apparent that it is necessary or desirable to make it."* Dove J therefore concluded that an application for a variation should be made by the defendant at the stage of filing the acknowledgment of service. He was satisfied that the decision on cost capping would accordingly be an appropriately early stage of proceedings.

In answer to the second question, Dove J concluded that an application to vary the costs order could only be brought at a later stage if there was a good reason. He accepted the two possible circumstances that could provide such a reason: (1) the claimant had provided false or misleading information; or (2) the financial circumstances had changed. He concluded that *"a system which provides for the accommodation of variation in the costs caps in these circumstances still remains reasonably predictable"* (at paragraph 40).

Second Ground

Regarding the second ground, Dove J noted first that the schedule of financial resources would be a confidential document, notwithstanding the claim form to which it is attached being a public one. He considered that the provision in the public domain of confidential information arose in relation to: (1) private individual claimants; (2) organisations (like the claimants); and (3) third party supporters.

Dove J concluded (at paragraph 57) that *"if a dispute in relation to the appropriate level of costs caps were to proceed to a hearing […] then the rules should provide for that hearing to be in private in the first instance."*[7] That is not only to preserve confidentiality, but also because of the *"chilling effect which the prospect of the public disclosure of financial information of the claimant and/or his or her financial supporters would have on the propensity to bring meritorious claims would be in breach of the requirements to ensure wide access to justice set out in the CJEU jurisprudence set out above."* He emphasised that the reasons for that hearing to be held in private applied equally to an individual claimant or a third party supporter. Dove J also observed the need for a specific definition regarding the nature and content of the financial information required.

Third Ground

Dove J promptly dealt with the third ground, because the Respondents had conceded that Claimant's costs may be a material matter for the court to consider in determining any application for a variation of the costs cap.

Comment

The judgment provides some clarity (or at least the need for further clarity) in relation to a number of points:

- The most likely timing of an application to vary the costs cap;
- That hearings at which financial information will be disclosed will be private; and,
- The meaning of financial information.

It therefore goes some way towards providing the necessary *"reasonable predictability"* required by the CJEU jurisprudence. But, it is concerning that, more

7 Indeed, on 13 December 2017, a direction was given that any application for variation of the costs cap, where it proceeds to a hearing, will be heard in private in the first instance.

generally, the move away from the blanket costs capping rules may in fact undermine access to justice in environmental matters. That is for two main reasons:

- Would-be claimants may be deterred from investigating potentially meritorious claims, simply by virtue of the requirement to now provide financial information and the uncertainty with regards to costs exposure (at least up to the stage of permission being granted). Indeed this does already appear to be happening. Not to mention the time that could be required to put together that financial information. Many very important challenges require months of possibly costly investigation prior even to drafting a letter before action. The chilling effect therefore kicks in much earlier.
- There is the potential for extensive satellite litigation in relation to applications to vary or remove the costs caps – the resources required for that, both time and money, could have been better spent on the substantive environmental matters.

Finally, the preoccupation with the requirement that proceedings are not *"prohibitively expensive"* has, I suggest, led to a failure to give sufficient weight to the public interest in bringing meritorious challenges and the ultimate purpose behind Article 9(3) of the Aarhus Convention. That purpose is to incentivise private individuals and organisations to bring challenges to measures that might be contrary to environmental protection. This failure is especially to be lamented in circumstances where the previous rules had, for the most part, been working well. As Advocate-General Kokott indicated, the environment cannot defend itself before the court. Surely therefore, that purpose is better achieved by giving more weight to, and perhaps starting with, the factor at r 45.44(3)(b)(iv): *"the importance of what is at stake for the environment."*

MAKING PLANNING CONDITIONS GREAT AGAIN!

Jonathan Darby

Far from being satisfied with turning international relations on its head, Donald Trump's influence now extends into the construction and interpretation of planning conditions. Further developments to the law as it relates to conditions are also eagerly awaited pursuant to Regulations made under the Neighbourhood Planning Act.

Although in broad terms, a long line of authorities indicates that the power to impose conditions is not unfettered. In this regard, the speeches in the House of Lords in ***Newbury*** have long been considered to provide a clear framework for assessing the validity of conditions, which i) must be imposed for a "planning" purpose and not for any ulterior purpose; ii) must fairly and reasonably relate to the development permitted by the planning permission; and iii) should not be so unreasonable that no reasonable planning authority could have imposed it.

The courts have also developed a number of principles for construing conditions, including – notably for the purpose of what follows – a strict approach to the use of extrinsic material and a clear indication that there is little room for conditions to be implied in a planning permission.

However, this approach was refined somewhat by the Supreme Court in *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2015] UKSC 74, in which the following test was unanimously approved:

> *"When the court is concerned with the interpretation of words in a condition in a public document … it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."*

As to the extent to which extrinsic material can be used in the interpretation of a permission, Lord Hodge held that:

> *"Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent".*

Perhaps more of a departure from previous authorities was the Supreme Court's clear relaxation of the principle against the implication of conditions in a planning permission.

Although Mr Justice Cranston subsequently sought to distinguish *Trump International in Eatherley v Camden LBC* [2016] EWHC 3108 (Admin) (a GPDO case), by suggesting that permissions under the Order were not to be interpreted in accordance with ***Trump International*** because that case concerned permissions granted by planning authorities, not permissions laid down by statutory instrument, in *Dunnett Investments Ltd v SSCLG* [2016] EWHC 534 Patterson J applied the principles set out in ***Trump International*** as follows.

(i) Conditions need to be construed in the context of the permission as a whole;
(ii) Conditions should be construed in a common sense way;
(iii) Conditions should not be construed narrowly or strictly;
(iv) There is no reason to exclude an implied condition;
(v) Conditions are to be construed objectively;
(vi) Conditions should be clearly and expressly imposed;
(vii) Conditions are to be construed in conjunction with the reason for its imposition.

The Court of Appeal then agreed that the starting point for interpretation of planning conditions was ***Trump International,*** by the same stroke confirming that yes, with appropriate caution, words can be implied into conditions.

Any current discussion of conditions would be incomplete without reference to the Neighbourhood Planning Act 2017, which includes restrictions on powers to impose planning conditions, including the use of pre-commencement conditions.

The Explanatory memorandum states as follows:

"Planning conditions

4 *The Act introduces a power for the Secretary of State to make regulations which prescribe the circumstances where certain conditions may or may not be imposed and descriptions of such conditions for the purpose of ensuring that conditions meet national policy tests in the National Planning Policy Framework.*

5 *Pre-commencement conditions are planning conditions which prevent any development authorised by a planning permission from taking place until the condition has been formally discharged, for example, the condition may require the approval of detailed aspects of the development. The Act ensures that pre-commencement planning conditions are only used by local planning authorities where they have the written agreement of the applicant, subject to any exemptions that the Secretary of State may prescribe in regulations.*

6 *It is intended that the process of agreeing pre-commencement conditions before a decision is issued should become a routine part of the dialogue between the applicant and the local planning authority, building on current best practice. In the event that an applicant refuses to accept a necessary pre-commencement condition proposed by a local planning authority, the authority can refuse planning permission. This will maintain appropriate protections for important matters such as heritage, the natural environment, green spaces, and measures to mitigate the risk of flooding."*

Crucially, the 6 tests in Paragraph 206 of the NPPF (i.e. planning conditions must be: i) necessary; ii) relevant to planning; iii) relevant to the development; iv) enforceable; v) precise; vi) reasonable) are now set out on a statutory basis. Moreover, pre-commencement conditions will now be required to be agreed with an applicant before they are imposed. Although already advised as being 'best practice' by the NPPG (as a means of increasing the certainty of what is proposed and how it is to be controlled, including highlighting any condition requirements that may impact on the implementation of the development), this provides significant scope for strategic negotiations between applicant and local authority.

Now who would have thought that an article that started with Trump would end with a comment on the benefits of collaborative working?

CONTAMINATED LAND

Stephen Tromans QC and Rose Grogan

Since the introduction of the regime under Part IIA of the Environmental Protection Act 1990 for identifying and remediating contaminated land was brought into force in 2001, it has generated surprisingly little case law, given the intense complexity of the scheme. This may be due in part, paradoxically, to that very complexity having a chilling deterrent effect on local authorities pursuing cases. It is also undoubtedly due to the huge cuts in government funding to local authorities by way of the capital grant scheme for dealing with contaminated land.

However, Part IIA is still capable of generating some action for lawyers, as the decision of the Court of Appeal in *Price and Hardwicke v Powys County Council* [2017] EWCA Civ 1133 shows. In that case, a series of Welsh local authorities, the last of which was the Borough of Brecknock, had operated a rural landfill site for many years, under a series of licences with the owners of a farm on which it was located. After the site had closed in 1992 and was restored, local government reorganisation vested the assets and liabilities of Brecknock in Powys County Council, on 1 April 1996. At that point, the Environment Act 1995 had been enacted, but its provision inserting Part IIA into the Environmental Protection Act 1990 had not been brought into force. This only occurred in 2001.

Initially Powys assumed responsibility for the site and installed drains, a small treatment plant and a pumping station. However it then decided that as a matter of law it was not liable and terminated the arrangement. The landowners, fearful that they might be left responsible if at some point in future the land was identified as contaminated, sought a declaration that Powys was an "appropriate person" to bear liability under Part IIA as statutory successor to Brecknock.

At first instance the landowners' arguments succeeded. HHJ Milwyn Jarman QC sitting as a High Court judge held that the word "liabilities" used in the reorganisation order was wide enough to transfer to Powys the Part IIA liabilities of Brecknock, even though at that time Part IIA was not in force. He relied heavily on a line of cases beginning with the decision of Woolf J in *Walters v Babergh District Council* (1983) 82 LGR 235, in which "liabilities" had been held to include contingent liabilities where a breach of duty had occurred but at the date of transfer no damage had resulted, so that there was no complete cause of action.

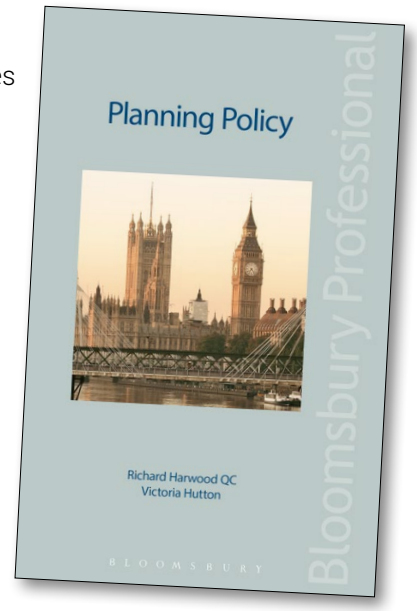
The Court of Appeal disagreed with this approach. They found there was no basis to distinguish the decision of the House of Lords in *R (National Grid Gas (formerly Transco plc)) v Environment Agency* [2007] 1 WLR 318, and hence Powys could not be treated as the same person in law as Brecknock. The word "liabilities" was not wide enough to cover possible future liability under law which was not yet in force. The Walters line of cases did not address the situation where the predecessor body was under no relevant obligation at the time of the transfer and where legal obligations were only imposed under a statutory scheme implemented afterwards. The Court rejected arguments of a general nature based on the "polluter pays" principle: the application of that principle was a matter for Parliament, not the courts.

The decision is of obvious significance as the wording in question is used in many local authority transfer schemes.

PLANNING POLICY BOOK

Richard Harwood QC and Victoria Hutton

A new book on planning policy making by Richard Harwood QC and Victoria Hutton will be published in January 2018. It deals with local and national policy in England, Wales and Northern Ireland with overviews on legal principles, SEA, examination process and court challenges and detailed chapters on the types of plans. The book can be preordered in paperback and electronic formats from Bloomsbury Professional.



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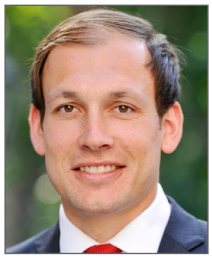

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