

THE HOTTEST ENVIRONMENTAL CASES OF THE YEAR: EIA, SEA, CONSULTATION, AARHUS, ENVIRONMENTAL INFORMATION AND PCOS

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Introduction

1. It would be impossible to attempt to summarise in a single paper all the important environmental law cases over the past 12 months. The purpose of this paper is to supplement the material covered by the other speakers at this seminar and provide a round up of key recent developments in substantive and procedural areas of environmental law which we consider to be most relevant to practitioners in the field.
2. The first section of the paper covers some of the key cases in the last year in the areas of:
 - (i) Environmental Impact Assessment (“EIA”);
 - (ii) Strategic Environmental Assessment (“SEA”); and
 - (iii) Public consultation in environmental decisions
3. The second section deals with cases concerning the procedure in environmental litigation and in particular it examines:
 - (iv) The Applicability of the Aarhus Convention in UK law;
 - (v) Environmental Information; and
 - (vi) Protective Costs Orders.

SECTION 1 – SUBSTANTIVE LAW UPDATE

(i) Environmental Impact Assessment

4. Environmental Impact Assessment (EIA) is one of the cornerstones of European Community Law concerned with protecting the environment. The EIA Directive has proven problematic to implement correctly in most member states. In the UK it has generated more case law than any other area of EC or domestic environmental law. The last year has been no exception. The courts have come to view EIA not only as a technical means of assisting expert decision-making but as an important guarantee of the democratic right of the public to be informed about the potential environmental consequences of proposed development, how they may be avoided or mitigated and to participate in the planning process by expressing their views.
5. For practitioners the starting point in understanding the legal requirements as to EIA is, of course, the EIA Directive 85/337/EEC as amended. The ECJ has stated on numerous occasions that the scope of the EIA Directive (85/337, as amended) is very wide; and that Member States must implement the EIA Directive in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before consent is given, projects likely to

have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to an assessment with regard to their effects (e.g. *Ecologistas en Accion-CODA* paras.28 and 33).

6. The focus in the series of cases considered here is the often vexed question of whether a project falls within the remit of the EIA Directive and in what circumstances an EIA is required. Many of you will be familiar with the ‘screening’ process whereby planning authorities determine whether an EIA is required. However, it is worth reminding ourselves of the criteria for considering whether a project is or is not “EIA development”. Projects are defined in Article 4. For Annex I projects, the fact that it is within the list is sufficient to trigger an EIA. For Annex II projects member states are required to determine on a case-by-case basis or by reference to thresholds set by the member state whether the project is one which is likely to have a significant environmental impact in Article 2(1) terms.

Case 1: Case C-142/07 *Ecologistas en Accion CODA v Ayuntamiento de Madrid* [2009] Env L.R. D4.

7. This case concerned the refurbishment of the Madrid ring road. The complex engineering scheme was subdivided into 15 projects, each of which was treated separately for the purposes of considering the need for an EIA.
8. The ECJ held that:
 - (i) the scope of the amended Directive is “very wide” and provides for the environmental assessment of refurbishment and improvement of projects for urban roads (para. 28). It would be contrary to the Directive’s purpose to allow any urban road to fall outside the Directive’s scope solely on the ground that that particular kind of road is not expressly referred to among the list of projects in Annex I and II. The refurbishment of an urban road was covered either by point 7(b) or (c) of Annex I to the directive or where they are projects covered by point 10(e) of Annex II or the first indent of point 13 thereof, which are likely by virtue of their nature, size or location...to have significant effects on the environment.
 - (ii) when assessing the environmental impact of a project or of its modification it is necessary to take account not only of the direct effect of the works envisaged but also of the environmental impact liable to result from the use and exploitation of the end product of those works (paras. 38-39).
 - (iii) the purpose of the Directive cannot be circumvented by the splitting up of projects. The failure to take account of the cumulative effect of several projects must not mean that in practice they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive (para. 44) (see Case C-392/96 *Commission v Ireland*, paragraph 76 and Case C-2/07 *Abraham and Others*, paragraph 27).

9. *Ecologistas* exemplifies once again the ECJ’s broad, purposive approach to EIA. The case addresses two important questions with implications for planning authorities tasked with deciding whether a project requires EIA:

(1) *When screening for EIA, can you take into account the environmental benefits as well as the adverse effects of development?*

(2) *When is the decision-maker required to consider the project as part of a wider scheme?*

Netting the benefits and adverse effects

10. In respect of the question (1), those determining the need for EIA must distinguish a proper consideration of the cumulative effects of a project at the screening stage from a consideration of the “overall” effects of the project. The proper approach to EIA is not to offset the benefits of a scheme against the adverse effects. *Ecologistas* makes clear that the benefits, including environmental benefits, of a proposed development are irrelevant in determining whether EIA is required. Advocate General Kokott in her Opinion in *Ecologistas* said at paragraph 50 that:

“In examining whether an environmental impact assessment is necessary...the expectation of favourable environmental effects cannot offset significant adverse environmental effects of a project in such a way that no assessment at all takes place because on balance the project as a whole is beneficial to the environment.”

11. The ECJ upheld that view at paragraph 41:

“the fact relied on by the Ayuntamiento de Madrid that the projects at issue in the main proceedings should have beneficial effects on the environment is not relevant in determining whether it is necessary to make those projects subject to an assessment of their environmental impact.”

12. The implication of this decision for decision-makers at the screening stage is that if a proposed development is likely to produce any significant adverse environmental effects then the planning authority should require an environmental statement in respect of those matters. Even if the project will produce other beneficial effects such that the “overall” effect of the project will be negligible or not significantly negative, that does not obviate the need for an EIA of those aspects of the scheme which *may* have any significant environmental effect.

Splitting Projects

13. In respect of question (2), the proposition that developers should not be allowed to split up projects in order to circumvent the requirements of the EIA Directive is now well-established in European case-law. This begs the question when is it correct to consider a project as part of a wider scheme? In a large-scale phased scheme, how detailed do plans for the wider scheme have to be for it to become necessary and

possible to consider the wider scheme? Is a project which is designed to operate independently but which *may* be interconnected with later phases subject to an EIA of the entirety of the scheme?

14. In a very early domestic EIA case, *R. v Swale BC ex p RSPB* [1991] 1 PLR 6, 16, Mr Justice Simon Brown (as he then was) said:

“...the question of whether “it would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location” should, in my judgement, be answered rather differently. The proposals should not then be considered in isolation if, in reality, it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate to the language of the Regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common-sense moreover, developers could otherwise defeat the object of the Regulations by piecemeal development proposals.”

15. *Swale* is the stated basis for the statement in Circular No.02/99 para.46 that:

“For the purposes of determining whether EIA is required, a particular planning application should not be considered in isolation if, in reality, it is properly to be regarded as an integral part of an inevitably more substantial development. In such cases, the need for EIA ...must be considered in respect of the total development”.

16. The *Swale* test of “inevitability” – that a proposal needs to be an integral part of an *inevitably* wider scheme - remains good law. However, it would appear to be inconsistent with more recent case law like *Ecologistas* and in particular in relation to the precautionary aspects of the EIA Directive. *Swale* was decided before the meaning of “likely” in European environmental law had been elucidated by the European court. The meaning of “likely” in European law does not equate to the “balance of probabilities” standard usually applied in domestic law, rather it requires the consideration of the “risk” of a significant environmental effect occurring. Therefore even if a more substantial development cannot be said to be inevitable, but merely likely, it arguably ought to be assessed as part of the effects of the project.
17. These arguments were advanced by the claimant in a recent judicial review of a grant of planning permission in *Morge v Hampshire County Council*. The outcome of that case will become known later this month.

Case 2: R (Baker) v Bath and North East Somerset DC [2009] EWHC 595 (Admin)

18. *Baker* was a challenge to the decision of the defendant local authority to grant a series of planning permissions for the further development of a waste disposal facility. This site was also the subject of nuisance proceedings in *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 (which is discussed in relation to the applicability of Aarhus Convention see Section 2 (iv) below). The facility, which composted “green” waste, gave off unpleasant odours which resulted in a number of

complaints to the local authority. As a consequence of the proposed modification to the facility, the use at the primary site of the facility would be intensified and processed from the primary site to a secondary site.

19. The main challenge related to the local authority's failure to carry out an EIA. Since the grants of planning permission in question were modifications or extensions to an already authorised development it was argued by the respondent that the additional development did not cross the threshold contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 Sch 2 para 13 col 2 ("the EIA Regulations"). The EIA Regulations required that in assessing whether a modification needs an EIA it is necessary to apply the threshold "to the change or extension" and not to the entirety of the development which is being changed or extended. On that basis the local authority argued there was no need to screen the proposed development and consider whether the permissions were likely to have significant environmental effects.
20. Moreover, the Secretary of State contended that the provision for the screening of development contained in reg 4(8) of the EIA Regulations provided the necessary protection for the environment and members of the public, since it was open to the Secretary of State to direct that any development was EIA development and a member of the public could apply to the Secretary of State to make such a decision.
21. Mr Justice Collins held that:
 - (1) the issue to be determined was whether the EIA Regulations adequately implemented the Directive. It was clear from Article 4 of the Directive that projects which were likely to have a significant effect on the environment had to be subject to an EIA before being approved. It would be wrong if regard were only had to the modification itself and not to the cumulative effect that the modification would have (*Ecologistas* considered). Accordingly, Sch 2, para 13, col 2 of the EIA Regulations did not properly implement the EIA Directive in that modifications or extensions to Schedule 2 projects were considered in isolation of the pre-existing project. This was contrary to the purpose and language of the Directive. 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 10(a) of the Directive imposed an obligation on the Secretary of State to make it known to members of the public that they had the right to make an application to the Secretary of State pursuant to reg 4(8) to consider whether it was appropriate for there to be an environmental impact assessment before any development which could give rise to significant environmental effects was approved. The procedure provided for by the Regulations did not comply with Article 10(a) since it did not specifically require the Secretary of State to inform members of the public of their right to address him/her.
22. The decision is another example of the UK's failure to comply with the EIA Directive and its emphasis on democratic participation in the EIA process mirrors the participatory ethos of the Aarhus convention discussed below. The Secretary of State has not appealed the decision.

What are the implications of Baker?

23. *Baker* is significant for planning authorities and developers alike. As a consequence of *Baker*, pending the amendment of the EIA Regulations, planning authorities, in applying the thresholds for changes or extensions should apply the thresholds to the development as changed or extended. Where there is an existing development which was itself over the threshold in Schedule 2 any application to change or extend that development will also exceed the threshold and require screening for EIA.
24. The impact of this decision is likely to be felt by developers of large scale or environmentally sensitive projects. Where developers wish to make even minor amendments to a scheme for which they have already obtained planning permission there will need to be screening of the same.

Case 3: Case C-75/08 R (Mellor) v Secretary of State for Communities and Local Government [2009] 18 E.G. 84 (C.S.)

25. *Mellor* concerned the question of whether local planning authorities are required to give reasons where, following a screening opinion, it is determined that a project does not need to be subject to an environmental impact assessment.
26. Whereas with reg 4(6) of the EIA Regulations requires the provision of full written reasons where a *positive* screening decision is given, Schedule 2 para 13, column 2 does not expressly require the appropriate authority to give reasons for a negative screening decision. There is little in the Directive itself which supports the requirement for the giving of reasons for negative screening decisions. The question of whether Article 4 of the Directive required Member States to publicise the reasons for a negative decision was referred to the ECJ by the Court of Appeal.
27. Despite its previous decisions in Case C-87/02 *Commission v Italy* and Case C-83/03 *Commission v Italy* which had hinted at the possibility of a requirement to give reasons for a negative screening opinion, the ECJ held that there was no such requirement.
28. The effect of the ECJ's judgement is that:
- (i) there is no need for a negative screening opinion to contain reasons.
 - (ii) However, there is a duty to provide further information and relevant documents regarding the reasons for a negative screening decision if an interested party requests the same.
 - (iii) That request for further information does not need to be met by a formal statement and the reasons given can be brief.
29. The ECJ's decision effectively upholds the Court of Appeal's approach in *R v Secretary of State for the Environment, Transport and Regions ex.p. Marson [1998] Env. L.R. Mellor* was re-listed before the Court of Appeal and judgement was handed down at the end of last month. A transcript of the decision is not yet available.

Case 4: *Friends of Basildon Golf Course v Basildon District Council* [2009] EWHC 66

30. In the Basildon case, Wyn Williams J held that a local planning authority, having issued a negative screening decision, did have the power to subsequently determine that the development was nevertheless EIA development (see the view expressed by Richards J in *R (Fernback) v Harrow LBC* [2002] Env LR 10). However, the judge found that there was no power for a local planning authority (in contrast to the Secretary of State) to reconsider such matters of their own volition. The adoption of a further screening opinion was dependent upon a request for such an opinion from the prospective developer.

(ii) Strategic Environmental Assessment

31. Like the jurisprudence on the EIA of specific projects, the jurisprudence on the SEA of the environmental effects of plans or programmes has continued to evolve over the last 12 months.

Case 1: *Seaport Investments Ltd's Application for Judicial Review* [2008] Env LR 23

32. There has been a second reference to the ECJ in the *Seaport* case.

Case 2: *Hertfordshire County Council v Secretary of State for Communities and Local Government* [2009] EWHC 1280 (Admin)

33. This case concerned a challenge to certain policies contained in the regional spatial strategy, namely the East of England plan. The Secretary of State's revised policies allocated additional housing development to Hemel Hempstead, Harlow, Hatfield and Welwyn Garden City by means of significant releases of land from the Green Belt. Although two environmental reports had already been produced, the local authorities contended that, contrary to articles 3(1) and (4) of the SEA Directive 2001/42, the Secretary of State had failed to identify or evaluate alternatives to the modified policies before their adoption. Consequently, the plan had been adopted without a lawful SEA which considered the reasonable alternatives to these revised proposals.

34. Granting the application in part, Mitting J held that:

- (1) Article 5 of the SEA Directive and Reg 12(2) of the Environmental Assessment of Plans and Regulations 2004 required that reasonable alternatives should be considered and evaluated before a choice was made as to how a plan should be modified. No reasonable alternatives to the development that might affect the green belt had been examined in the environmental reports.
- (2) With regard to Harlow, the environmental effects of expansion had already been exhaustively considered in the environmental reports obtained. It was clear that the development around the town had been properly considered through an iterative process and the Secretary of State was entitled to decide the expansion into the green belt could occur without obtaining a further environmental report.

Case 3: R (Bard Campaign) v Secretary of State for Communities and Local Government [2009] EWHC 624(Admin)

35. *Bard* was a challenge to the Government's eco-town policy. Although the main part of the decision concerned public consultation which is discussed in further below, some consideration was given to the timing of SEA.
36. The Claimants sought a declaration that the SEA Directive is applicable to eco-town policies. The Secretary of State indicated that she would voluntarily undertake a Sustainability Appraisal in compliance with the Directive. Therefore the issue of whether a draft PPS is subject to the SEA Directive was largely academic. The live issue was whether the SEA Directive required assessment prior to draft PPS stage, for example, when the Government was consulting on the policy in a Green Paper and related documents.
37. Walker J held that the SEA process was not required to start earlier than it had. The relevant draft plan was the draft PPS. A renewed application for permission to appeal to the Court of Appeal was dismissed in June.

Potential litigation in the coming year in the context of SEA

38. The interaction of SEA with the procedures for the adoption National Policy Statements under the Planning Act 2008 is likely to give rise to a good deal of environmental litigation in the coming year. The publication of the NPSs on transport, energy, water, waste water and waste, many of which will be site specific, is imminent. Given their central role under the Planning Act in the decision-making of the Infrastructure Planning Commission, NPSs will need to be subject to the requirements of SEA. Presumably, any SEA will be incorporated in the sustainability appraisal as is the case in the current development plan procedures. It is likely that, as with the eco-town policies, the Government will voluntarily undertake to comply with SEA in respect of NPSs (see *Bard*). Challenges are likely to attack the adequacy of any SEA and the quality of the public consultation on the environmental effects of site specific NPSs. Following *Seaport*, claimants and respondents alike will be alive to the fact that SEA also brings with it further consultation requirements.

(iii) Public Consultation in Environmental Law cases

39. In recent years the courts have demonstrated their willingness to quash the adoption of policies likely to have a significant impact on the environment where consultation has not been fair. There have been a litany of challenges to the consultation on White Paper and pre-White-paper consultation documents, notably, *R(oao Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516 (challenge to the Secretary of State's decision to exclude any options relating to the expansion of Gatwick airport from a consultation document preparatory to a White Paper on the future development of air transport); *R(oao Wandsworth LBC) v Secretary of State for Transport* [2005] EWHC 20 (challenge to the lawfulness of the White Paper "The Future of Air Transport") and *R(oao Greenpeace Ltd) v Secretary of State* [2007] EWHC 311 (challenge to the consultation process leading to "The Energy Challenge Energy Review Report 2006" on the proposed nuclear new build).

40. The latest in this line of environmental consultation cases is ***Bard* [2009] EWHC 308**. The claimants in *Bard* applied for judicial review of the Secretary of State's decision to include a particular location in a shortlist of sites for the possible development of an "eco-town".
41. The case is interesting because of its consideration of the requirements of public consultation, when is the appropriate time to challenge a policy on the basis of inadequate consultation and in what circumstances the courts are willing to intervene.
42. The Government's publication of a housing Green Paper sought views on a range of housing proposals including eco-towns. The paper invited responses to specific questions and also any general comments. At the same time, a prospectus was published outlining the criteria for eco-towns and inviting bids from local authorities and other developers wishing to develop an eco-town. The Secretary of State assessed which bids were strong and then a cross-government review determined a shortlist of the bids. A consultation paper entitled "Eco-towns – Living a Greener Future" was issued seeking views on the benefits of eco-towns and on the short listed locations.
43. A claim for judicial review was brought shortly before the end of the consultation period in which the claimants submitted that the Secretary of State had acted in breach of common law consultation requirements, the SEA Directive and the Aarhus Convention by failing (1) to consult, or to consult properly, on the principle of eco-towns; (2) to consult on the locational criteria for eco-towns; (3) to consult on the location for all the bids rather than on the shortlisted locations; (4) to provide adequate information to enable an informed response to be made; (5) to provide adequate time for consultation.
44. The Court held that the appropriate legal test was the familiar formulation set out by Lord Woolf in ***R v North East and Devon Health Authority ex parte Coughlan* [2001] QB 213** (para 108). Proper consultation must:
 - a. be undertaken at a time when proposals are still at a formative stage
 - b. include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and response
 - c. allow enough time to be given for careful consideration
 - d. allow the product of the consultation to be conscientiously taken into account.
45. The court acknowledged that the ***ex p. Coughlan*** test was added to in one respect by the Sullivan J (as he then was) in ***R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env L.R. 29**, namely, that if a question arose as to whether a document was a consultation or merely an issues paper, the court should resolve this by asking whether those consultees who took the document at face value could reasonably foresee that, following the consideration of their responses, the principle in issue would be determined.
46. The question as to whether the Aarhus Convention in any way adds to the common law requirements on consultation remains unanswered. The Secretary of State disputed the legal relevance of the Aarhus Convention as it is not incorporated into UK law. In

court, the claimants did not pursue the point and Walker J did not find it necessary to decide the question.

47. Walker J rejected the claim, holding that:

- (1) A reasonable reader would have been in no doubt that the Green Paper had been a consultation document and that people had been consulted on the principle of eco-towns. There were no grounds for a reader to think that their views were sought only on the questions asked. The fact that a prospectus had been issued at the same time as the Green Paper did not mean the Secretary of State had already determined the matter. It must have been plain to those who received the prospectus that there was no guarantee that the proposals for eco-towns would be taken forward following the responses to the Green Paper. Fairness did not require there to be consultation on alternatives to eco-towns. The Green Paper had informed the public in clear terms about the nature of the proposals and why it was under positive consideration. This would have enabled an intelligent consultation response.
- (2) No adverse inference should be drawn simply because consultees were not specifically asked about the number, size and other key-criteria regarding the eco-towns. It was clear that comment was invited on the Government's proposals and that those issues were subject to continuing consultation.
- (3) The Green Paper was clearly no more than a preliminary to consultation prior to the final determination of which potential locations should be on the shortlist. Alternative sites could be considered at a later stage.
- (4) The consultation had provided local people with a preliminary opportunity to air their views and provide the Secretary of State with the benefit of local knowledge. Complaints about lack of information might well inform later consultation stages but did not give rise to good grounds to complain about the Green Paper.

Applying the principles of consultation to National Policy Statements

48. What constitutes fairness in public consultation will necessarily vary from case to case. As with SEA, High Court challenges on the grounds of inadequate consultation are likely to feature during the adoption of the forthcoming National Policy Statements under the Planning Act 2008. The more detailed and location specific the draft NPSs are, the more onerous the duty to consult. It is probable that the courts will appreciate the considerable weight to be attached by the IPC to NPSs. The fact that once a NPS has been designated, objectors to a development will probably have no recourse to an oral hearing before the IPC, is likely to weigh on the judges' mind when scrutinising the standard of consultation.
49. Despite the judge's finding in *Bard* that the consultation document in that case did not need to ask specific questions on all aspects of the eco-town policy in order to be fair, it is clear that the matters put before consultees must reflect the level of detail in the eventual policy. Where consultees are invited to express their views on broad strategic questions, policy authors should be advised not to stray beyond policy expressions of a broad strategic nature into levels of detail which have not been properly consulted on.

50. Consultation on NPSs is envisaged as an ongoing requirement. Where material modifications to the assumptions underlying a policy or to the wording of a NPS take place following consultation prior to the final adoption of the NPS, further consultation may be required. The case law suggests that failure to consult on the new material is high risk (see for example *Wandsworth*). The Secretary of State has a duty to review the contents of a NPS “if he considers it appropriate” and should be prepared, where appropriate, to draft a revised NPS. Any draft will, in turn, need to be subjected to consultation and a new environmental or sustainability report produced.

Conclusion to Section 1 – Identifying Trends

- **Purposive approach to EIA and SEA**
- **Transposing a European approach to environmental protection**
- **Public involvement in environmental assessment**
- **Forthcoming litigation under the Planning Act 2008**

SECTION 2: PROCEDURAL UPDATE

(iv) Applicability of Aarhus in Domestic Law

***Morgan v. Hinton Organics* [2009] EWCA Civ 107**

1. No environmental lawyer can escape the significance of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (commonly known as the ‘Aarhus Convention’), which grants members of the public rights regarding access to information, public participation and access to justice, in governmental decision-making processes concerning the local, national and transboundary environment, and came into force on 30 October 2001.
2. As stated by UN Secretary-General Kofi Annan (1997-2006): “Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens’ participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.”
3. Stepping back from the global, and focussing on the national, the Court of Appeal has recently grappled with the extent to which individuals may rely on the principles enshrined in Aarhus in domestic litigation in *Morgan v. Hinton Organics* [2009] EWCA Civ 107.
4. Reliance is often placed by parties to environmental litigation on Aarhus, most commonly on:
 - a) Article 3(2): ‘Each Party shall endeavour to ensure that officials and authorities assist ... the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters’;
 - b) Articles 9(2) and (3): Each Party shall, within the framework of its national legislation, ensure that members of the public (defined so as to include NGOs) with a ‘sufficient interest’ shall have access to a review procedure to challenge the substantive and procedural legality of any decision to permit certain specified operations listed in Annexe I (similar to that in the EIA regime under community law) and to challenge the acts and omissions by ‘private persons and public authorities which contravene provisions of its national law relating to the environment’;
 - c) Article 9(4): The procedures referred to in Articles 9(2) and (3) ‘shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive’.
5. The question is: what status does Aarhus have in domestic law and what weight (if any) should decision-makers place on it?
6. The primary points to note at the outset are that:
 - a) Aarhus was ratified by the United Kingdom in February 2005; and

- b) Aarhus was ratified by the European Community (also in February 2005), and the EC has been applying Aarhus-type principles in its legislation (e.g. in Directive 2003/4/EC on public access to environmental information, discussed below).

The CA 'Morgan' Decision

7. The Court considered that the consequence of UK ratification was that, for the purposes of domestic law, Aarhus has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect (at [22]). Carnwath LJ stated 'it is at most a matter potentially relevant to the exercise of the judge's discretion' (at [50]) and stressed that the point must be made before the decision-maker exercising the discretion. The Court could not, of its own motion, or upon subsequent submissions, take Aarhus into account.
8. As far as EC ratification is concerned, the Court held:
 - a) Ratification by the European Community itself gives the European Commission the right to ensure that Member States comply with the Aarhus obligations *in areas within Community competence* (*Commission v. France* Case C-239/03 (2004) ECR I-09325 paras 25-31), so the UK may be vulnerable to action by the Commission to enforce the Community's own obligations as a party to the treaty. This cannot, however, impact on private or public litigation.
 - b) Where the Convention has been reproduced in EC environmental Directives, these are directly effective (e.g. in the Environmental Assessment and Integrated Pollution Control Directives) (at [22]). Thus, in the absence of a Directive specifically relating to the type of action in issue in *Morgan* (costs), there was no directly applicable rule of Community law (at [44]) (the Court noted that there was a proposal for a more general European Directive on access to justice in environmental matters (COM (2003) 624), but this had not progressed beyond the draft stage).
9. The practical consequences, if this decision is followed, are:
 1. If there is an EC Directive that reproduces Aarhus, Aarhus is directly effective, but only by virtue of the Directive itself and the general principles of EC law.
 2. In all other cases, Aarhus is a *material consideration* in the exercise of a decision-maker's discretion or resolution of ambiguities, but only if arguments are raised by a party before him. It is not binding on domestic courts.
10. This at least goes further than the traditional House of Lords authority of *R v. Secretary of State for the Home Department Ex p. Brind* [1991] 1 All ER 720, where the House of Lords rejected the argument that where a wide discretion was given by a statute it had to be exercised in a way that complied with international law obligations,

in that case the European Convention on Human Rights. There it was even held that there was no legal requirement to have regard to whether the exercise of the legal power would be in breach as a relevant consideration.

11. But, times have moved on, and many commentators are frustrated that *Morgan* does not go far enough in advancing the cause for greater public involvement in environmental decision-making. Many feel that it appears regressive in light of the work and progress in this field achieved by the May 2008 Sullivan Report ('Ensuring Access to Environmental Justice in England and Wales') and are frustrated that such a strongly constituted Court of Appeal did not do more to move the law on (composed of Laws, Carnwath and Maurice Kay LJJ, the latter of whom it should be noted has chaired his own working group on 'Litigating the Public Interest').
12. One possible route of challenge to the decision in *Morgan*, should it be taken up in the future, is based on community law and article 300(7) of the treaty, which provides that international agreements ratified by the community 'shall be binding on the institutions of the Community and Member States'. As Aarhus has been ratified by the EU, it is arguable that it should be binding on Member States and of direct effect (and therefore enforceable in the national courts). This argument is given powerful force by the ECJ decision in *Pecheurs de l'étang de Berre* (C-213/03 ECR 2004 I-07357) where it was held that the Barcelona Convention was directly enforceable in courts of Member States (but c.f. C-308/06 *Intertanko v. SST* [2008] CMLR 9). The decision in *Morgan* appears to have been made without reference to these arguments, and is as such open to future challenge.

(v) Environmental Information

Office of Communications v. Information Commissioner [2009] EWCA Civ 90 ('Ofcom')

13. The appeal against the 'Ofcom' decision, as it is known, is due to be heard by the Supreme Court this autumn. In the meantime, it is a somewhat controversial decision, that changes the approach that local authorities should take to the disclosure of environmental information under the Environmental Information Regulations 2004 (EIR).
14. This is of course of significance for those who work for local authorities. However, in our experience, the frequency with which requests under the EIR (and its sister the Freedom of Information Act 2000) are deployed as a litigation tool, to compel disclosure from public bodies of information adverse to the other side's case (both at planning inquiries and at the High Court challenge stage), means that the 'Ofcom' decision is of relevance to all those who practice in the field of environmental law.

The Legal Background

15. Both the Environmental Information Regulations 2004 (EIR) and the Freedom of Information Act 2000 (FOIA) require public authorities that hold certain information to make it available on request, subject to various exceptions or exemptions.
16. When it is alleged that information falls within the ambit of a qualified exception or exemption, authorities must apply a public interest test and may refuse disclosure if:

"in all the circumstances of the case, the public interest in maintaining the exception

outweighs the public interest in disclosing the information” (r. 12(5)(a) EIR: the FOIA test under s 2(2)(b) FOIA is near identical).

17. Application of this test can be something of a challenge in practice. Not only must an authority decide what weight should be attributed to particular public interests, but authorities must also now grapple, in cases where multiple exceptions / exemptions are alleged, with whether they should:
 - a) aggregate all the public interest considerations together in a single balancing exercise, or
 - b) undertake individual balancing exercises under each exception / exemption, applying only public interest considerations that flow directly from the individual exception / exemption in issue.

The CA ‘Ofcom’ Decision

18. The Court of Appeal in ‘Ofcom’ advocated the latter approach in relation to the EIR. Given the close relationship between the EIR and the FOIA, it is submitted that this has the potential to impact on the application of the FOIA public interest test as well.
19. Ofcom sought to claim that disclosure of environmental information consisting of very specific details of the location of mobile phone base stations would fall within the exceptions of public safety and intellectual property rights in the EIR (r. 12(5)(a) and 12(5)(c)). They argued that disclosure would compromise the security of what are called TETRA sites (which provide the police and emergency service radio network) and also would adversely affect the intellectual property rights of mobile network operators.
20. The Information Tribunal found that the exceptions were engaged but that, when conducting discrete balancing exercises against the two, the public interest in maintaining the exception did not outweigh the public interest in disclosing the information (EA/2006/00280). The High Court agreed that was the correct approach to take, Laws LJ stating: “the focus of the legislation is on the particular interests which the particular exceptions serve. It requires such interests, in effect, to be specifically justified in a context where the presumption is in favour of disclosure” ([2008] EWHC 1448 (Admin) per Laws LJ at [48]).
21. However, the Court of Appeal, in a unanimous judgment, held that the correct approach is, rather, to take all the exceptions together and weigh the aggregate public interest considerations flowing from those exceptions against the public interest in disclosure.
22. Their reasoning, as set out in the judgment of Richards LJ (at [37] – [43]), can be summarized as follows:
 1. Regulation 12(1) provides that, subject to the application of the public interest test, a public authority may refuse to disclose environmental information if ‘an exception applies under paragraphs (4) or (5)’. The general principles of statutory construction (s 6 Interpretation Act 1978) require that words in the singular include the plural unless the contrary intention appears: so, ‘an exception’ is to be read as ‘one or more exceptions’. That in itself suggests that exceptions may be considered together and not in isolation.

2. That conclusion was reinforced by:
 - a) the fact that the public interest test requires consideration of ‘all the circumstances of the case’ (Reg 12(1)(b)); and
 - b) the number and nature of possible exceptions (e.g. in Reg 12(5)(a): “international relations”, “defence”, “national security” and “public safety”).
3. It would be wholly artificial to have to look at each exception separately for the purpose of the public interest balancing exercise.
4. There was nothing in Directive 2003/4/EC (which the EIR implement) which required a different result. Although the Directive requires that grounds of refusal “shall be interpreted in a restrictive way” (Article 4(2)) and that account should be taken “for the particular case”, that does not require that the exercise has to be carried out for each ground of refusal separately.

The Practical Consequences

23. The differences between the traditional and ‘Ofcom’ approaches can be conveniently set out as follows:

Traditional Discrete Approach

1. Consider each public interest exception alleged.
2. Ask for each: is it engaged?
3. Decide what are the public interest considerations that arise naturally from the particular exception (there can, of course, be more than one public interest consideration)?
4. Ask whether the public interest consideration/s identified outweigh/s the public interest in disclosing the information?
5. Repeat the exercise for each exception engaged.
6. If the answer to stage 4 is “yes” for any exception, do not disclose the information.

‘Ofcom’ Approach

1. Consider each public interest exception alleged.
 2. Ask for each: is it engaged?
 3. Decide what are the public interest considerations that arise naturally from all the exceptions engaged?
 4. Ask whether the public interest considerations identified when looked at in the round outweigh the public interest in disclosure.
 5. If the answer is “yes”, do not disclose the information.
24. What is immediately clear is that there will be cases when disclosure will be refused under the ‘Ofcom’ approach, which would not have been under the traditional discrete approach. This is because under the ‘Ofcom’ approach a factor in favour of one exception, which is insufficient to justify maintenance of that exception, can still be relied upon to add weight to public interest factors supporting the maintenance of another exception. The tribunal considered this a “nonsensical outcome” (at [58]). However Richards LJ stated there was nothing nonsensical or unacceptable in the

possibility of the aggregate approach resulting in non-disclosure in a case where looking at each exception individually would have resulted in disclosure. He continued: “On the contrary, I would consider it surprising if the Directive or the EIR required disclosure in a case where the *overall* public interest favoured non-disclosure”.

25. He did, however, add that: “Of course, it may be convenient in a particular case to proceed in the first place exception by exception, considering whether each exception applies and, if it does, whether the public interest in maintaining it outweighs the public interest in disclosing the information. There is no objection to that course *provided that* the matter is also looked at in the round at the end of the process by considering whether the aggregate public interest in maintaining the applicable exceptions outweighs the public interest in disclosure.”
26. As stated above, the Supreme Court will shortly be revisiting these issues. The CA judgment is controversial, not least because it seems to be at odds with the clear language of r. 12(1)(b) which refers to ‘public interests in maintaining the exception’; suggesting that public interests cannot be aggregated and those relating to each exception should be considered discretely.
27. The fact that ‘Ofcom’ was decided under the EIR, and not the FOIA, also poses questions as to whether the same approach should be adopted under s 2(2)(b) FOIA, given the similarity in language, structure and purpose of the two. For the time being, however, the ‘Ofcom’ approach does not apply to FOIA requests, which should continue to be dealt with under the traditional discrete approach.
28. Furthermore, given that the ‘Ofcom’ approach may well shortly be laid to rest by the Supreme Court, for the time being, authorities may consider it prudent to err on the side of caution and adopt the traditional discrete approach to the application of the public interest test under the EIR too. Those involved in environmental litigation should be aware of this uncertainty when dealing with authorities faced with an EIR request.

(vi) Protective Costs Orders

29. The *Corner House* principles underlying the grant of Protective Costs Orders are well-known: a PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
 - a) The issues raised are of general public importance;
 - b) The public interest requires that those issues should be resolved;
 - c) The applicant has no private interest in the outcome of the case;
 - d) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
 - e) If the order is not made the applicant will probably discontinue with the proceedings and will be acting reasonably in so doing. (*R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [74].)

30. The Court of Appeal in *Corner House* suggested that PCOs would only be made in ‘exceptional’ circumstances. It has more recently been confirmed that this is not part of the test for granting PCOs but simply a prediction as to the effect of applying the principles (*R (Compton) v. Wiltshire Primary Care Trust* [2008] EWCA Civ 749 per Waller LJ at [23] and see also criticism of an ‘exceptionality test’ in the Sullivan Report (at Appendix 3, paragraph 2)). It is difficult to know how many applications for PCOs are successful as many applications are dealt with on paper and thus not reported. However, it does seem in the past year that PCOs are being more readily made, especially in environmental cases (see e.g. the PCOs recently granted in *Compton, R (Eley) v. SSCLG* (unreported, HC 1 July 2008), *R (Buglife) v. Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 and *Weaver v. London Quadrant Housing Trust* [2009] EWCA Civ 235).
31. This may be in part due to the refining, and some may say relaxing, of the strict principles in *Corner House*, which are now accepted as guidelines, and not strict rules (see *Morgan* (above) at [33] and *Compton* per Waller LJ at [23] and Smith LJ at [75] c.f. *Compton* at [52] per Buxton LJ (dissenting)). I propose to set out a few of the most significant recent developments.

Public Importance (principles a and b)

32. The two stage tests of general public importance and the public interest in the issue being resolved are now usually considered together, as they are difficult to separate (see *Compton* per Smith LJ at [21]). Insofar as there is a distinction between principles a) and b), consideration tends to focus on a). This is perhaps because it is inherently likely that the public interest will require that issues of general public importance be resolved.
33. *Corner House* did not define what is an issue of ‘general public importance’ (*Compton* per Smith LJ at [76]), although the case does provide examples of the types of issue which could be of general public importance. Broadly speaking a matter is of public importance where:
- a) there is a public interest in the elucidation of public law by the higher courts in addition to the interests of the individual parties (*Corner House* at [70]);
 - b) there are matters of significant importance to a general class of people such as the body of taxpayers (*Corner House* at [137]).
34. These examples are illustrative rather than determinative. There is no absolute standard by which to define an issue of general public importance. Rather there are degrees to which the requirement may be satisfied; some issues may be of the first rank of general importance, others of a lesser rank may still be of general public importance (*Compton* at [75] per Smith LJ). Cases must therefore be decided on an individual basis and it is worth recalling that “a PCO is a flexible remedy which can take a variety of different forms” (*Compton* per Smith LJ at [85]). In that case, the Court of Appeal accepted that local issues (e.g. arising from the grant of planning permission) can be of ‘general importance’, even though only a small number of

people may be directly affected (per Smith LJ at [77]). If the facts of the case confine the importance of the court's decision to a small section of the public, it may however be necessary to show some importance in terms of development or clarification of the law with a far-reaching outcome for a PCO to be granted (see *Susan Wilkinson v. Celia Kitzinger and Attorney-General* [2006] EWHC 835 (Fam) at [53] per Sir Mark Potter).

35. Having said that courts tend to focus on principle a), litigants should be aware that principle b) cannot be ignored altogether. Although principle b) may be a given, if principle a) is made out, a PCO can be refused where the public interest does not require issues to be resolved, despite them being of general public importance (as was the case in *R (Goodson) v. Bedfordshire and Luton Coroner* [2005] EWCA Civ 1172 where the Court of Appeal refused a PCO in part because the issues of public interest were likely to be resolved in another appeal already before the court, thus the public interest did not require them to be dealt with in the appellate court).

Private Interest (principle c)

36. The private interest test (principle c) has perhaps attracted the most debate since *Corner House*. Its origins can be found in *R v. Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347, a precursor to the *Corner House* decision, where the Court set out that the purpose of a PCO is not to provide one party with financial support to enable them to litigate their private rights vis-à-vis another individual or company, but to allow litigation to proceed which would otherwise have to be abandoned due to lack of funds, where it is *purely* in the public interest that the issues should be resolved and they are of general public importance (at 353G).
37. In *Goodson*, the traditional approach was adopted and the Court dismissed the application on a strict reading of this requirement (per Moore-Bick LJ at [27] – [28]). Around the time, the lack of private interest requirement was subject to powerful academic criticism (see Chakrabarti et al [2003] PL 697 and Stein & Beagent [2005] JR 206). Indeed, it is difficult to see why, if legal aid is unavailable, a PCO should not be available to ensure that private individuals are not forced to take the risk of an adverse costs order in order to subject important public law decisions which may be unlawful or flawed to review by the courts.
38. More recent decisions have followed the path of this academic criticism and adopted a liberal approach to the interpretation and application of the 'private interest' test. Collins J, in particular, has been vocal in expressing that the private interest limitation suggested in *Corner House* is incorrect (in the *Kings Cross Railway Lands Group* decision of 22 March 2007 and in *R (Eley) v. SSCLG*, 1 July 2008). The Court of Appeal has also diluted this requirement in *Compton* at [23] and *Weaver* at [12]. The principles of PCOs, including the requirement for no private interest, were most recently discussed in *Morgan* (despite there being no application for a PCO) and the Court of Appeal, whilst not strictly overruling *Goodson*, made it clear that the third criterion was to be applied in light of the fact that the principles in *Corner House* were guidelines rather than rules and, therefore, the extent and nature of the claimant's private interest, if any, were matters to take into consideration, but there was no absolute bar (at [39]).

39. Therefore, recent authorities appear to have relaxed this guideline, so that a private interest is a relevant consideration, but a lack of it is not a strict requirement.

Capping the Claimant's Costs

40. If a PCO is granted, the consequence is of course that the claimant's exposure to costs will be limited to a specified amount. However, the Court in *Corner House* also provided for a system of capping the Claimant's costs, to ensure that Claimants did not run up excessive costs and that the grant of a PCO struck a fair balance between the interests of both sides. The claimant's costs, it was said, should be "restricted to a reasonably modest amount" (at [76]), which was interpreted as limited to solicitors' fees and a modest fee for single junior counsel. This led to a focus on reciprocal costs capping, so that the claimant's costs recovery, should they be successful, would be limited to their own PCO costs liability (see Sullivan Report, 2008, Appendix 3, paragraph 7).
41. The recent decision of *R (on the application of Buglife) v. Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 has, however, cast doubt on reciprocal costs capping and the strict requirement for the claimant's costs to be modest. There, the Court of Appeal held that, although costs should be modest, this should be interpreted flexibly and there can be no absolute rule limiting costs to those of junior counsel because one can imagine cases where it would be unjust to do so (at [25]).
42. In relation to 'mirrored capping' of the claimant's costs, the Court of Appeal further held that there should be no assumption that it was appropriate, where the claimant's liability for costs was capped, that the defendant's liability should be capped at the same level. Although it was within the court's discretion to make such an order, the amount of any cap on the defendant's liability for the claimant's costs would depend on all the circumstances of the case (per Sir Anthony Clarke MR at [26]). However, it should be noted that, despite this, the Court of Appeal in *Buglife* approved a "mirrored cap" imposed by Sullivan J at first instance and imposed a similar cap in the Court of Appeal.

The Future of PCOs

43. The large amount of 'satellite litigation' that has taken place to determine PCOs is far from the spirit of limiting the costs of both sides – indeed Sir Anthony Clarke MR commented in *Buglife* that "courts should do their utmost to dissuade parties from engaging in expensive satellite litigation" on the questions of whether PCOs should be made (at [31]) – and courts have frequently made calls for the Rules Committee to codify these issues, but as yet to no avail (see e.g. the most recent comment of Carnwarth LJ in *Morgan* at [40]).
44. The Jackson Review of costs in civil proceedings (initiated by the Master of the Rolls and led by Jackson LJ), which is due to be published in December this year, has as one of its objectives a review of the principles that govern PCOs. The preliminary report contains various proposals for reform and it is to be hoped that this will provide the impetus for future clarity on the issue of claimants' liability for costs in environmental litigation, and the five *Corner House* principles.



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