Environmental judicial review

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Introductory note:

1. Environmental judicial review is dominated by land use planning decisions. This is no surprise given that it is by far the most common public decision-making and regulatory mechanism in environmental law.

2. In European law, land use planning is subject to the subsidiarity principle whereby the EU leaves land use planning regulation largely to Member States, save in a few key areas relating to environmental impact assessment (EIA). The most commonly applied legislation is Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (codification) ("the EIA Directive").

3. Notwithstanding the focus of the paper, the cases and discussion refers to wider principles of environmental and judicial review.

The first part of this paper, reviews important environmental decisions relating to land use planning. The second part considers recent costs decisions specific to environmental law. The third part summarises recent changes to the CPR and further proposals, again relating in particular to land use planning.

1. Precautionary principle and EIA

R (Anne-Marie Loader) v Secretary of State [2013] Env LR 13
This is a case about a bowling green in Bexhill-on-Sea. Not just any bowling green but one dedicated to public use and backing on to a Grade II listed mansion block that itself faced the sea. It has been the centre of controversy for over 15 years. The developer wanted to develop part of the bowling green to redevelop an indoor bowling rink along with an apartment block of 41 retirement homes plus parking etc.

In 2006, a planning appeal decision was quashed for a failure to consider whether the proposal was EIA development. In 2008, the Secretary of State reconsidered the proposal and concluded that the development was not 'EIA development'. However, the Claimant alleged that the Secretary of State had decided so without properly taking into account the original reason for refusing the planning permission, namely the adverse effect on the heritage asset which was, it was alleged, 'a likely significant effect on the environment' - a necessary requirement for determining whether a project is EIA development. The Claimant relied upon the European Commission's EIA Guidance on Screening (EC, 2001) which advises that a useful question to ask in deciding whether an

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environmental effect was significant was whether it would have an influence on the outcome of the decision. The Claimant alleged that, in this instance, this question would have been answered affirmatively because the planning appeal decision-maker would be required to consider the impact on the heritage asset as it was one of the reasons the Council gave for refusing permission.

The Court of Appeal (and the High Court) disagreed. Lord Justice Pill in his conclusions held as follows:

> 43 What emerges is that the test to be applied is: "Is this project likely to have significant effects on the environment?" That is clear from European and national authority, including the Commission Guidance at B3.4.1. The criteria to be applied are set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene (Commission v United Kingdom [2006] E.C.R. I-3969).
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> The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker.
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> 44 The criteria in the annexes to the Regulations justify the approach to the question proposed in Circular 02/99, paras 33, 34 and annex A (cited at [17] and [18] above). It is stated, at [34], that the number of cases of Sch.2 development which are EIA developments will be "a very small proportion of the total number of schedule 2 developments".
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> 45 I do not consider that the reference in the Commission Guidance to a "useful simple check" ([20] above) can lead to a conclusion that the test proposed by the appellant is appropriate. Whether the perceived environmental effect has an influence on the development consent decision is a relevant consideration but ***147** cannot in itself answer the question to be posed. The sentence in the Guidance relied on also requires the decision maker to ask "whether the effect is one that ought to be considered", an affirmation of the need to answer the question "is this project likely to have significant effects on the environment" posed at B3.4.1 of the Guidance. The purpose of the checklist is stated to be to help decide whether the effects are likely to be significant. Establishing that the environmental effect will influence a particular development consent decision may well be a necessary requirement for a decision that development is EIA development but it is not determinative of whether the effects are likely to be significant and "ought to be considered".

Accordingly the case was dismissed. It does, however, clarify, in clear terms, that the precautionary principle applies in EIA screening decisions. Further, that where there is uncertainty an EIA screening decision-maker should take an inclusive and purposive approach to the Directive.

Postscript: following the CA decision the matter went to planning appeal and, in Appeal Decision, the Inspector dismissed the planning appeal and refused permission on the basis that the development would give rise to 'significant harm' to the heritage asset.

2. *Wednesbury* reasonableness not 'proportionality' is the test for EIA screening

R (Evans) v Secretary of State [2013] EWCA Civ 114

In *Evans* the Claimant sought to challenge the Secretary of State's EIA screening direction which determined that a development of 170 homes on Greenfield land was not 'EIA development' for the purposes of the EIA Directive. The development was adjacent to a Grade 1 listed building, Abbas Hall in Sudbury, Suffolk. The landscape (one of the key environmental aspects) was depicted in 18th century paintings by Thomas Gainsborough, Mr and Mrs Andrews, and Cornard Wood.

The Claimant argued that deciding that the proposal was EIA development would afford him enhanced public participation rights (analogous to human rights) beyond those normally conferred under land use planning legislation. In particular, he would be afforded the right to 'early and effective public participation' in the decision-making process (Art. 6(4)) and the right to have his representations taken into account in the decision (Art. 7). As such, any decision to exclude such fundamental participatory rights by stating that the proposal was not EIA development must be proportionate in order to be lawful (see e.g. *Daly v SSHD* [2001] UKHL 57 §§24-32 and ACCC/C/2008/33 finding of the Aarhus Convention Compliance Committee at §§126). In 2010 the Aarhus Convention Compliance Committee decided that:

> "The Committee considers that the application of a "proportionality principle" by the courts in England and Wales could provide an adequate standard of review in cases within the scope of the Aarhus Convention. A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake. While a proportionality principle in cases within the scope of the Aarhus Convention may go a long way towards providing for a review of substantive and procedural legality, the Party concerned must make sure that such a principle does not generally or prima facie exclude any issue of substantive legality from a review." (emphasis added)

The matter came before the Court of Appeal as an application for permission for judicial review. Lord Justice Beatson held that, contrary to the Claimant's arguments, there was much case law on the issue of the test applicable to EIA screening decisions that post-

dated the adoption of Aarhus Convention 1998 and EIA Directive including *Loader v Secretary of State* [2013] Env LR 7, which Beatson LJ said implicitly held that *Wednesbury* unreasonableness was the suitable test to apply in EIA screening decision cases. It should also be noted that he rejected outright any suggestion that a proportionality based test could apply given that he found EIA screening decisions to be purely concerned with fact-finding. Beatson LJ concluded:

> 43. I have also carefully considered Mr Wolfe's submissions on the question of referring this case to the CJEU, but have decided that, since he was unable to point to any European jurisprudence taking or favouring an approach that differs from the standard common law approach to judicial review including the different strands of the *Wednesbury* test, his submission that there is sufficient doubt in the position to justify making a reference is simply not made out.

The concern about the review mechanism of substantive legality has not gone away contrary to Beatson LJ's findings, nor has the question underlying the EIA test in determining 'significant effects' see e.g. *Hockley v Essex County Council* (HC, 29-30.10.13).

Postscript: The PCO in *Evans v Secretary of State* [2013] EWCA Civ 87 affirms that a decision on costs protection is not final:

> 10. It is important to bear in mind that the renewed application for permission to appeal has been adjourned. In these circumstances, even though procedural orders have been made, in this case not to grant a protective costs order, it does seem to me that it is open to the court at any time to revisit those procedural decisions if it is satisfied that it is necessary to do so in order to enable the adjourned application for permission to appeal to have a fair hearing. There is a further point that Mr Stookes makes in his note, and that is to say that a decision to grant or refuse a protective costs order is not a 'once and for all' decision. The court has a continuing discretion to review the need for a protective costs order and may make or indeed withdraw an order at any stage in the proceedings if it thinks it appropriate to do so (see paragraph 74(1) of R(Corner House Research) v SSTI [2005] EWCA Civ 192.

3. Land use planning: 'needs' not 'wants'
R (Cherkley Campaign Ltd) v Mole Valley DC [2013] EWHC 2582 (Admin)

The Cherkley Estate is in the Surrey Hills and totals around 375 acres. The developer, Longshot, applied to Mole Valley DC to develop Cherkley Court and the Estate into a hotel and spa complex together with an 18-hole golf course. The application was highly controversial with numerous objections made. The officer's report to committee recommended refusal of the application for 3 main reasons: (i) the golf course would be seriously detrimental to the visual amenities of the locality; (ii) there was no justification why the golf course needed to be in the protected landscape as per the local plan; and (iii) the new buildings in the Green Belt would be inappropriate development. The committee rejected the officer's recommendations and granted permission. The Claimant challenged this decision.

In quashing the decision, Mr Justice Haddon-Cave held that a developer's attempt to equate private "demand" to public "need" was legally flawed. He held that there was no "proven need" for additional golf facilities as required by the Local Plan:

> *Answer on meaning of "need"*
> 102. I reject Mr Findlay QC and Mr Katkowski QC's constructions of the word *"need"*. They are inimical to the philosophy of planning law. They run counter to the specific context in which the word appears in the Mole Valley Local Plan. They do not accord with common sense. Their approach would be recipe for a planning free-for-all.
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> 103. In my judgment, the word *"need"* in paragraph 12.71 means *"required"* in the interests of the public and the community as a whole, *i.e. "necessary"* in the public interest sense. *"Need"* does not simply mean *"demand"* or *"desire"* by private interests. Nor is mere proof of *"viability"* of such demand enough. The fact that Longshot could sell membership debentures to 400 millionaires in UK and abroad who might want to play golf at their own exclusive, 'world class', luxury golf club in Surrey does not equate to a *"need"* for such facilities in its proper public interest sense. Paragraph 12.71 in the Local Plan requires applicants proposing new golf courses in the Mole Valley to demonstrate that further golf facilities are *"necessary"* in this part of Surrey in the interests of the public and community as a whole.

Postscript: The Independent newspaper (30.8.13). "Out! Andy Murray set to lose £500,000 as High Court quashes plans for golf club. Another major loser will be the unique chalklands of the Leatherhead Downs, which some feel may never recover from the damage already done by the developers."

4. 'Adequate' summary necessary when decision is contrary to advice

R (Wildie) v Wakefield MDC [2013] EWHC 2769 (Admin)

Mrs Avison of Goodwin Farms Ltd applied for permission for a change of use from agricultural field for use as a 20 pitch caravan and camping site and, secondly, use of a manager's mobile home. Land was sited in the green belt. The Officer recommended approval for the first part (i.e. caravan site) but refusal for the second part (i.e. residential use). A neighbouring landowner, Mark Wildie, challenged the grant of permission and argued that, among other things, the planning committee had failed to give adequate reasons for their decision contrary to Article 31 of the TCP (Development Management Procedure) (England) Order 2010). In quashing the decision Mr Stephen Morris QC held that it was implicit in *Siraj v Kirklees MBC* [2010] EWCA Civ 1286 that a brief summary of reasoning is sufficient *only* where there was no disagreement with the officer; i.e. where the committee accepts the officer's detailed recommendations contained within his/her report. The judge considered the recent decision in *Cherkley* and noted that it is fundamentally requisite for a committee who goes against an officer's advice to provide a brief explanation for the reasons behind such a departure:

> 9(8) "… The implication is that where there *is* disagreement, the fuller summary reasons should include reasons for that disagreement. Further, in the *Cherkley Campaign* case, supra, Haddon-Cave J accepted (at §45) the

proposition that, in such a case, there must be a rational and *discernable* basis for members to reject the officers' advice. Haddon-Cave J went on (at §185) to criticise the absence, in that case, of any explanation for the disagreement with the planning officer.

> 66. In summary, at the very minimum, the Defendant was required to identify the circumstances which were capable of being "very special", the reasons why they were "very special" in the case, and briefly, why they disagreed with the Planning Officer's conclusions. It had not done so. As a result, the mischief identified in *Siraj* §15 was present: the Claimant could not ascertain whether the Committee had interpreted the Green Belt policy correctly and taken into account all relevant matters. Indeed there was no evidence that the Committee had even turned their minded to consider whether "very special circumstances" existed, or, if they had, whether they had addressed their minds to the correct legal test to be applied. The reference, in the Minutes and in the Decision Notice to the concept of "significant or unacceptable harm" gave rise to a real risk that the Committee in fact adopted or applied the wrong test.

The Court went on to hold that the normal remedy should be the quashing of the decision unless it is clear that upon re-determination the substantive decision would be the same. It further considered the circumstances in which a Court may order the partial quashing of a permission. The Court held that the established rules relating to the severability of conditions from a planning permission as per *Kingsway and Guiney* apply to the severing unlawful parts of a planning permission from the permission. Therefore, the correct test should be how dependent the lawful parts of the permission are on the part that seeks to be severed i.e. is the good part so "inextricably mixed up" with the bad part that it is not possible to save the good part. Finally, the Court noted that when deciding whether a partial quashing of a permission can be ordered, it is important to consider whether the planning authority would have made the same decision had it known at the time it made its decision that the grant of permission in respect of part of the application was invalid.

5. Other interesting environmental cases

R (Marton-cum-Grafton PC) v North Yorks CC [2013] EWHC 2406 (Admin). It was not irrational to exclude combined heat and power pipes from an EIA scoping opinion or to permit them to be excluded from an environmental statement. The EIA Directive does not require the assessment of need for a proposal.

Champion v North Norfolk DC [2013] EWHC 1065 (Admin). A local planning authority could not reasonably decide not to have an EIA or a Habitats Appropriate Assessment on the ground that there was no risk of pollutants entering a nearby river but then impose planning conditions to limit such risk.

R (SAVE) v Sheffield CC [2013] EWCA Civ 1108 (re permission to appeal) - the test for demolition of a listed building was a question of planning judgment for the Council.

HS2 Alliance Ltd, Buckinghamshire CC & Heathrow Hub Ltd v Secretary of State for Transport [2013] EWCA Civ 920. The Court of Appeal dismissed challenges to

proposals and consultation documents relating to the HS2 rail network from London to Birmingham and beyond. Permission to the Supreme Court has been granted.

R (Prideaux) v Buckinghamshire CC [2013] EWHC 1054 (Admin), a challenge alleging a failure to sufficiently consider ecological matters under the Habitats Directive 92/43/EEC was dismissed.

R (ClientEarth) v SSEFRA [2013] UKSC 25. The Supreme Court granted a declaration of non-compliance with the Air Quality Directive 2008/50/EC and referred the following questions to the CJEU:

> i) Where in a given zone or agglomeration conformity with the limit values for nitrogen dioxide cannot be achieved by the deadline of 1 January 2010 specified in annex XI of Directive 2008/50/EC ("the Directive"), is a Member State obliged pursuant to the Directive and/or article 4 TEU to seek postponement of the deadline in accordance with article 22 of the Directive?
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> ii) If so, in what circumstances (if any) may a Member State be relieved of that obligation?
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> iii) If the answer to (i) is no, to what extent (if at all) are the obligations of a Member State which has failed to comply with article 13, and has not made an application under article 22, affected by article 23 (in particular its second paragraph)?
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> iv) In the event of non-compliance with article 13, and in the absence of an application under article 22, what (if any) remedies must a national court provide as a matter of European law in order to comply with article 30 of the Directive and/or article 4 or 19 TEU?

Cusack v Harrow LBC [2013] 1 WLR 2022, the Supreme Court in allowing the Council's appeal held that provision restricting 4 wheeled vehicle access from private property to the highway was not a breach of Article 1, Protocol 1 of the ECHR. The control of use was in accordance with the general public interest rather than a deprivation of property.

6. Costs and the Aarhus Convention

The question of costs continues to be an important aspect of environmental and public law litigation with international and European Union (EU) obligations often appearing to collide with the UK's 'loser pays' rule. This paper focuses on recent developments relating to environmental litigation and costs including:

- The Aarhus Convention 1998 and the UK
- Case C-260/11 *Edwards v Environment Agency* [2013] CJEU
- Amendments to the Civil Procedure Rules and the Aarhus Convention

a) The Aarhus Convention 1998 and the UK

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention 1998) was adopted at the 4th Ministerial Conference "Environment for Europe" in Aarhus, Denmark, on 25 June 1998. It entered into force on 30 October 2001. As of March 2013, there were 39 signatory parties from the United Nations Economic Commission Europe (UNECE) region. It was ratified in the UK and European Union in February 2005.

The Aarhus Implementation Guide 2nd Ed (UN 2013) (*Implementation Guide*) provides extensive guidance on the application of the Convention. In the recent case of Case C-260/11 *Edwards v Environment Agency* [2013] the European Court of Justice (CJEU) noted that:

> 34. Lastly, although the document published in 2000 by the United Nations Economic Commission for Europe, entitled 'The Aarhus Convention, an implementation guide', cannot offer a binding interpretation of that Convention, it may be noted that, according to that document, the cost of bringing a challenge under the Convention or to enforce national environmental law must not be so expensive as to prevent the public from seeking review in appropriate cases.[1]

The *Implementation Guide* notes at page 1 that:

> The Aarhus Convention is a new kind of environmental agreement. It links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It links government accountability and environmental protection. It focuses on interactions between the public and public authorities in a democratic context and it is forging a new process for public participation in the negotiation and implementation of international agreements.
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> The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency, and responsiveness.
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> The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation. It backs up these rights with access-to-justice provisions that go some way towards putting teeth into the Convention. In fact, the preamble immediately links environmental protection to human rights norms and recognizes that every person has the right to live in an environment adequate to his or her health and well-being.

The Aarhus Convention affords citizens and NGOs of signatory Parties three key environmental rights relating to:

[1] See the discussion of *Edwards* in section 2 below.

- access to information
- public participation and
- access to justice.

These may be regarded as procedural rather than substantive rights (that is, they provide rights in relation to process rather than, say, a right to a health environment). The *Implementation Guide* (p. 6-7) summarises the rights and describes them as 'pillars'

> ***The three "pillars"***
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> The Aarhus Convention stands on three "pillars": access to information, public participation and access to justice, provided for under its articles 4 to 9. The three pillars depend on each other for full implementation of the Convention's objectives.
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> ***Pillar I - Access to information***
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> Access to information stands as the first of the pillars. It is the first in time, since effective public participation in decision-making depends on full, accurate, up-to-date information. It can also stand alone, in the sense that the public may seek access to information for any number of purposes, not just to participate.
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> The access to information pillar is split in two. The first part concerns the right of the public to seek information from public authorities and the obligation of public authorities to provide information in response to a request. This type of access to information is called "passive", and is covered by article 4. The second part of the information pillar concerns the right of the public to receive information and the obligation of authorities to collect and disseminate information of public interest without the need for a specific request. This is called "active" access to information, and is covered by article 5.
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> ***Pillar II - Public participation in decision-making***
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> The second pillar of the Aarhus Convention is the public participation pillar. It relies upon the other two pillars for its effectiveness—the information pillar to ensure that the public can participate in an informed fashion, and the access to justice pillar to ensure that participation happens in reality and not just on paper.
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> The public participation pillar is divided into three parts. The first part concerns participation by the public that may be affected by or is otherwise interested in decision-making on a specific activity, and is covered by article 6. The second part concerns the participation of the public in the development of plans, programmes and policies relating to the environment, and is covered by article 7. Finally, article 8 covers participation of the public in the preparation of laws, rules and legally binding norms.

Pillar III - Access to justice

> The third pillar of the Aarhus Convention is the access to justice pillar. It enforces both the information and the participation pillars in domestic legal systems, and strengthens enforcement of domestic environmental law. It is covered by article 9. Specific provisions in article 9 enforce the provisions of the Convention that convey rights onto members of the public. These are article 4, on passive information, article 6, on public participation in decisions on specific activities, and whatever other provisions of the Convention Parties choose to enforce in this manner. The access to justice pillar also provides a mechanism for the public to enforce environmental law directly.

i) EU implementation of the Aarhus Convention

The European Union has implemented two Directives and one Regulation[2] to transpose the Aarhus Convention. The Access to Environmental Information Directive 2003/4/EC and Public Participation Directive 2003/35/EC amended enacted public participation provisions in other key environmental Directives and in particular the EIA Directive 2011/92/EU requiring environmental impact assessment for certain projects that may have environmental effects and the Industrial Emissions Directive 2010/75/EU relating to integrated pollution prevention and control. Convention rights are conferred to members of the public and NGOs. Articles 3(5) & (6) state that the Convention provisions:

> shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation and wider access to justice than required by [the Convention] ... and shall not require any derogation from existing rights.

Since ratification, the domestic courts have frequently stated that the provision of Convention rights is an obligation rather than an option e.g. *R v LB Hammersmith & Fulham ex p Burkett* [2004] EWCA (Civ) 1342 at §74, *R (England) v LB Tower Hamlets & others* [2006] EWCA Civ 1742 and *Davey v Aylesbury Vale DC* [2007] EWCA Civ 1166. In *R (Greenpeace Ltd) v Sec of State for Trade & Industry* [2007] EWHC 311 Sullivan J noted in terms of the Art 7 consultation requirements:

> 49. ... Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to ... ('the Aarhus Convention') ...

Articles 9(1) and (2) of the Aarhus Convention provide review procedures for any breach of the information and participation provisions contained in Articles 4, and 6-8. Article 9(3) requires signatory states to ensure that:

> … members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the

[2] Regulation 1367/2006 aims to ensure that the EU and its organisations comply with the Aarhus Convention.

environment.

Article 9(4) provides that:

> the procedures referred to in [Art 9] shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

The principle of *actio popularis* whereby anyone can sue the government when it acts unlawfully, regardless of whether they have standing in a strict sense, is said to be consistent with Article 9. Yet, one of the critical aspects of the Convention, and an area that has been the subject of concern in the way the UK has approached compliance, is the need to provide a fair review process for members of the public.

ii) The Aarhus Convention Compliance Committee

The UNECE Meeting of the Parties (Oct 2002) adopted Decision I/7 establishing a compliance mechanism for the Convention and creating a Compliance Committee to review a specific party's compliance with the Convention including from one Party concerned of non-compliance by another Party and by communications from members of the public. There have been 78 communications from the public since 2004.

The Compliance Committee reports to the Convention's Meeting of the Parties which convenes once every two years. The Meeting may decide to take one of a number of measures against a Party including: making recommendations for compliance to the Party concerned, issuing a declaration of non-compliance or issuing a caution against the Party. There have been a number of communications to the Compliance Committee relating to the UK. The Meeting of the Parties of July 2011 endorsed a series of findings by the Compliance Committee in Decision IV/9i: ACCC/C/2008/23 in relation to unfairness of apportioning costs; ACCC/C/2008/27 in relation to prohibitive expense in the quantum and allocation of costs; and ACCC/C/2008/33 relating to: (a) the absence of clear legally binding directions from the legislature or judiciary, (b) the failure to remove or reduce financial burden under Article 9(5), (c) the failure to provide clear time limits, and (d) the failure to provide a clear, transparent and consistent framework.

iii) Prohibitive expensive under the Convention

One of the common problems with UK non-compliance with the Convention is that legal proceedings are prohibitively expensive. The question of fairness in judicial proceedings is in terms of what is 'fair for the claimant' or member of the public rather than the defendant as, say, a public body: see §45 of ACCC/2008/27 discussed in the context of 'prohibitively expensive' under Article 9(4). There are 3 key areas where costs arise for a particular party:

> A party's own legal fees, although these can be limited by agreement including e.g. limiting the total costs budget, by entering conditional fee agreements (CFA), or by agreeing to work on a *pro bono* basis:
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> That party's own expenses or disbursements such as court fees, expert fees, travel costs counsel's fees etc. (Counsel's fee are generally regarded as a

> 'disbursement' for costs assessment, although are frequently subject to similar arrangements as in (1) above.
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> An opponent's costs including, potentially, any Interested Party. This is the primary cause of prohibitive expense in environmental claims where the risk or exposure to costs are uncertain such as to prohibit a party commencing legal proceedings or, if certain, (see below the discussion of costs budgeting) simply too costly to afford.,

The problems of prohibitive expense and the limits on access to justice have been raised in a number of reports including: *Civil Aspects of Environmental Justice* (ELF, 2003), *Environmental Justice* (EJP, 2004) and *Cost Barriers to Environmental Justice* (ELF/BRASS 2009). The judiciary have also commented publicly in *Environmental Litigation, A Way through the Maze?* (OUP, 1999) Lord Justice Carnwath suggested that you had to be either very poor or very rich to use the courts to protect the environment[3]. In 2002, Lord Justice Sedley expressed similar concerns to the London Aarhus Convention Conference (ELF, 2002). Lord Justice Brooke in *Environmental Justice: The Cost Barrier* (ELF, 2006) express concern that the problem of costs and difficulty faced by members of the public may present wider problems of access to justice with practitioners simply being unable to continue in this area of work. This echoed his comments in §76 of *R (Burkett) v Hammersmith & Fulham LBC* [2004] EWCA 1342 that:

> If the figures revealed by this case were in any sense typical of the costs reasonably incurred in litigating such cases up to the highest level, very serious questions would be raised as to the possibility of ever living up to the Aarhus ideals within our present system. And if these costs were upheld on detailed assessment, the outcome would cast serious doubts on the cost-effectiveness of the courts as a means of resolving environmental disputes. ... An unprotected claimant in such a case, if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and this may be a potent factor in deterring litigation directed towards protecting the environment from harm.

The report *Ensuring access to environmental justice in England and Wales* (WWF, 2008) (the Sullivan Report) made recommendations relating to access to justice in environmental matters including, among others, that a bespoke approach to Protective Costs Orders (PCO) be adopted in environmental cases to which the Aarhus Convention

[3] This proposition is now doubtful with the legal aid funding criteria capable of excluding even the very poor. Regulation 39 of the Civil Legal Aid (Merits Criteria) Regulations 2013, No. 104 which provides that an individual may qualify for legal representation only if the Director is satisfied that, among other things, '… (c) there is no person other than the individual, including a person who might benefit from the proceedings, who can reasonably be expected to bring the proceedings; …'. This requirement may be reasonable if the matter is being pursued by a local community group or residents' association, but can operate unfairly if other local residents are simply unwilling to get involved in litigation; a common but often overlooked concern. See e.g. Genn, H and Paterson, A (1999). *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law*: Hart Publishing: Oxfords. - its summary notes that: '… with the exception of divorce and separation problems and accidental injury, involvement in legal proceedings is a rare event for most members of the public. … Reluctance to become involved in legal proceedings stems from beliefs about costs, discomfort and uncertainty about outcome. These factors will continue to affect the threshold at which people will take steps to access the legal system.' See also the latest reforms to legal aid announced by the Government in early April 2013.

applies and that where a PCO is made that it secures compliance with the Convention's obligation to ensure proceedings are not prohibitively expensive.[4] The Sullivan Report update (2010) in the light of the Jackson Report confirmed the 2008 findings and recommendations.

iv) UK government view of the Aarhus Convention

Defra, the government department responsible for the Convention, considered that it was compliant with the Aarhus Convention by the provision of legal aid, PCOs, and the use of statutory nuisance and other judicial review mechanisms. The UK response to the question of prohibitive expense and non-compliance with the Convention was set out in Communication ACCC/C/2008/33.

The European Commission (EC), having an interest in ensuring compliance with EU Directives that have transposed the Convention, did not agree. In March 2010, and quite separate from the Aarhus Convention Compliance Committee, the EC issued a reasoned opinion against the UK and announced in April 2011 that the matter was being referred to the CJEU through infraction proceedings. The matter was heard on 11.7.13. The Court's view on specific aspects of prohibitive expense is discussed in *Edwards* below.

b) Case C-260/11 *Edwards v Environment Agency* [2013] CJEU

On 11.4.13 the CJEU handed down judgment in Case C-260/11 *Edwards v Environment* [2013] ruling that:

> 49. The requirement under the [EIA Directive and IPPC Directive] that judicial review proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public while an unsuccessful claimant in an environmental dispute or, more generally, where it is required - as courts in the UK may be - to state its views, at an earlier stage of the proceedings, on a possible capping of the costs of which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both then interest of the person wishing to defend his rights and the public interest in the protection of the environment.
>
> In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection scheme.

[4] See further Chapter 2, Environmental Rights & Principles of Stookes, P *A Practical Approach to Environmental Law 2e* (OUP, 2009).

> By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.
>
> Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or second appeal.

i) Background to *Edwards*

The proceedings were lengthy. The claimant had challenged the grant of an environmental permit for the construction of a very large replacement cement works in Rugby on the basis, of among other things, the lack of EIA. The High Court, Court of Appeal and eventually the House of Lords dismissed the claim, although, the House of Lords considered that the lack of EIA by reference to whether it was necessary to have EIA for a change of fuel, including the burning of waste tyres, was not *acte clair*, and would have referred the matter to the CJEU for a preliminary ruling. The House of Lords ordered that the costs of the Environment Agency and the Secretary of State be paid by Lillian Pallikaropoulos who had, by this time, become a substituted claimant. The Agency and Secretary of State claimed costs totalling £88,000.

The matter of costs of the proceedings then came before the House of Lords Costs Officers who determined that the costs award by the House of Lords was prohibitively expensive and in breach of Article 15 of the IPPC Directive and Article 10a (now Art. 11) of the EIA Directive. The Agency appealed the costs decision.

The Supreme Court[5] held on appeal that the Costs Officers did not have the jurisdiction to consider the substantive costs point and that this was a matter that should be addressed by the court itself, preferably at the outset of the proceedings. It then sought to refer the question of how the 'prohibitively expensive' test should operate i.e. whether it should be an objective test based upon an 'ordinary member of the public' or instead focus on the actual circumstance of the parties to the CJEU. The Supreme Court tended towards the objective approach, as set out in *Garner v Elmbridge*. It recognised the role of the Aarhus Convention and the Compliance Committee. In particular, Lord Hope noted that:

> 30 … There was evidence that without a protective costs order the liability and costs of an unsuccessful appellant was likely to be prohibitively expensive to anyone of ordinary means. So the judge's decision was set aside.
>
> 31 The importance that is to be attached to Sullivan LJ's observations in R (Garner) v Elmbridge Borough Council gathers strength when they are viewed in the light of the proposal in para 4.5 of Chapter 30 of the Jackson Review of Civil Litigation Costs (December 2009) as to environmental judicial review cases that the costs ordered against the claimant should not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, and the entirely different proposal in para 30 of the Update Report of the Sullivan Working Group (August 2010) that an

[5] *Edwards v Environment Agency* [2010] UKSC 57

unsuccessful claimant in a claim for judicial review should not be ordered to pay the costs of any other party other than where the claimant has acted unreasonably in bringing or conducting the proceedings. They have to be viewed too in the light of the conclusion of the Aarhus Convention Compliance Committee which was communicated by letter dated 18 October 2010 that, in legal proceedings in the UK within the scope of article 9 of the Convention, the public interest nature of the environmental claims under consideration does not seem to have been given sufficient consideration in the apportioning of costs by the courts and that despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements of the Convention: see paras 134-135. It is clear that the test which the court must apply to ensure that the proceedings are not prohibitively expensive remains in a state of uncertainty. The balance seems to lie in favour of the objective approach, but this has yet to be finally determined.

ii) The key findings of the CJEU in *Edwards v Environment Agency*

The Coalition for Access to Justice for the Environment (CAJE) recently updated the ACCC in preparation for its June 2013 and its review on the UK's compliance with the Convention. Annex B to the CAJE letter of 21.5.13 summarised the key findings of the *Edwards* decision noting that:

- The requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings. The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned (§§27 & 28).

- The assessment of what must be regarded as prohibitively expensive is not a matter for national law alone (§§ 29 & 30).

- The objective of the EU legislature is to give the public concerned 'wide access to justice' in order that they may play an active part in protecting and improving the quality of the environment. The requirement that costs should be 'not prohibitively expensive' pertains to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law (§§ 31-33).

- Although the Aarhus Implementation Guide (2000) is not a binding interpretation of that Convention, it is persuasive (in noting that the cost of bringing a challenge under the Convention or to enforce national environmental law must not be so expensive as to prevent the public from seeking review in appropriate cases (§34)).

- In accordance with Article 10a of Directive 85/337 and Article 15a of Directive 96/61, the requirement that judicial proceedings should not be

prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result (§35).

- The assessment as to what is prohibitively expensive cannot be based exclusively on the estimated financial resources of an 'average' applicant, since such information may have little connection with the situation of the person concerned. Equally, it cannot be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable (§§40-41).

- In deciding the figure, other factors are relevant, including: (i) the situation of the parties concerned; (ii) whether the claimant has a reasonable prospect of success; (iii) the importance of what is at stake for the claimant and the protection of the environment; (iv) the complexity of the relevant law and procedure; (iv) the potentially frivolous nature of the claim at its various stages; and (v) the existence of a national legal aid scheme or a costs protection regime (§§ 42 & 46).

- The fact that the claimant has not been deterred, in practice, from asserting his or her claim is not in itself sufficient to establish that the proceedings are not, as far as that claimant is concerned, prohibitively expensive (§43).

- The requirement that judicial proceedings should not be prohibitively expensive cannot be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal (§§44 & 45).

ii) The impact of CJEU findings in *Edwards* on domestic law

The Supreme Court considered the CJEU judgment of 11.4.13 and adjourned the matter until publication of the Advocate-General's opinion in Case C-530/11 *Commission v UK* which was published on 12.9.13. This case considers UK compliance (or non-compliance with the Aarhus Convention (and EU law), but on the UK rules prior to CPR 45.41-44. The focus is therefore on the operation of PCOs. The opinion states that:

- Approach to PCOs "restrictive" and entails time and money which has nothing to do with the resolution of the underlying environmental dispute (§44)
- Discretion entailed in granting a PCO is problematic: the absence of "an unambiguous obligation" on the courts to ensure adequate costs protection does not satisfy the criteria in Edwards (§§46-50). In short, there is a mis-

match between the discretion to grant a PCO and the objectives of costs protection

- Failure of PCO rules to permit recovery of a reasonable success fee for claimants is in breach of EU law (§§78-80)
- In environmental cases, the requirement in England and Wales and Northern Ireland for cross-undertakings in damages for interim relief is in breach of EU law.

The Supreme Court is to reconsider the matter.

c) Amendments to the Civil Procedure Rules and the Aarhus Convention

The Civil Procedure (Amendment) Rules 2013, No. 262 (CPAR 2013) together with the 60th and 61st Practice Direction Updates were published on 1.4.13. CPAR 2013 comprised 62 pages with 22 Rules and a Schedule that either amend or replace existing rules. The 60th Update was 83 pages in length with 17 pdf attachments. The 60th Update replaces, amends or supplements a number existing Practice Directions. The 61st Update clarified one aspect of cost-capping and refers to the 2nd Mediation Pilot Scheme.

The changes to costs and legal procedures are wide ranging, in particular the effects on environmental litigation. General changes in costs and procedures that are likely to relate to environmental matters are covered in the following sections of the paper.[6] The new rules considered to have a direct effect on the application of the Aarhus Convention are covered in this Part.

i) CPAR, the 60th Update and 'Aarhus' claims

Rule 16 of the CPAR 2013 refers to a Schedule which provides for new Parts 44 to 48 of the CPR. Section VII is entitled ''Costs Limits in Aarhus Convention Claims'.

SECTION VII

Costs Limits in Aarhus Convention Claims

Scope and interpretation

45.41. (1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section, "Aarhus Convention claim" means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE 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, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.

(Rule 52.9A makes provision in relation to costs of an appeal.)

Opting out

[6] The White Book 2013 published a Special Supplement in April 2013 to summarise the changes.

45.42. Rules 45.43 to 45.44 do not apply where the claimant -

has not stated in the claim form that the claim is an Aarhus Convention claim; or

has stated in the claim form that -

the claim is not an Aarhus Convention claim, or

although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

Limit on costs recoverable from a party in an Aarhus Convention claim

45.43. (1) Subject to rule 45.44, a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45.

(2) Practice Direction 45 may prescribe a different amount for the purpose of paragraph (1) according to the nature of the claimant.

Challenging whether the claim is an Aarhus Convention claim

45.44. (1) If the claimant has stated in the claim form that the claim is an Aarhus Convention claim, rule 45.43 will apply unless -

the defendant has in the acknowledgment of service filed in accordance with rule 54.8 -

denied that the claim is an Aarhus Convention claim; and

set out the defendant's grounds for such denial; and

the court has determined that the claim is not an Aarhus Convention claim.

Where the defendant argues that the claim is not an Aarhus Convention claim, the court will determine that issue at the earliest opportunity.

In any proceedings to determine whether the claim is an Aarhus Convention claim -

if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;

if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings on the indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in Practice Direction 45.

New Rule 45.43 provides that a party may not be ordered to pay costs exceeding the amount prescribed in PD 45.

SECTION VII - PART 45 COSTS LIMITS IN AARHUS CONVENTION CLAIMS

Limit on costs recoverable from a party in an Aarhus Convention claim: R 45.43

Where a claimant is order to pay costs, the amount specified for the purpose of rule 45.43(1) is -

£5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

in all other cases, £10,000

Where a defendant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is £35,000.

ii) What is an "Aarhus Convention claim"?

The new rules define an "Aarhus Convention claim" as 'a claim for judicial review of a decision, act or omission' subject to the provisions of the Aarhus Convention (R 45.41(2)). A wide and purposive reading of the Rule would include all legal proceedings that may fall within the scope of the Aarhus Convention. That is to say, that Rule 45.41(2) is not to read as limiting the term 'judicial review' under Part 54 of the CPR but giving it a general meaning of any environmental claim. Such an approach is consistent with rulings of the Court of Appeal and conclusions of the Aarhus Compliance Committee: see e.g. §44 of *Morgan & Baker v Hinton Organics* [2009] Env LR 30, & §45 of Communication ACCC/C/2008/23. Such a wide meaning will ensure that claims for statutory review under ss. 287, 288 and 289 of the TCPA 1990 and private nuisance proceedings will fall within the scope Rules 45.41-44.

In contrast, a narrow reading of the rule would limit the application of Part 45.41-44 to claims under Part 54 and exclude all proceeding that fall outside the scope of Part 54.

The extent and scope of Rules 45.41-44 have recently been raised in the legal proceedings of *Austin v Miller Argent* – a private nuisance claim alleging dust and noise from opencast coal operations in South Wales, involved a pre-action application for costs protection in which a one day costs hearing to hear that application proceed on the basis of 'no order for costs'. This was to ensure that that application was not prohibitively expensive. The High Court dismissed the Claimant's application for costs protection but granted permission to appeal to the Court of Appeal: see *Austin v Miller Argent (South Wales) Ltd* [2013] EWHC 2622 (TCC).

The proposed claimant in *Austin* has also referred the matter to the Aarhus Compliance Committee alleging non-compliance of Article 9(4) on the basis of the costs ruling of 31.1.13 and that the UK has failed to provide a system of justice that is timely (ACCC/C/2013/86) this communication has been found to be preliminarily admissible and the UK has to respond by 22.12.13.

What is clear is that if a narrow interpretation to Rules 45.41-44 are taken and claims such as s. 288 claims and private nuisance are not regarded as falling within the definition then the rationale, principles and approach to Rules 45.41-44 will nevertheless apply to those claims. To consider otherwise is likely to be an error of law and result in non-compliance of the Directive.

iii) Triggering the cost protection of Part 45.43

To secure the protection of Rule 45.43, the claim form must state that the claim is an 'Aarhus' claim. Claim form N461 (rev. 04.13) contains a new section 6 which asks the applicant to 'contend' whether the claim is an Aarhus Convention claim. If 'yes' the form asks whether the claimant wishes the costs limits to apply and also setting out the grounds why the claim is an 'Aarhus claim'. The revised guidance notes to N461 refer to section 6 but do not elaborate.

Similarly, the pre-action protocol letter to be sent must state that the claim is an 'Aarhus' claim. The 60th Update amends the Pre-action Protocol for Judicial Review by adding at the end of §10 relating to the contents of the letter of claim that:

> "If the claim is considered to be an Aarhus Convention claim, the letter should state this clearly and explain the reasons, since specific rules as to costs apply to such claims."

iv) A presumption that a claim is an Aarhus claim?

Rules 45.41-44 appear to create a presumption in favour of an Aarhus claim if it is expressly stated to be so. The pre-action protocol and Form N461 require a claimant to provide reasons as to why the claim is an 'Aarhus claim'. This is consistent with the provisions of Article 18 of CPAR 2013 which inserts additional text at the end of Rule 54.6(1) setting out what must be stated in the claim form. Rule 54.6(1) now states that:

> In addition to the matters set out in rule 8.2 (contents of the claim form) the claimant must also state—
>
> > the name and address of any person he considers to be an interested party;
> >
> > that he is requesting permission to proceed with a claim for judicial review; and
> >
> > any remedy (including any interim remedy) he is claiming, and
> >
> > where appropriate, the grounds on which it is contended that the claim is an Aarhus Convention claim.
>
> (Rules 45.41 to 45.44 make provision about costs in Aarhus Convention claims.)

Rule 45.44(1) then provides that if the claimant has stated in the claim form that the claim is an Aarhus Convention claim then rule 45.43 and the costs limits will apply unless the defendant resists under Rule 45.44(1)(a).

A defendant challenging the Aarhus claim contention must deny the claim in its Acknowledgement of Service (Rule 45.44(1)(i)-(ii). If a Defendant does choose to deny the Aarhus claim the Court will then determine this at the earliest opportunity (Rule 45.44(2)).

In order to comply with the need for costs certainty in environmental claims (see *Commission v Ireland* [2009], the question of an Aarhus claim should be determined before permission is considered. On receipt of an Aarhus denial, a claimant should have the opportunity to respond. A summary reply should filed and served dealing with any denial and asking the court to determine the question of an Aarhus Claim before considering the question of permission.

Part 45.44(3)(a) provides that if the court rules that the claim is not an Aarhus claim then it will normally make no order for costs. However, if the court holds that the claim is an Aarhus claim, it will normally order the defendant to pay the claimant's costs of those proceedings on an indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in PD 45.

It is not known whether the Court has not yet had to determine the question as to whether the Aarhus Convention applies and its approach will be of interest.

v) The types of cases to which the Aarhus Convention applies

As indicated above the scope and interpretation of Rule 45.41 is ambiguous. On the one hand it refers to 'judicial review' but then explains that such review is subject to the provisions of the Aarhus Convention. Either way, it is necessary to look to the Aarhus Convention to decide its application and scope.

There is no formal definition of the environment in the Convention. Nor is there any provision setting out its scope and purpose. However, the Convention may be regarded as having wide scope for the following reasons.

The Convention does define 'environmental information' and provides a very wide scope (see below). At page 32, the *Implementation Guide* states that:

> Definitions play an important role in the interpretation and implementation of any convention. As the Aarhus Convention deals in part with the development of international standards for domestic legal systems, definitions are exceptionally important. Because of the wide variety of legal systems in the UNECE region, it is important to define as precisely as possible the terms that are at the heart of the Convention. By doing so, a more consistent implementation of the Convention in the framework of the domestic legal systems of all the Parties can be assured.
>
> The terms whose definition is important under the Convention include "public authority", "public", "public concerned" and "environmental information". They help to define the scope of the Convention, in terms of the persons who should be made bound by its obligations, as well as those who should be allowed to use the rights described. While the Convention does not attempt a definition of the term "environment" or of "environmental matters", some indication of the meanings of these terms in the sense of the

> Convention can be deduced from the definition of "environmental information"

At page 13, the *Implementation Guide* states that:

> Health is explicitly referred to in many parts of the Aarhus Convention. Article 1, which sets out the objective of the Convention, refers to "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being," and this statement is supported by similar phrases in the preamble. Human health is also referred to in article 5, paragraph 1 (c). In article 2, the Aarhus Convention defines "environmental information" to include a qualified but explicit reference to human health and safety and the conditions of human life. By implication, these factors are included in the definition of "environment". Thus the entire Convention— not just its information provisions—should be interpreted as applying to health issues, to the extent that they are affected by or through the elements of the environment (see commentary to article 2, paragraph 3 (c)).
>
> The definition of environmental information under the Convention includes at Article 2(3):
>
> > "… any information in written, visual, aural, electronic or any other material form on:
> >
> > The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
> >
> > Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
> >
> > The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

The public participation provisions under Article 6 of the Convention cover matters that 'may have a significant effect on the environment'. This follows the approach taken by the EIA Directive 2011/92/EU which has been held by the CJEU on numerous occasions to have 'wide scope and broad purpose': see §28 of Case C-142/07 *Ecologistas v Madrid* [2008].

The recent CJEU ruling in Case C-420/11 *Leth v Osterreich Republic* [2013] highlights the wide scope of environmental effects under the EIA Directive (which adopts and the Aarhus Convention 1998); including that significant environmental effects includes significant effects on individuals.

vi) The costs caps under PD45 5.1

PD45 5.1 and 5.2 cap a claimant's cost liability at £5,000, and a defendant's liability at £35,000. There is no reference to any interested party. However, the principle for costs protection is to be found in 45.43(1) and that a party to an Aarhus claim may not be ordered to pay costs exceeding the amount prescribed in PD45. On this basis, an interested party is effectively precluded from pursuing costs from a claimant.

The costs liability limits reflect the Ministry of Justice (MoJ) consultation on PCOs (Jan. 2012).

Finally, Rules 45.41-44 are silent as to whether any VAT should form part of the VAT. It is suggested that unless, expressed to the contrary, any cap should be exclusive of VAT for the following reasons:

> PD 44, §2.3 & 4 relating to VAT provides that VAT should not be included in a claim for costs if the receiving party is able to recover the VAT as input tax and that VAT is claimed only when the receiving party is unable to recover the VAT i.e. there is an implicit assumption that any costs referred to are not subject to VAT
>
> Costs budgeting under new Part 3 proceeds on the basis that all costs discussed are plus VAT.
>
> VAT is not part of the costs incurred by a receiving party but a tax recovered on behalf of the Government: see e.g. the post-judgment discussion in *R (Warley) v Wealden DC* [2011] EWHC 2083 (Admin).

Varying the costs cap according to the individual claimant

Rule 45.43(2) provides that PD 45 may prescribe different costs liability limits under 45.43(1) according to the nature of the claimant. At present PD45 is silent on this and does not provide for a reduction in the level of cap. If a £5,000 cap is likely to be prohibitively expensive, then to comply with the Convention a lower cap will need to be either agreed or ordered by the court. It is notable that Part 45.43 provides that a party to the claim not be ordered to pay costs *exceeding* the amount prescribed in PD 4.

The Court has discretion to lower the cap under the general management powers found in Rule 3(1)(m). It may also rely upon the Convention or if applicable, the EIA Directive and IPPC Directive. However, it is necessary to ask the court to use its discretion to lower the cap in the claim form.

vii) Costs, Aarhus and the Court of Appeal

Article 17 of the CPAR 2013 inserts a new Rule 52.9A which provides that:

> In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.
>
> In making such an order the court will have regard to -
>
> the means of both parties;
>
> all the circumstances of the case; and
>
> the need to facilitate access to justice.
>
> If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).
>
> An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise."

This appears to permit the same or a similar approach to Rules 45.41-44 although it leaves the discretion of any order or the limit or cap of such an order to the Court of Appeal. Rule 52.9A(3) enables the matter to be dealt with without a hearing. In terms of the level of any cap, *Edwards* notes at §44 that any costs should not be assessed differently depending on whether the matter is in relation to a first instance decision or an appeal. To ensure that the appeal proceedings are not prohibitively expensive, the Court of Appeal will need to take account of any liability incurred in the lower court.

viii) The Scottish Rules on costs

The Court of Session has introduced rules limiting costs in similar (albeit more limited fashion). In outline, the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Ords in Environmental Appeals and Judicial Reviews) 2013, No. 81 provides:

> The Protective Expenses Orders (PEO) provisions will only apply in judicial review or statutory appeal cases where the Public Participation Directive 2003/35/EC applies: see Rule 58A.1(1). This means that an applicant may only apply for a PEO where the challenged decision, act or omission is, or is said to be, subject to the public participation rights granted by either the EIA Directive 85/337/EEC or IPPC Directive 2008/1/EC. There is no explicit mention of the Aarhus Convention and its provisions nor of similar European Legislation such as the SEA Directive or the Industrial Emissions Directive let alone national law[7].
>
> The applicant must apply for a PEO by motion as soon as it is practicable to do so after the applicant learns of the respondent's intent to defend the claim R. 58A.3. The applicant must either be (i) an individual, or (ii) a NGO promoting environmental protection: R.58A.2(2)(i),(ii). This does *not* include individuals who are acting as a representative of an unincorporated body or in a special capacity such as a trustee: R.58A.1(3). Further, they

[7] Although passing mention is given in Scottish Government's response to the consultation findings.

must show that proceedings are prohibitively expensive. This is defined as being where an applicant could not reasonably proceed with the proceedings in the absence of a PEO: R.58A.2 (5),(6). However, a PEO is not to be granted until all parties have had a chance to be heard: R.58A.5 (5). A respondent may therefore challenge the applicant's claim that the proceedings are prohibitively expensive. However, they may only use information that is publicly available to challenge the applicant's representations as to their financial capability meaning that no order can be granted requiring the applicant to disclose their financial information.

If the court is satisfied that the proceedings are prohibitively expensive then it must grant a PEO: R.58A.2(4). However, they may refuse to grant such an order if (i) the applicant has not demonstrated sufficient interest in the subject matter of the proceedings or (ii) if they consider that proceedings do not have a real prospect of success. The PEO must also contain provisions limiting the applicant's liability to any respondent to £5,000, although this sum may be *lowered* when just cause is shown: 58A.4 (2); and limiting the respondent's liability to £30,000, although this sum may be *raised* when just cause is shown: 58A.4 (4). Further, a PEO may include directions and orders that: (R.58A.4 (5)):

exclude any party's liability in expenses to any other party;

limit any party's liability in expenses to any other party;

provide that no party will be liable for the expenses of any other party;

include provision –

as to a party's liability in expenses to any other party;

as to a party's liability in expenses if the applicant is unsuccessful in the proceedings; or

as to a party's liability in expenses regardless of the outcome of the proceedings.

ix) Interim injunctions revision of PD25A

The 60th Update revises the provisions relating to cross-undertakings in damages when seeking an interim injunction. It inserts a new §5.1B into PD25A which provides that:

> If in an Aarhus Convention claim the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking -
>
> have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and

make such directions as are necessary to ensure that the case is heard promptly.

"Aarhus Convention claim" has the same meaning as in rule 45.41(2).

The new rule seeks to address, for Aarhus claims, the difficulty incurred in some cases of the need to provide an undertaking in damages if seeking an injunction. The judicial approach to the concern has been varied. In *Thornhill v NMR* [2010], the High Court refused an injunction to limit the noise from a scrapyard primarily because the applicants were unable to provide an undertaking. In contrast in *R (Grove Park Community Group) v LB Lewisham* [2011], the court did grant an injunction to prevent the demolition of a locally listed building. The new rules do not go as far as to remove the need for a cross-undertaking but do provide a conscious need to have regard to the fact that in Aarhus cases, there is an overriding need to prevent matters being prohibitively expensive.

x) The role of traditional *Corner House* PCOs

There will be a continuing need for conventional PCOs after Part 45.41-44, not least for matters that fall outside the scope of the Aarhus Convention. Although how long a restrictive and narrow interpretation of the *R (Corner House Research) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192 may be maintained will remain to be seen. It is difficult to see how this may be justified where it is beyond the scope of what is fair, just and proportionate.

xi) Recent costs protection decisions

R (Thomas) v Carmarthenshire CC [2012] with a claimant costs cap of £5,000 and defendant's cap of £35,000.

Oldfield v Secretary of State [2013] EWHC (27.3.13): £2,000 claimant's cap, £35,000 defendant's cap, plus VAT.

Costs orders since 1.4.13 include:

R (May) v Rother DC, CO/544/13 (24.5.13) £5K Claimant's cap inc. expenses & VAT. No reciprocal cap (because where no application).

Roberts v Elmbridge BC (19.4.13) (2 cases) C's cap £5K, R cap: £35K

Thomas v MMA (17.5.13) CA C's cap: £2.5K, D cap: £8K, (private nuisance) some reciprocal cap agreed by parties

R (Champion) v North Norfolk DC (19.4.13), C: £5K, R, £35K (plus VAT)

R (SAVE) v Sheffield CC (26.6.13) PCO refused on the basis that challenge to listed building consent not within Article 9(3) as this only states 'act or omissions' cf. ACCC/C/2005/11 Belgium non-compliant with Convention in determining that town planning permits and area plans did not fall with Art. 9(3). The Compliance Committee held that such matters were the "acts of public authorities".

R (Eaton) v Natural England (23.8.12) PCO refused and costs order subject to detailed assessment if not agreed with parties claiming c. £40K.

R (Lancashire) v Northumberland CC (4.9.13) CPR 45.43 costs protection automatically applied where Council's AoS did not contest Aarhus Convention claim without need for a PCO or reference to this fact in Order granting permission.

7. Changes to the CPR relevant to environmental judicial review

On 1 July 2013, the Civil Procedure Rules (Amendment No. 4) 2013, No. 1413 entered into force. These provided, among other things, that the time limit for judicial review claims involving the planning acts was reduced from 3 months to 6 weeks (CPR 54.5(5)); and that where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision to be reconsidered at a hearing (CPR 54.5(7).

In September 2013, the MoJ published a consultation paper entitled: Judicial Review: Proposals for further reform. Key proposals for change are:

- creating a specialist Land and Planning Chamber in the Upper Tribunal;
- limiting the ability of local authorities to challenge nationally significant infrastructure projects;
- limiting the rules on standing;
- revising rules on "no difference" argument being brought forward to the permission stage;
- limiting payment for legal aid dependent on permission being granted;
- varying the rules on wasted costs orders;
- revising the rules on protective costs orders; and
- revising the rules on leapfrogging appeals to the Supreme Court.

The deadline for submitting responses was 1.11.13.

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7.10.13