Hot cases 2014: the changing environmental landscape

James Findlay QC, Harriet Townsend, Estelle Dehon

Cornerstone Barristers, London, Birmingham, Cardiff

Introduction

Christine de Luca, who is the new Edinburgh Makar (akin to poet laureate), wrote several poems in the Shetlandic language in her 2005 collection ‘Parallel Worlds’. In translation, the opening of her poem ‘Chance of a Lifetime’ reflects on the Scottish landscape from above:

From the airplane, streaks of light pick out
a little town, plumped down there by chance:
an accident of streams and slopes,
heads and tails of nature’s providence.

Attendees at this conference may have different views on the impact of chance, and whether the complex web of planning and environmental requirements combine to strike a predictable balance between ‘nature’s providence’ and the built environment. This is especially so in the sphere of energy, which is a particular focus of this year’s conference.

Our task in highlighting 2013–2014’s ‘hot cases’ has been to pick out from the voluminous case law of the last 12 months those decisions which cast light on the changing environmental landscape, either because of their importance as landmark cases, or because they are part of key trends in decision-making. We begin with a procedural round-up, spotlighting issues raised by the Aarhus Convention. We then move on to the acronym-laden cornerstones of energy, which is a particular focus of this year’s conference.

Before looking at the cases themselves, it is worth recording the significant procedural changes that affect practitioners in the High Court of England and Wales, and flagging up the changes on their way in Scotland.

By the 71st update to the Civil Procedure Rules (CPR), a planning court overseen by a judge of the Queen’s Bench Division was created and put to work on 6 April 2014. As the new CPR r54.21 states, a ‘planning court claim’ includes any claim arising from EU Environmental legislation and can include an application for judicial review or a statutory appeal. A new practice direction (PD 54E) governs planning court claims, and identifies ‘target’ timescales for the determination of claims identified as ‘significant’ by the planning liaison judge, currently Mr Justice Lindblom.

An interesting early example of the use of this procedure is to be found in Harrier Developments Ltd v Fenland District Council,1 a ‘store wars’ case (Harrier Developments had been seeking a judicial review of Fenland District Council’s decision to grant planning permission for a new Sainsbury’s store in King’s Lynn). Following transfer to the planning court in early April, the claim was categorised as ‘significant’ at the end of April, which meant that it became subject to the timescales in the new regime, and Sainsbury’s was refused permission to bring the claim on 22 May 2014. The swiftness of the process was matched by the robustness of the decision, in which Mr Justice Mitting certified Harrier’s claim as being ‘totally without merit’ under the new CPR r54.12(7), thereby preventing Harrier from seeking a reconsideration of the decision at an oral permission hearing, although it has appealed to the Court of Appeal. (The phrase ‘totally without merit’ means simply ‘bound to fail’ and not completely hopeless or misconceived; see the unreported case of R (Grace) v SOSHD.2)

Not surprisingly, none of the cases to which we refer has been brought to a substantive hearing under the new procedures, but our experience has been that the greater efficiency with which claims are dealt once made are broadly welcomed by practitioners. However, it does mean that the days of firing off a claim form in May and sitting back to enjoy a long summer are over. It also reinforces the need to ensure the best points in the claim are identified at the outset to reduce the risk of a ‘totally without merit’ label.

Further, a note of warning to Scots practitioners; changes to judicial review are on their way in Scotland too, with the probable inclusion of a permission stage (written and oral) and a time limit of three months (with a discretion to extend), see clause 85 Courts Reform (Scotland) Bill. The concepts of mora, taciturnity and acquiescence, which currently govern delay, will be restricted to non-public claims. This brings matters closer to the position in England. As at 8 June 2014, amendments have been tabled even suggesting reducing the limit to six weeks in the case of certain challenges.

The cases we consider on procedure fall neatly into two categories:

- the cost of proceedings
- the standard of review.

---

1 CO/1489/2014.
2 Court of Appeal (9 June 2014).
The cost/expense of proceedings

It is now well over 10 years since the Aarhus Convention came into force, and the Guide to Implementation is in its second edition (April 2013), extending to some 300 pages. Recent cases illustrate the long reach of the Convention and its impact on costs awards where claimants seek access to justice in environmental matters. We consider that whilst this may be the end of the beginning in terms of the Aarhus jurisprudence, it is certainly not the beginning of the end. When considering the accuracy of that forecast, bring to mind the following extract from the preamble to the Convention:

Recognising also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations . . .

By way of context, the public participation provisions of the Aarhus Convention had been incorporated into the 1985 EIA Directive by Articles 3(7) and 4(4) of Directive 2003/35. These give a member of the public the right to 'a review procedure before a court of law or [equivalent] which must be fair, equitable, timely and not prohibitively expensive'. It is this right which is under scrutiny in the cases on costs which are considered here.

In this part of the article we will look at decisions such as Edwards v Environment Agency in the CJEU and SC, and at the CJEU's definition of the phrase 'prohibitively expensive', and in the Court's approach to that task. We will also look at the infringement proceedings against the UK which were concluded on 13 February 2014 (Commission v UK Case C–530/11). We end with references to the first instance decision of Mrs Justice Lang in Venn v SSSLG in granting a Protective Costs Order (PCO) on a section 288 challenge and to the opinion of Lord Drummond Young concerning Protective Expenses Orders (PEOs) in Sally Carroll v Scottish Borders Council.

In the infringement proceedings against the UK the Commission, in late 2007, had asked the UK to respond to the complaint that the UK had not complied with its obligations under the public participation provisions including that the review procedure should be "not prohibitively expensive". This did not result in a finding until well over six years later. What is important to note, and is indeed frustrating, is that the Court considers the law as it was six years ago, before Garner v Elmbridge and the Court did not provide much, if any, assistance for the post-Garner and CPR r45 (England and Wales) or post-RCS r58A (Scotland) world, of which more below.

The Court of Appeal had, in R(Garner) v Elmbridge BC significantly developed the Corner House principles for making PCOs in the context of environmental law. In effect, a separate system of costs was being developed for environmental cases. The Supreme Court had then referred certain related questions to the CJEU for a ruling in Edwards (May 2011) which was given in April 2013 (well after the complaint was made against the UK but before argument was heard in July 2013). The same Advocate General (AG Kokott) was involved in both cases.

In Edwards, the question that prompted the reference to the CJEU was whether an unsuccessful claimant should be required to pay the costs of the successful defence of an application for judicial review and, if so, to what extent. In unusual circumstances, the claimant in question, Mrs Pallikaropoulos, had been substituted for a legally aided individual, Edwards, and was relatively well resourced. The unusual facts of the case make it less useful as an indication to the answer a court is likely to give to the question of what costs order should be made in any particular case. However, the Supreme Court's interpretation and application of the CJEU's ruling provides essential guidance on the approach that the courts must now take to awards of costs against claimants who seek the review of decisions which are subject to the public participation provisions of European directives concerning the environment.

It will be seen that none of the five Corner House principles now stands without substantial qualification where environmental issues are concerned. The Supreme Court's judgment in Edwards was given by Lord Carnwath, with the agreement of the other four members of the judicial panel. It sets out the substantive guidance of the CJEU and extracts five significant points from the CJEU's judgment. From these and the CJEU judgment itself, it emerges that there are some issues of approach on which clear and definitive guidance has now been given, and that some further considerations 'may' influence the decision in a particular case, although how this will impact on the current CPR r45 or RCS r58A is still unclear.
As to clear and definitive guidance, the following is now clear from the judgment of the CJEU:

1. The need for the uniform application of European Union law requires that (in cases where there is no express reference to the law of the Member States for the purpose of determining its meaning and scope) there be an autonomous and uniform interpretation of the provisions throughout the EU.19

2. The cost of proceedings must neither exceed the financial resources of the person concerned nor appear in any event to be objectively unreasonable.20

3. The requirement that judicial proceedings should not be prohibitively expensive cannot be assessed differently at first instance and on appeal.21

4. The fact that the claimant has not in fact been deterred from bringing proceedings, cannot be sufficient to establish that the proceedings are not prohibitively expensive for that claimant.22

As to those considerations which may influence the decision whether a particular costs order would make the review procedure prohibitively expensive, the following are identified by the CJEU:23

1. The situation of the parties (although it is not immediately obvious quite how this should influence the question, and it is not given any particular consideration by the Supreme Court).

2. The prospects of success – as the Supreme Court suggested: ‘Lack of a reasonable prospect of success in the claim may, it seems, be a reason for allowing the respondents to recover a higher proportion of their costs. The fact that “frivolity” is mentioned separately (see below) suggests that something more demanding is envisaged than, for example, the threshold test of reasonable arguability’ (SC judgment para 28 (i)).

3. The importance of what is at stake to the claimant, which is likely to be a factor capable of increasing the costs recoverable by the respondent.

4. The complexity of the relevant law and procedure. The Supreme Court interpreted this to suggest that a complex case is likely to require higher expenditure by respondents and thus, objectively, to justify a higher award of costs.

5. The potentially frivolous nature of the claim.

In Commission v UK24 the question before the CJEU was naturally wider in scope than in Edwards, in that it was argued that the UK had not adequately transposed the relevant provisions of the relevant directive into UK law. The discretionary protective costs order (PCO) was under attack.

The UK argued that the practice of the courts in England and Wales had codified the principles governing such orders and that the flexibility of this approach was not only legitimate but desirable. It may be worth noting for general interest that, in relation to the size of UK lawyers’ fees, it was said by the UK Government that this results from the nature of the legal system, which is adversarial and in which oral argument plays a predominant role.25

Again, the court’s judgment is definitive that the law as at 2010 was not Directive compliant. In particular it is clear that:

1. The Corner House requirement that the issues must be of public interest ‘is not appropriate’. Protection may be granted even where it is only the particular interest of the claimant which is involved.26

2. The courts must grant protection where the cost of the proceedings is objectively unreasonable (even if they are affordable to the individual claimant).27

3. The PCO ‘regime’ was not judged sufficiently predictable.28 To put this another way, the degree of uncertainty and imprecision as to the costs implications of proceedings for claimants is too great.

4. Where cross-undertakings in damages are being contemplated (in connection with an interim order, for example) these must not make the proceedings as a whole prohibitively expensive.29 The current system ‘constitutes an additional element of uncertainty and imprecision so far as concerns compliance with the requirement that proceedings not be prohibitively expensive’.

However, the Commission’s complaint about the reciprocal cap (a restriction on the amount of costs which a successful claimant may recover) was insufficiently supported by evidence to be examined.30 This leaves the issue available for further argument, and hence uncertain.

At the time of writing, only one important High Court decision has had to grapple with the Supreme Court’s judgment on an application for a PCO, namely Venn v SSCLG.31 As a section 288 challenge,32 the claim did not benefit from the revisions to the Civil Procedure Rules in England and Wales for judicial reviews in Aarhus Convention claims and it did not raise an environmental issue that engaged the provisions of a European directive. The four grounds of challenge were fairly typical of planning cases generally, albeit one of them concerned the defendant’s approach to residential development on garden land, and was accordingly judged to raise ‘environmental matters’ within the meaning of Article 9(3) of the Convention.33

19 Edwards v Environment Agency (n 7) paras 29, 30.
20 ibid para 40.
21 ibid para 45. The same order need not be made, but at each stage of the proceedings the same principles apply to assessment at each stage. See Supreme Court judgment (n 8) para 24.
22 Edwards v Environment Agency (n 7) para 56.
23 ibid para 46.
24 Case C-530/11 (13 February 2014).
25 Judgment para 27.
26 ibid para 57.
27 ibid.
28 ibid para 58.
29 ibid para 66.
30 ibid para 62.
32 An application to the High Court for a decision to be quashed and the matter referred back to the Secretary of State, made under s 288 of the Town and Country Planning Act 1990.
Mrs Justice Lang noted that no European directive could be relied upon and, accordingly, for the purposes of the ground in question, that the Aarhus Convention was not part of UK domestic law. Nevertheless, she held that the Corner House criteria should be relaxed to give effect to the requirements of the Aarhus Convention and considered herself unable to extend the CPR to such claims. She granted a PCO, stating that it would be prohibitively expensive for [the claimant] to raise more than £3500. There is no mention of a reciprocal cap. The Secretary of State’s appeal remains outstanding.

In Scotland, helpful judicial guidance in relation to RCS 58A was given by Lord Drummond Young in January of this year in Sally Carroll v Scottish Borders Council, although his decision is based on argument from the summer of 2013 and so does not take account of the most recent authorities. RCS r58A is in quite different terms from CPR r45 – it is far narrower for a start, applying only to EAVIPPPC cases – but, arguably, it survives comparatively well in terms of the judgments of the SC and the CJEU in Edwards. In addition, it covers both judicial review and statutory appeals, unlike its English counterpart. What is less clear is how it would fare if assessed against the Convention and the requirements in respect of national law under Article 9(3), that is, claims concerning decisions that contravene the provisions of the national law relating to the environment which the High Court was dealing with in Venn. Most importantly, it is clear from the terms of the rule and the opinion of Lord Drummond Young that the approach of the Scottish courts will be more intrusive than those in England. They will consider issues such as the genuineness of the interest of the petitioner; the requirement for a real prospect of success and whether or not the proceedings are still prohibitively expensive. There is still greater scope for satellite litigation in Scotland than in England, and no threat of indemnity costs either.

A number of important questions remain unanswered (or not fully answered), and are thus areas in which the hot cases of future conferences may germinate. Our top picks for fertile future discussion and litigation are:

- Are reciprocal caps lawful?
- Is £5000 a sensible limit?
- What to do on appeal, not only to the Court of Appeal but beyond?
- What are the limits of the Aarhus Convention – does it apply to a strict questioning of listing/historical significance, for example?

---

34 ibid para 36.
35 ibid para 32.
36 Ibid. The judge agreed with the claimant that ‘it seems inconsistent to exclude section 288 claims from costs protection’ (para 32).
37 ibid para 43.
41 Directive 2003/4/EC.
43 At para 40.

The standard of review

Given the general controversy surrounding Prince Charles’s correspondence with government departments and the efforts made by them to resist publication, we touch briefly on the case of Evans, R (on the application of) v HM Attorney General & Anor. If information is power, the Court of Appeal has shed some light on the question of where, ultimately, the seat of power lies as between two parts of the constitutional framework (in this case the AG and the Upper Tribunal – although the Prince of Wales has an important walk-on part). It engages, potentially at least, with the question of how meaningful it is to say that the British constitution supports the rule of law.


Mr Evans was unsuccessful before the Information Commissioner; but the Upper Tribunal (UT) ruled (after a full contested hearing and having read the disputed correspondence) that the communications should be disclosed to the extent that they fell into a category which the UT defined as ‘advocacy correspondence’. The essential reason for the UT’s decision was ‘that it will generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government’.

The Aarhus Convention was in play again, of course, as the progenitor of the Environmental Information Directive, to which the Environmental Information Regulations 2004 give effect. Both the FOIA and the EIR make provision for the ‘accountable person’ (the Attorney General) to give the Information Commissioner a certificate, which has the effect of overriding a notice to disclose information. That certificate must state that the accountable person ‘has on reasonable grounds formed the opinion that . . . there was no failure to comply with the Act or regulations in relation to the provision of information.

Despite the UT’s decision, the Attorney General issued a certificate to that effect, following which Mr Evans sought judicial review of his exercise of that power. He was unsuccessful before the divisional court but its decision was overturned by a robust ruling from a unanimous Court of Appeal (led by the Master of the Rolls). The main points are these:

1. It is not reasonable for the accountable person simply to disagree with the evaluation of the tribunal. The Court of Appeal drew support for this view from a range of authorities, including R v Warwickshire ex parte Powergen.
2. The Attorney General had simply disagreed with the evaluation made by the UT, and this was insufficient to amount to ‘reasonable grounds’.

www.lawtext.com
1. The expertise within, and the function of, the National submissions in that context: assessment (AA) itself, and noted, in discussing the rival argument as a The Inner House of the Court of Session reframed the that the assessment could not be adequate since it left for planning permission). It was argued for the appellants adoption of the local plan to the assessment of applications pended wholesale to a later stage of the process (from the adverse effect on a Natura site had been unlawfully post- assessment required by the Habitats Regulations and National Park Authority

44 Referred to at paras 55–57.
45 At para 73.
46 At paras 80–81.
50 Cairngorms Campaign and Others v Cairngorms National Park Authority (n 47) para 62(4).

The Court of Appeal granted permission to appeal to the Supreme Court, and we understand that the appeal is being pursued.

In Cairngorms Campaign and Others v Cairngorms National Park Authority it was argued that the appropriate assessment required by the Habitats Regulations and Directive for development having the potential to cause an adverse effect on a Natura site had been unlawfully post-poned wholesale to a later stage of the process (from the adoption of the local plan to the assessment of applications for planning permission). It was argued for the appellants that the assessment could not be adequate since it left matters (which could have been assessed at that stage) still to be assessed in a subsequent planning application. The Inner House of the Court of Session reframed the argument as a Wednesbury challenge to the appropriate assessment (AA) itself, and, noted, in discussing the rival submissions in that context:

1. The expertise within, and the function of, the National Park Authority itself.
2. The lack of statutory guidance as to what must be done by way of an AA, citing Waddenzee.
3. There was no suggestion that a potential problem or issue had been omitted.
4. Safeguarding or mitigating provisions are legitimate at the plan-making stage – citing for example Feeeney v Oxford City Council.
5. There is no obligation (established either in case law or in other general guidance) to assess broadly at the local plan stage whether or not a particular housing allocation would pass the Habitats test.
6. On the facts the local plan would not be rendered ineffective or illegal if one or more of the housing allocations did not come forward since it failed to satisfy the safeguarding policies at the time of the application.

The Court dismissed the appeal, holding that the AA should be considered as a whole and judged according to well known Wednesbury principles. In particular, a planning authority, at the plan-making stage, may use safeguarding policies to ensure the requirements of the Directive are met. Note that it may be that an appeal against this decision will be heard later this year in the SC, but a question mark hangs over that given the outcome of a PCO application. The approach of the Inner House and its recourse to the Wednesbury test reflects a growing judicial recognition both north and south of the border that procedures for environmental protection should not be seen as an obstacle course. This infects all areas of law, and is reflected in the relatively lower rate of success in challenges discussed below. Coupled with the ‘Carnwath approach’ to discretionary relief as expounded in Walton (see below), the question is whether the pendulum has swung too far.

Strategic environmental assessment – losing purpose?

It has also been almost 10 years since EU Directive 2001/42/EC (the SEA Directive) was transposed into the law of England and Wales through the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633), and into the law of Scotland through SSI 2004/258 and then the Environmental Assessment (Scotland) Act 2005. It requires an environmental assessment to be carried out for ‘all plans and programmes’ that ‘set the framework for future development consent projects’, and which are ‘likely to have significant environmental effects’ and are ‘required by administrative provision’. The Supreme Court in Walton, following the CJEU, has made it clear that SEA is not coextensive with EIA, even though there is a potential for overlap between the two processes.

HS2 – What price the purposive approach?

The Supreme Court has spoken again in the HS2 litigation, concerning the proposed HS2 high speed rail network from London to Manchester and Leeds, via Birmingham in R (Buckinghamshire CC) v SST. As is well known, the proceedings were sparked by the Secretary of State for Transport’s publication of a command paper, ‘High speed rail: investing in Britain’s future – decisions and next steps’ (DNS). The DNS set out the government’s decision to press ahead with HS2 and outlined the steps by which it was to be realised, including the proposal that there should be hybrid bills in Parliament, which would contain development consent in the form of deemed planning permission.

A key question before the Supreme Court was whether the DNS was a plan or programme which set the framework for development consent and was required by administrative provision. The leading judgment on the SEA issues was given by Lord Carnwath, who held that the DNS did not set the framework for the purposes of Article 3. Despite recognising that the ‘very elaborate description of the HS2 project, including the thinking behind it and the
government’s reasons for rejecting alternatives’ could be seen as ‘helping to set the framework for subsequent debate’, Lord Carnwath was swayed by the fact that the DNS does not in any way constrain the decision-making process of the authority responsible, which in this case is Parliament. 54 Accordingly, even if a document is intended to influence the result of subsequent debate, as it was acknowledged the DNS was, that is not sufficient for the contents to be a plan or programme that ‘sets the framework’. ‘Influence’, in the ordinary sense of the word, is insufficient; what is required is influence ‘such as to constrain subsequent consideration, and to prevent appropriate account from being taken of all the environmental effects which might otherwise be relevant’. 55

Although Lord Carnwath recognised that a development plan is not ‘prescriptive’, but is still ‘an obvious example’ of a plan or programme, he reasoned that the development plan ‘defines the criteria by which the application is to be determined, and thus sets the framework for the grant of consent’, in a way that was materially different from the DNS. 56

Lord Sumption was in forceful agreement with Lord Carnwath. 57 Baroness Hale was rather more cautious, even framing a question to be referred to the CJEU, but she then reasoned such a reference was unnecessary. 58 She was particularly persuaded by the aim of the SEA Directive:

... the aim of the Directive is not to ensure that all development proposals which will have major environmental effects are preceded by a strategic environmental assessment; rather, it is to ensure that future development consent for projects is not constrained by decisions which have been taken ‘upstream’ without such assessment, thus pre-empting the environmental assessment to be made at project level. 59

Whilst this discussion alone would have been sufficient to make the HS2 decision of importance, the joint judgment of Lords Neuberger and Mance (with whom the remainder of the Court agreed) is arguably even more significant. The justices take the opportunity to make some further observations concerning the decisions of the CJEU which they have found problematic (paragraph 158). What follows is a biting critique of the purposive approach adopted by the CJEU in interpreting EU legislation, and in particular the decision in Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale. 60

In an analysis that arguably reflects peculiarly British concerns, forged in the crucible of a system of parliamentary sovereignty, the justices assert at paragraphs 170–71 that it is

... a common place in legislation that objectives may not fully be achievable or achieved. Compromises or concessions have to be made if legislators are to achieve the enactment of particular provisions ... When reading or interpreting legislation, it can never therefore be assumed that particular objectives have been achieved to the fullest possible degree ... Where the legislature has agreed a clearly expressed measure, reflecting the legislator's choices and compromises in order to achieve agreement, it is not for the court to rewrite the legislation, to extend or ‘improve’ it in respects which the legislator clearly did not intend.

Accordingly, the justices assert that interpretation ‘is only necessary when legislation, construed in the light of its language, context and objectives, is unclear’ (paragraph 166), and that such interpretation must respect the limitations and qualifications which may ‘may have to be introduced to arrive at any agreement’ (paragraph 170). There then followed a scathing analysis of the CJEU’s reasoning in Inter-Environnement Bruxelles, which supported the CJEU’s holding that plans and programmes ‘required by legislative, regulatory or administrative provisions’ in Article 2 was not restricted to those plans whose adoption was compulsory (paragraphs 175–89).

The Supreme Court thus asserted its preference for a narrower approach to the word ‘required’, and also stepped away from purposive interpretation to a more literalist approach, underpinned by a type of original intent theory. This represents a very significant departure indeed from the approach adopted by the CJEU, and seeks to drain much of the potency out of the clear objectives that are articulated at the outset of EU directives (and which, it must be pointed out, are the expressly agreed articulation of the objectives of the legislation as set down by the legislators). 61

Despite the trenchant disagreement with the CJEU, the way in which it arose meant that a reference to the CJEU was not forthcoming, with the result that this disagreement on domestic interpretation of EU legislation presents real difficulty for practitioners. Clearly, those relying on well-established CJEU jurisprudence to urge a broad purposive interpretation of EU legislation will have to overcome not only the Supreme Court’s disapproval of that approach, but also the willingness of that Court to criticise and break away from CJEU case law. Quite what the future holds for the purposive approach is unclear.

54 ibid para 30.
56 R (Buckinghamshire GBC) v SST (n 55) para 37.
57 ibid para 123.
58 ibid paras 154–55.
59 ibid para 153.
60 Case C–567/10 (2012) 2 CMLR 909. This applied a broad, purposive approach to art 2 of the SEA Directive, in which the word ‘required’ was given a wide meaning.

61 Article 1 of the SEA Directive, for example, states: ‘The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment’.
SEA in practice

Recent SEA decisions show a trend that is also discernible in EIA and AA case law: insistence by the courts that deficiencies in an authority’s assessment process are not always substantively fatal (ie rejecting a counsel of perfection) and the adoption by the courts of a more flexible approach to remedy (ie the exercise of discretion). This trend means that it is increasingly difficult to succeed in challenges based on the EU environmental directives.

A number of recent cases reject the counsel of perfection, including the following:

- **Shadwell Estates v Breckland DC** 62
  This case concerned a challenge to the sustainability appraisal supporting the Thetford Area Action Plan, based on criticisms of a ‘highly detailed nature’ concerning alternatives, biodiversity issues and impacts on stone curlews. The judge emphasised that review of environmental documents takes place ‘on conventional Wednesbury grounds’, meaning that any deficiencies identified must be so serious that the document cannot be described, in substance, as an environmental assessment (paragraphs 73–78). Citing Seaport Investments Ltd, 63 the judge held that the court ‘will not examine the fine detail of the contents of such a report’, but ‘will seek to establish whether there has been substantial compliance with the information required’ (paragraph 78). The challenge failed. 64

- **No Adastral New Town v Suffolk Coastal DC** 65
  This case involved a challenge to the adoption of a core strategy. The AA ground is discussed below but, in relation to SEA, the claimant submitted that there was a requirement for there to be an assessment at each stage of the development plan process, which meant that each stage of the development plan had to be accompanied by a sustainability appraisal. The judge accepted that significant steps had been taken over four years during the preparation of the draft plan, which should have been informed by a sustainability appraisal in order to comply with the directive and the regulations. However, the judge held that the publication of the preferred option, together with a sustainability appraisal and public consultation, had allowed the local authority to make a properly informed decision and hence the authority had acted correctly and reasonably at the critical stage of the development plan process (paragraphs 122–24). The challenge failed. 66

- **Zurich Assurance Ltd v Winchester City Council** 66
  This case also related to a challenge to a joint core strategy on a number of bases, including that no further sustainability or strategic environmental appraisal had been carried out following modifications to the core strategy through the inclusion of an additional housing requirement of 1500 dwellings. The judge emphasised that the question of whether the modifications would be likely to have any significant additional environmental effects beyond those that had already been the subject of appraisal was a matter for the planning judgment, first for the inspector and then for the local authority. The judge accepted that the reasons given by the inspector and the authority for deciding there would not be significant environmental effects were neither irrational nor unlawful. The challenge failed. 67

The effects of the Supreme Court’s decision in **Walton** 68 concerning discretion as to remedy 69 have begun to be felt in the recent case law. 70 South of the border, in **West Kensington Estate Tenants and Residents’ Association v Hammersmith and Fulham LBC**, 71 Lindblom J refused to quash the Earl’s Court and West Kensington Opportunity Area Joint Supplementary Planning Document (SPD), which made provision for the redevelopment of Earl’s Court, including through the construction of housing estates. Although the SEA conducted for the SPD was found to be adequate and lawful, the judge found there had been a failure to provide a proper statement of compliance, as required by Article 9(1) of the SEA Directive and regulation 16 of the SEA Regulations (paragraphs 200–204). Following Walton, the judge held that there was ‘no justification for the draconian step of quashing the SPD’ (paragraph 209). Rather, given the error was one of omission, the judge made a mandatory order requiring the local authorities to publish an adequate statement of compliance.

North of the border, in **McGinty v Scottish Ministers**, 72 Lords Clarke, Brodie and Kingarth refused to reduce part of the National Planning Framework for Scotland 2. Alongside finding that the claimant had not demonstrated any proper basis for taking such a serious step (paragraph 59), the court held that any arguable breach of the SEA Directive by reason of a failure in the consultation process was at best technical, rather than material (paragraph 54). As a result, and citing Walton, the court indicated that it would have exercised its discretion not to grant a remedy (paragraphs 55–58).

---

67 See also, along similar lines, Performance Retail Ltd Partnership v Eastbourne BC [2014] EWHC 102 (Admin), in which Mr CMG Ockleston refused to accept that an SA/SEA was vitiated by the lack of assessment of a minor modification recommended by an Inspector at Examination in Public.
69 Lord Carnwath’s extensive obiter remarks that the principles relevant to discretion on remedy arising in domestic law (where procedural challenges fail because the breach did not cause substantial prejudice) are equally applicable to challenges brought under European legislation.
70 They have also been felt in the learning, and it is clear that practitioners held widely divergent views as to the propriety of Walton: cf McCracken and Edwards: ‘Standing and discretion in environmental challenges: Walton, a curate’s egg’ [2014] PL 304 and Liven: ‘Untangling the Golden Thread’ [2013] PL OP 149–160.
72 [2013] CSIH 78 (S).
Appropriate assessment (AA): birds, bats and habitats

The regulatory context to these challenges is set principally by two European directives (the Birds Directive and the Habitats Directive), transposed into English/Welsh law by the Conservation of Habitats and Species Regulations 2010 and into Scots law by the 1994 Regulations in their amended form.

There have been at least seven fully argued challenges raising Habitats Directive issues in the last year in England and Wales, of which only one was successful. In reverse chronological order they were the following.

- **Forest of Dean Friends of the Earth v Forest of Dean DC**
  - The case challenged the grant of two outline planning permissions for development of two sites for employment uses near special areas of conservation (SACs) (home to lesser horseshoe bats). Future plans included a spine road to link the sites and deliver additional development. The permission hearing on this took seven hours, and finished at seven pm. The issue was whether it was unlawful to permit before the proposals because potential adverse impacts could not be ruled out and whether such a decision could be taken before details of the route of the spine road had been established. The claim was dismissed (as was the earlier challenge to the adequacy of the assessment; see R (Champion) v North Norfolk DC below). The court relied upon the opinion of the Attorney General in Commission v UK and that adverse effects must be assessed at every relevant stage to the extent possible on the basis of the precision of the proposal, and in any event the spine road was not an inevitable part of the proposal under consideration. Burnett J’s approach is consistent with the Inner House in the Cairngorms case.

- **Bagshaw v Wyre Borough Council**
  - This case is discussed further below. The remaining cases included:

- **Ashdown Forest Economic Development LLP v SSCLG**
  - Challenge to adoption of core Strategy; Ashdown Forest an SPA; Plan setting framework for accommodating growth while avoiding the adverse effects which would be caused by a significant growth in visitor numbers; SEA issues given greater focus, but the Habitats Directive arguments – that the council was wrong in its screening decision not to proceed to an appropriate assessment stage – dismissed in a single paragraph (105). No assistance provided as to proper approach required in other cases on screening.

- **No Adastral New Town v Suffolk Coastal DC**
  - Challenge to adoption of core strategy; major allocation close to the Deben Estuary SPA; challenge to stage at which the AA was undertaken (not early enough) and the uncertainty of the mitigation relied upon (alternative green space); similar approach taken to that in Cairngorms and claim dismissed. Held: (i) reiterated that a decision-maker ‘should give’ the views of statutory consultees such as Natural England, great weight; (ii) noted whilst good practice to carry out an AA as early as possible that was not an absolute requirement; and (iii) mitigation measures can be taken into account in the assessment provided sufficiently certain.

- **Smyth v SSCLG**
  - Residential development in the countryside near an SPA and Ramsar site (supporting wintering populations of avocet and grebe), also a SAC (dunes and associated vegetation); challenge to grant of planning permission on appeal; proposed SANGS (suitable accessible natural green space) in accordance with agreed Joint Interim Approach supported by Natural England; court applied Hart and approached the inspector’s judgment on a Wednesbury basis; inspector entitled to give the views of NE considerable weight. Claim dismissed.

- **R (Champion) v North Norfolk DC**
  - Judicial review of planning permission; issue: impact on SAC, a river; by pollution caused by the development; overturned the High Court which had quashed permission on the basis it was irrational to decide against the need for an AA and to impose a water quality monitoring condition. Underlined importance of distinguishing between the EIA and AA regimes.

- **Cairngorms Campaign** (and see also above).

- **Forest of Dean Friends of the Earth v Forest of Dean DC**
  - Adoption of core strategy and Area Action Plan; issue: impact on SACs – habitats of the lesser horseshoe bat; at issue the timing and adequacy of the AA; Natural England closely involved and Local Planning Authority entitled to give their views considerable weight. Late publication of AA for consultation but claim dismissed. Permission to appeal refused by Court of Appeal (24 March 2014).

- **Feeney v SoS Transport**
  - Statutory challenge following inquiry into proposed development of a railway; effect on the Oxford Meadows SAC (lowland hay meadow habitat) caused by air pollution; court applied Gillespie to conditions requiring further survey work and monitoring; these recommended by Natural England. Claim dismissed. Court also considered application of Habitats Directive.
at successive stages of plan, see further Cairngorms Campaign\textsuperscript{89} and latest Forest of Dean\textsuperscript{90} cases above.

Of this list, perhaps the most interesting recurrent issue concerns the policies adopted within a development plan that are designed to address the impact on protected habitats and which the growth provided for by the plan could cause. The views of Natural England are, in each instance, given great weight by the court and it is unlikely that an authority would be criticised for doing likewise (recognising, of course, that it is the authority’s responsibility to weigh all relevant advice in their decisions).

Also interesting is the role played in an assessment by possible future proposals. As Burnett J said in the Forest of Dean Friends of the Earth:\textsuperscript{91}

The exercise identified by the Court of Justice is relatively straightforward when a competent authority is faced with a concrete proposal in isolation or even a concrete proposal in combination with other fully worked out plans or projects. But the reality of the planning system is that there are many plans which might come into play for the purposes of regulation 61 which have not been worked through at a high level of specificity. In Commission v United Kingdom [2005] ECR I–9017 the Advocate General proposed a solution. In paragraph 43 of her opinion she noted that the observations of the Court of Justice relating to scientific certainty were concerned with measures whose implementation was certain. In considering the relationship between concrete proposals and plans the detail of which was yet to be determined, she said this:

49. The United Kingdom is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure.

The case concerned the transposition on the Habitats Directive into domestic law in the United Kingdom and Gibraltar and wide-ranging complaints by the Commission that domestic law was deficient in doing so. It was unnecessary for the Court to comment upon paragraph 49 of the Advocate General’s opinion, although there is no sign of disagreement. An approach of the sort suggested by the Advocate General is clearly necessary to avoid sclerosis of the system. It represents an authoritative statement of the law from which the claimants have not sought to dissent and has been accepted in this jurisdiction: Feeney v Oxford City Council [2011] EWHC 2699 and R (Buckingham County Council) v Secretary of State for Transport [2013] EWHC 481 (Admin).

It is, however, worth looking in a little more detail at the one successful challenge, Bagshaw v Wyre Borough Council.\textsuperscript{92} This was an application for judicial review of the grant of planning permission for residential development. The principal ecological survey and report supporting the development had been prepared in support of a previous application, which involved the removal of a roadside hedgerow and a mature ash tree. In her response to consultation, the county ecologist had recommended that further information be provided to demonstrate that mitigation for the loss of the hedgerow could be delivered (she advised that the loss ‘could result in detrimental impacts on bats’). She advised, further, that ‘ideally’ the proposals would retain ‘a significant length’ of hedgerow and create a new hedgerow.

The application for planning permission was different to that previously considered – a shorter length of hedgerow was identified for removal (although the remainder was to be reduced in height) and a new hedgerow was provided. It seems that the alterations to the proposal were assumed to meet the ‘ideal’ scenario mentioned in the county ecologist’s earlier response. This, it would seem, led the planning officer to advise members that no objections had been raised by the county ecologist.

However, there had been no additional information provided as to the effect on bats, and as a result Mr Justice Stewart found that the planning authority had been materially misled by the report. Further, he did not accept ‘that what went before the planning committee was, in ecological terms, “the retention of a significant length of the roadside hedge”’ (paragraph 32). Ultimately, he found that the council had not established ‘the extent to which [any bats] may be affected by the proposed development’ (paragraph 33(i)).

Thus, the case turned on established principles of public law as to the role of the report to the planning committee, which was held to be materially misleading.\textsuperscript{93} The legal and policy context to the determination of applications where a potential impact on bats is concerned makes it necessary for decision-makers to obtain sufficient information to ascertain what the potential impacts are and which may require mitigation. Planning officers should be wary of assuming that a change in the proposals that appears to be beneficial will ensure that disturbance of a protected species is avoided.

The Inner House in Scotland has dismissed two challenges to approvals under the Habitats/Birds Directives recently in the Cairngorms\textsuperscript{94} case referred to above and in the recent judicial review claim challenging consent for construction of a wind farm in Sustainable Shetland v...
Scottish Ministers. In the latter case the Court took a restrictive view of the onus on the decision-maker in overturning the Lord Ordinary. It is understood that an appeal to the Supreme Court may be pending.

Environmental impact assessment: no longer coming up trumps?

The Environmental Impact Assessment Directive 85/337 (EIA Directive) was originally transposed into the law of England and Wales by the Town and Country Planning (Environmental Impact Assessment) Regulations 1988 and into the law of Scotland by the Environmental Impact Assessment (Scotland) Regulations 1999. A considerable body of EIA case law now exists, although the same trends identified above in relation to SEA and AA decisions are identifiable in recent EIA case law.

Screening decisions

A clearly discernible trend has emerged over the past year in this area: most challenges to EIA screening decisions now fail. Of the 11 fully argued challenges to screening decisions in England and Wales in the last 12 months or so, only two were successful at first instance, and one of those was overturned on appeal. The authors are not aware of any challenges to screening decisions in Scotland.

The successful challenge was made in R (Mouring) v West Berkshire,95 which was a rather extreme case: the council failed entirely to consider whether the erection of warehouse premises together with ancillary offices and staff car parking at a site within an area of outstanding natural beauty (AONB) fell within the EIA Regulations. The council had not carried out a screening opinion nor had any EIA issues been raised with the committee. Furthermore, the council’s planning officer had recommended refusal of planning permission partly on the basis of the size of the building, which would result in an urbanising effect on the locality which would demonstrably harm the visual quality and intrinsic character and beauty of that part of the AONB. In those circumstances, it is perhaps unsurprising that Collins J quashed the grant of permission on the basis that the development fell prima facie within Schedule 2 of the EIA Directive and a screening exercise should thus have been carried out (paragraphs 17–23).

The challenge that was successful at first instance but was overturned on appeal was R (Champion) v North Norfolk DC96 (also mentioned above in relation to AA). This concerned a grant of planning permission for the erection of two silos and the construction of a lorry park on a maltings site, which had been in operation for a number of years. The site was near the river Wensum, a designated SAC, and there was evidence of hydrological connectivity between the site and the river. Two screening exercises had been undertaken and the local authority had concluded that neither EIA nor AA was required. Although the nature of the challenge at first instance changed over time, the aspect that convinced James Dingemans QC to quash the permission was the imposition of two conditions for the protection and monitoring of water quality, and remediation if necessary.97 The judge held that, if the planning committee felt these conditions were necessary, then it could not simultaneously accept that it was not likely that there would be a significant effect on the river. He exercised his discretion to quash the permission.

The Court of Appeal overturned that decision, finding that there was no inconsistency between the two positions adopted by the local authority. They were sequential and separate aspects of the committee’s decision-making process and reasoning (paragraphs 43–49). The concerns expressed by various bodies, including Natural England and the Environment Agency, ensured that the question of mitigation measures had been properly addressed. The committee had been put in a position where it could properly make the requisite assessment as to the likely effect of the development on the SSSI and the SAC, and the judge had been correct to find that the decision not to have an EIA or AA was ‘a rational and reasonable conclusion available to the committee’ on the material before it (paragraphs 51–59). On 30 July 2014, the Supreme Court granted permission for a further appeal. This should mean that detailed and authoritative consideration is given to the question whether/when it is lawful to have regard to mitigation measures in decisions of this sort.

The following cases are those in which the screening decision challenges failed.

- R (Gilbert) v SSCLG98

This case concerned a screening assessment of a vehicle proving and testing site, which the claimant alleged created a noise nuisance. The court held that the Secretary of State had asked the right questions and equipped himself with the relevant information. The precautionary principle had to be applied in the light of the stage of the proposal at which the screening assessment was made and in the instant case there had been a two-year trial of noise controls. The decision-maker had considered the evidence and had found that a significant impact was unlikely. Concerns about the enforceability of a noise cap did not affect the underlying noise measurements and the reports had been fair and accurate. It was also clear from the Secretary of State’s decision letter and from the screening checklist that consideration had been given to the cumulative effects of noise emissions and traffic congestion.

- R (CBRE Lionbrook (General Partners) Ltd) v Rugby BC100

This case concerned the redevelopment of a retail park on the outskirts of Rugby. A negative screening opinion

95 [2014] CSIH 60.
96 One case to buck the trend is the recent decision of the Inner House in Highland Council v Scottish Ministers [2014] CSIH 74, in which a decision to permit an incinerator at Invergordon was quashed (the second time that such an approval had been quashed). The reporter had failed to limit the permission to that which had been assessed by the EIA.
98 Note 73.
had been issued in 2011, but the local authority decided that it was not required to issue a further screening opinion for a revised proposal submitted in 2012. The court held that the screening process undertaken by the local authority fully complied with the requirements of the regulations. Regulation 7 allowed the authority to judge whether any changes to a proposal were such as to cast doubt on the continuing validity of the screening opinion for the proposal in its previous form. If the result of a further screening process for a revised proposal would inevitably be the same, the authority was able to conclude that its original screening opinion was competent for the proposed development in its modified form. In the instant case, a planning officer had considered the differences between the original and the revised proposal and had concluded that a further screening process would have been superfluous (paragraphs 42–51).

- R (Plant) v Pembrokeshire County Council

  This case concerned planning permission for the erection of two medium-scale wind turbines on land at an organic dairy farm in Pembrokeshire. The site was near several ancient monuments: the Castell Meherin scheduled monument is 100 m away; the Parc-y-Gerrig standing stone at 150 m; the Newhouse group of Bronze Age barrows at 600 m; and the Blaengwath-Noah camp at 800 m. The objects included the council’s own archaeological advisers, the Dyfed Archaeological Trust. A number of screening opinions were issued, each deciding that EIA was not necessary. The court held that the council did properly take into account the historic and archaeological landscape effects and that there were no material inconsistencies in the screening opinions.

- R (Trevone) v Cornwall Council

  This case concerned planning permission for 15 houses within an area of outstanding natural beauty in Cornwall. Even though the planning officer had accepted that the duration of landscape impact and loss of agricultural land impact was likely to be permanent, and the possibility of reversibility of such factors was low, the court held that this did not prevent the council from determining that the development was unlikely to have significant effects on the environment. The judge commented that, just as an impact can be temporary and reversible but nevertheless significant, an impact can be permanent and irreversible and yet not be significant, and held that there had not been Wednesbury unreasonable (paragraph 47).

- R (Oldfield) v SSCLG

  This case concerned redevelopment of a piece of land which was adjacent to another site that was also the subject of development proposals. The court held that the projects had not been unlawfully split and that the cumulative effects of the developments had properly been taken into account (paragraphs 24–29, 30–58).

- Smyth v SSCLG

  Concerning a grant of planning permission for the construction of 65 dwellings on undeveloped agricultural land close to a special protection area for birds the judge held that a negative screening opinion was not unlawful when a later decision had been made that AA was required, given the differences in the two processes. See further p 131.

- Mackman v SSCLG

  At issue in this case was an outline planning permission for a housing development. The site had been negatively screened a number of times. The court held that failure to refer expressly to a particular factor in the evaluation of environmental effects did not necessarily mean that it was not taken into account, and that, although the planning officer’s reasons had been brief, they were adequate in a case that was not complex or borderline (paragraphs 61–79).

- Aston v SSCLG

  This was a case relating to the development of 14 houses on a reserve housing site in an area of outstanding natural beauty. Although the Secretary of State acknowledged that the screening opinion was not a ‘flawless treatise on the application of the EIA Regulations’, the judge held that it was not Wednesbury unreasonable (paragraphs 22–30). He stated: ‘There are, now, a plethora of cases which demonstrate the difficulties which claimants face in seeking to persuade this court that a decision which is dependent upon the exercise of planning judgment should be quashed. Essentially, such a decision may be quashed on classic Wednesbury grounds but the threshold is a high one’ (paragraph 29).

- R (Save Britain’s Heritage) v SSCLG

  This case concerned the demolition of a Victorian chapel in an area earmarked for redevelopment. A number of criticisms of the negative screening opinion were rejected, including that there had been impermissible ‘salami slicing’ by excluding the chapel from a larger redevelopment scheme (paragraphs 312, 347–50, 355, 360, 422, 442).

- R (Halder) v Gedling Borough Council

  Finally, this case concerned a grant of planning permission to erect a single wind turbine on green belt land. The local authority had adopted a screening opinion that, since the proposed development was for a single turbine, an EIA was not required. The court held that it should not impose too high a burden on planning authorities in relation to a procedure intended to identify the relatively small number of cases in which an EIA was required. The screening opinion, read as a whole, showed that the relevant factors had been considered

---

105 Note 81.
when rejecting the need for an EIA and the requisite information provided (paragraphs 67–68, 75).

Discretion as to remedy

As with SEA, the discretion not to quash a planning permission despite a failure to comply with the EIA Regulations is becoming increasingly important, and so ‘technical’ challenges to EIA decisions are no longer likely to succeed. A good example is R (Gibson) v Harrow DC,[111] in which Sales J held that it was not appropriate to grant relief as a result of the local authority’s failure to place a screening opinion on the register; no detriment having been suffered by the claimant.

Enforcement of time limits and EIA

One case deserves particular mention, namely R (Evans) v Basingstoke and Deane BC,[112] which considered whether immunity from enforcement conferred by section 171B and/or section 191 of the Town and Country Planning Act 1990 was compatible with the EIA Directive. Lord Justice Sullivan (with whom Lord Justices Aikens and Patten agreed) held that a time limit on taking enforcement action against EIA development was not in principle incompatible with a Member State’s obligation to ensure compliance with the EIA Directive. The case concerned a watercress farm on which the proportion of the produce sorted, washed and packed which was imported from other sites increased, such that there was a material change of use of the site from agricultural to ‘mixed agricultural/industrial use with the industrial element predominant’. The change of use was immune from enforcement, having occurred more than 10 years earlier.

The Court of Appeal cited the CJEU’s decision in Commission of the European Communities v United Kingdom,[113] in which Advocate General Colomer’s opinion referring to the relevant UK legislation on time limits had not been accepted. Although the action was dismissed as inadmissible because the Commission had failed to complain about that aspect of the UK’s two-part legal mechanism, the Court of Appeal reasoned that if ‘the very existence of a system of time limits for taking enforcement action was incompatible with the EIA Directive, the court would surely have said so’ (paragraph 13). Furthermore, given that the judgment in Commission v United Kingdom was promulgated in 2006, the Commission would likely have renewed its application had it thought that the time limits were incompatible with the directive (paragraph 15).

The Court of Appeal held that, given that the time limits were not in principle incompatible, the precise nature of the time limits was a matter falling within the principle of procedural autonomy of the Member States provided that the time limits imposed by the Member States comply with the principles of equivalence and effectiveness (paragraph 26).

Energy cases

We are aware of three challenges to energy-related development consent order (DCO) decisions taken under the Planning Act 2008. Challenges to DCO decisions are made under section 118 of the 2008 Act by way of a claim for judicial review, which must be made within six weeks of the decision or its reasons.

The first case discussed here is the successful challenge: R (Halite Energy Group) v SoS Energy and Climate Change.[114] This concerned an application for a DCO to provide an underground gas storage facility within naturally occurring salt deposits (halite) in the Wyre Peninsula, Lancashire. The plans had been promoted twice previously on larger sites. Notably, the proposal would also have to comply with the Control of Major Accident Hazards Regulations 1999 (COMAH) following the grant of a DCO for which the competent authorities are the Health and Safety Executive and the Environment Agency.

The examining authority found that the geological analysis underpinning the DCO application (for up to 19 caverns for the underground storage of up to 900 million cubic metres of natural gas) ‘falls short of that required by NPS EN-4 to prove beyond reasonable doubt that the halite is geologically suitable for the caverns proposed’ (paragraph 53). The examining authority proposed that the deficiency be addressed by including requirements on the DCO (these operate in the same way as conditions on the grant of planning permission). The Secretary of State disagreed and refused the DCO.

Patterson J divided the developer’s grounds into three paragraphs (36):

- procedural unfairness
- the meaning of paragraph 2.8.9 of NPS EN-4
- irrationality.

In each case the claim was upheld.[115]

Of particular interest, in that it will be relevant to other inquisitorial procedures, is Patterson J’s finding that there was a breach of natural justice. The judge applied the familiar case (which concerned a public inquiry) of Castleford Homes v SoSE,[116] in order to pose the question whether the claimant got ‘a fair crack of the whip’. This required a detailed examination of the facts: she went through the examination process in detail. There was no issue-specific hearing (ISH) on geology and the applicant had provided a detailed statement of common ground with Lancashire County Council on the subject. However, there was an ISH hearing on the relationship between the DCO and the COMAH process, which it was the claimant’s case was the context in which more detailed geological data would support the proposal (paragraph 62).

[110] The decision was overturned on appeal on non-EIA grounds; see [2014] EWCA Civ 599.
[111] [2013] EWHC 3449 (Admin).
[114] [2014] EWHC 17 (Admin), Patterson J (January 2014).
[115] Although DECC sought permission to appeal and lodged an appeal, this has been withdrawn and the process of redetermination has commenced. In particular, a letter has been written requesting the further geological data required by the assessor.
[116] [2001] EWHC 77.
The heart of the claimant’s complaint is found at paragraphs 71–75 of the judgment, and the response to it at paragraphs 76–78, as a result of which Patterson J held:

I agree with the general submissions made by the defendant, namely, that the examination process is to be looked at as a whole and not with the benefit of hindsight. The still relatively new examination process is both inquisitorial, iterative and learning. The purpose of the examination process is to enable the ExA to be able to compile a fully informed report with a recommendation to the Secretary of State on the NSIP before it.

Nevertheless, she continued:

80. In the case of LB Croydon v Secretary of State for the Environment [1999] EWHC Admin 748 Keene J held [43]:

I return to a submission about need for the inspector to have adopted an inquisitorial role. No one suggests that an inspector is required to search for material not put before him. What the Dyson case establishes is that, when there is an informal hearing which, as a matter of procedure, normally excludes cross-examination, the inspector has to play an enhanced role in order to resolve conflicts of evidence. In addition, such an inspector must not arrive at a finding adverse to a party without having put the point to the party in question or his witness, and that is what happened in the Dyson case.

81. Although that was dealing with an informal hearing the enhanced role which the inspector has to play in an informal hearing is not dissimilar to the role of the ExA carrying out an examination under the 2008 Act. As a rule there is no cross-examination at the hearings or on the written documents submitted in response to the Panel’s questions. The onus is, therefore, on the ExA to ensure that material matters of concern, which may or may not, have been raised by others who have made representations on the planning application are raised with all parties in a fair and transparent way. In particular, where matters raised or of concern relate to the principal controversial issues, there is a duty upon the ExA to provide all parties with the opportunity to comment upon them before reaching their final conclusions.

82. The questions which Ouseley J set out in Castleford Homes on the sort of issues which could be used to guide a conclusion as to whether the manner in which a particular issue was dealt with at an inquiry involved a breach of natural justice and was unfair, are just as apposite to a process of examination by an ExA as they are to parties at an inquiry. The fundamental issue here is whether there was a fair process in the particular circumstances of this examination? If there was not, the supplemental question is, what are the consequences?

Ultimately the judge held that there was nothing to alert the claimant to the challenge to the SOCG, which appeared in the examining authority’s report (paragraph 95), the approach to the standard of proof on geological data lacked a fair and transparent process, and the flaws in the examining authority’s reasoning tainted the decision of the Secretary of State.

Turning now to the challenges which did not succeed, the first case to be discussed is FCC Environmental v SoS Energy and Climate Change,117 which was a challenge by a competitor business to the grant of a DCO for the provision of an energy from waste facility at a disused claypit in Bedfordshire. The two grounds were an alleged lack of reasons, including the compulsory acquisition of restrictive covenants benefiting the claimant, and the adequacy of environmental statement (it was said to be out of date). Mitting J gave the grounds of challenge short shrift and dismissed the claim. Of some interest for future cases where CPOs may be sought together with the DCO, is the effect of section 104(3) of the Planning Act 2008 on the policy test for confirmation of CPOs. As Mitting J held at paragraph 18:

For my part I find it difficult to conceive of circumstances in which the Panel in applying statutory guidance, as it must, which established an urgent need for development, could legitimately conclude that there was not a compelling case as a necessary element of the scheme, justifying compulsory acquisition of rights in land. To that extent, the established distinction between tests for the grant of planning consent and the grant of a power of compulsory acquisition (see Trusthouse Forte Hotels Ltd v Secretary of State for the Environment [1986] 53 P&CR 293 at page 299, paragraph 2 and page 300, paragraph 6) has been modified by statute.

Finally, as far as DCO challenges are concerned, is the case of R (An Taisce, the National Trust for Ireland) v Secretary of State for Energy and Climate Change.118,119 This case concerned the potential for transboundary environmental effects and the regime for their assessment that was introduced following the Espoo Convention of 1991, particularly as it appears there has only been one transboundary EIA case considered by the CJEU and that was on a site which straddled the boundary between countries. However, it was a ‘rolled up’ hearing including both the application for permission for judicial review and full argument, at the end of which Patterson J concluded that she would not have granted permission for judicial review. The long judgment and careful treatment the judge accorded the arguments made should not blind its readers to the robust terms in which the claim was dismissed.

The challenge was to the grant of consent for the Hinckley Point C nuclear plant. It was said that the screening decision under which it was determined there need be no consultation with the people of Ireland was flawed. It raised the question of how likely a transboundary effect must be for consultation to be necessary. The claimant borrowed from the Habitats Directive jurisprudence and argued for a similar approach; significant effects were said to be likely if they could not be excluded. Patterson J distinguished the approach required by the Habitats Directive from that required by the EIA Directive (paragraph 121), saw no reason for a different approach to likelihood where

119 The Court of Appeal has since handed down its decision refusing the appeal and refusing to refer any matters to the CJEU: [2014] EWCA Civ 1111.
the potential for transboundary effects was being considered, and adopted the same test as is applied at the screening opinion stage to the question whether significant effects are likely.

The second issue concerned the screening decision as to transboundary effects themselves. Patterson J set out clearly how the licensing of nuclear installations and the regime for development consent work in parallel. The claimant argued that no reliance could be placed on subsequent regulatory decisions. As to this, Patterson J said at paragraph 181:

At the time of the Secretary of State’s consideration of whether to grant development consent there was no evidence to suggest that the risk of an accident was more than a bare and remote possibility. In the instant case the regulatory regime is in existence precisely to oversee the safety of nuclear sites. There is nothing in the Directive and Article 7, in particular, to require the regulatory regime to be disregarded. NPS EN-6 refers to reliance being placed in the DCO process on the licensing and permitting regulatory regime for nuclear power stations, to avoid unnecessary duplication and delay and to ensure that planning and regulatory processes are focused in the most appropriate areas. It would be contrary to the accepted principle in Gateshead120 not to have regard to that regime, and in my judgment it would also be entirely contrary to common sense.

Other ‘hot’ cases south of the border include East Northamptonshire v SSCLG,121 in which the local planning authority successfully challenged the grant of planning permission for a wind farm on appeal, for treating less than substantial harm to the setting of a heritage asset as a less than substantial objection to the development. This is, right- ly treated as a heritage case rather than an energy case, but it has had considerable influence in the assessment of wind and solar farm proposals that frequently affect the setting of listed buildings.

As for the application of policy on renewable energy developments, there have been some interesting renewable energy cases. Three of these may help to illustrate some common themes.

On 16 October 2013, the SoS refused permission for a 24 MW solar farm proposed on 46 hectares of agricultural land in Waveney, Suffolk against the recommendation of his appointed inspector, on account of its harmful impact on the character and appearance of the countryside. He agreed that this harm would be ‘limited’ but also agreed that it would be greater than the ‘very limited’ harm which would be caused by a smaller permitted scheme in part of the site. He found the limited harm identified outweighed the benefit of the renewable energy provided by the proposal. A decision is awaited following the developer’s statutory appeal to the High Court.

On 22 May 2014, the SoS refused permission for a 25 MW solar farm proposed on 50 hectares of agricultural land in Suffolk Coastal District in accordance with the recommendation of his appointed inspector. The main issues were the impact on the setting of three listed buildings, and the impact on landscape and visual amenity which the proposal would cause. Particularly notable for future cases was: (a) the significant weight given to the ‘less than substantial’ harm to the setting of one of the three listed buildings; and (b) that the reversibility of the development should not be ‘an influential factor’ in the determination of the appeal.

On 2 June 2014, an inspector dismissed an appeal for a 10 MW solar farm in Babergh for landscape impact reasons and reflecting the sequential approach required by the Planning Practice Guidance (paragraph ID 5–013) where agricultural land is proposed to be used. The first factor for consideration is ‘... focusing large scale solar farms on previously developed and non-agricultural land, provided it is not of high environmental value’. The first part of the second factor to consider is ‘where a proposal involves greenfield land, whether ... the proposed use of any agricultural land has been shown to be necessary and poorer quality land has been used in preference to higher quality land’.

These decisions suggest that a hard line is being taken on the policy requirements of the recently published PPG, and on questions of impact. This may reflect the objective of ministers that the solar industry will make use of rooftop sites and other brownfield land.

In Scotland there have been two important first instance energy cases on section 36 of the Electricity Act 1989: Sustainable Shetland v Scottish Ministers,122 now overturned on appeal, and Trump International Golf Club Scotland Ltd v Scottish Ministers,123 appeal pending. The main issue in Sustainable Shetland, at least in the eyes of the first instance court, was whether an applicant for construction and operation of a wind farm needs to be a licence holder or a person authorised by an exemption before a consent could be granted. Lady Clark of Carlton said yes (sending shock waves through the industry); Lord Doherty then said no and declined to follow Lady Clark. Scottish ministers appealed Lady Clark’s decision. Trump tried to join in, whilst awaiting Lord Doherty’s opinion, as did others including the RSPB on the underlying Birds Directive point. Their attempts were rejected by the Inner House.124 Taking what some consider a very restrictive approach to a public law issue. It determined that Trump would not be directly affected by the outcome of the appeal in Sustainable Shetland, although on Trump’s appeal the Inner House might well suggest otherwise. It considered the RSPB’s submissions would not be of benefit to it.

The appeal in Sustainable Shetland was allowed, the Inner House in effect adopting Lord Doherty’s reasoning. The amicus curia appointed to argue the licence point was also persuaded by Lord Doherty’s reasoning and no party sought to sustain Lady Clark’s position before the Inner House – the petitioner apparently only having reluctantly taken it below at the judge’s suggestion. Trump has,
however, duly appealed, with four days being set down in January 2015 for consideration by the Inner House. His appeal raises the licence issue but also predetermination and a point on conditions.

Other interesting developments

Finally, there are some other ‘hot’ cases deserving mention but, as with the best architectonics, which do not fit neatly within any categorisation.

The Supreme Court has this year given an important decision considering the relevance of a grant of planning permission as to whether activities on land constitute a nuisance: Lawrence v Coventry (via RDC Promotions). The case concerned the operation of a stadium, on agricultural land, which had permission for use for motor sports (including speedway racing and stock-car racing), and an adjacent permitted moto-cross track. The permissions placed limits on the frequency and times of activities, but not on the permissible level of noise. Across open fields, about 560 metres from the stadium and about 860 metres from the track, stood the nearest residential property – a 1950s bungalow surrounded by agricultural land. The claimants bought the bungalow in 2006, whereupon began a long-running tussle about noise nuisance. Although it has long been accepted that a planning permission cannot be considered to be a ‘licence to commit nuisance’, several decisions had recognised that the planning system, through the operation of development plans and through decisions made under those plans (particularly large or strategic grants of permission), could ‘alter the character of a neighbourhood’. The Supreme Court found this to be unsatisfactory.

In the leading judgment, Lord Neuberger pointed out that the way in which the case law had developed meant that a grant of planning permission for a large area effectively defeated a nuisance claim, with the paradoxical result that the planning authority had in mind when granting permission (see paragraphs 98 and 219).

Lord Neuberger and Lord Carnwath contain entertainingly careful, and emphasised the obiter nature of the discussion whether to award damages in place of an injunction; see, in the realm of employment law, Prophet Pic v Nuggett. As an interesting aside, the judgments of Lord Neuberger and Lord Carnwath contain entertainingly opposed views as to whether the reasons given by a planning officer in a report recommending planning permission be granted can reliably be taken to be the actual reasons that the planning authority had in mind when granting permission (see paragraphs 98 and 219).

125 [2014] UKSC 13; [2014] 2 WLR 433, also known as Lawrence v Fen Tigers Ltd.
‘Hot’ cases concludes with a short discussion of two important cases concerning access to environmental information.

In Fish Legal v Information Commissioner and United Utilities Water plc,129 the CJEU has given general guidance on how the definition of ‘public authority’ is to be applied for the purposes of the EU Directive on public access to environmental information (Directive 2003/4/EC), and hence under the Environmental Information Regulations 2004 (EIR 2004) and the Environmental Information (Scotland) Regulations 2004. This is a decision that has significant implications for privatised utility providers and for companies operating in other regulated industries (such as transport), as the definition adopted by the CJEU of ‘public authorities’ is very wide and these types of companies are likely to fall within its ambit.

The case arose as a result of requests for information from various water companies, made by an individual and by Fish Legal (the legal arm of the Angling Trust). The information, which concerned discharges, clean-up operations, emergency overflow and sewerage capacity, was clearly environmental information, but the requests were refused as the companies considered they were not public authorities under regulation 2(2) of the EIR 2004. Both the Information Commissioner and the first-tier tribunal agreed. The upper tribunal requested a preliminary ruling from the CJEU.

The Grand Chamber of the CJEU held that only entities empowered to perform public administrative functions by national law are capable of being ‘public authorities’, but that the question of whether any functions are ‘public administrative functions’ must be examined in the light of European Union law, as it should be standardised across Member States. The court identified the following criteria for making this determination:

1. Whether the entities (which can be private companies) are vested with special powers beyond private law powers.
2. Whether the entities do not determine ‘in a genuinely autonomous manner’ the way in which they perform their functions in the environmental field (regulation is a relevant but not sufficient condition – the question is whether they have ‘genuine autonomy’ to determine their day-to-day management).

It will be an interesting challenge for the upper tribunal and others to determine what is meant by companies being vested with ‘special powers’.

The CJEU also reiterated its disdain for any form of ‘hybrid’ public authorities, but held that a commercial service provider which is a public authority is only required to provide requesters with environmental information that relates to the provision of the relevant service.

Some have suggested that the CJEU’s determination in Fish Legal may have implications beyond information law – in particular, in relation to the extent of activities which could be regarded as public functions capable of being challenged by way of judicial review. Time will tell, but the user-unfriendly nature of the ‘special powers’ discussion is unlikely to make Fish Legal an obvious port of call for advocates.

Finally, London Borough of Southwark v Information Commissioner and Lend Lease (Elephant and Castle) Ltd130 concerned a request by a resident of Southwark for the viability assessment which supported the planning application made by Lend Lease for the redevelopment of a very large estate in south London. The scope of the project was significant, with Lend Lease funding and delivering the infrastructure and energy requirements of the development, ‘essentially building an entire town centre at its own risk’ (paragraph 32).

The viability assessment demonstrated that it was not viable to provide 35 per cent affordable housing as part of the development, as required by the council’s local planning policies, and the developer proposed to provide 25 per cent affordable housing. In fact, the viability assessment showed that even 25 per cent of affordable housing was not viable on the site, let alone the 35 per cent, but the developer remained committed to providing 25 per cent and planning permission was granted on this basis. The viability assessment was submitted to the council on a confidential basis because it included commercially sensitive information, both from the point of view of the developer and of the council. Lend Lease contended that the assessment contained a ‘treasure trove of competitively sensitive information’, including Lend Lease’s financial model, applicable to the majority of its large developments. By the time of the appeal, the council had of its own volition disclosed large parts of the viability assessment in response to the request, and only the key confidential information remained withheld, including the financial model.

In his decision under appeal, the Information Commissioner had undertaken a detailed analysis of the public interest and ordered that the entire viability assessment be disclosed, including the financial model. He also adopted a robust position before the Information Tribunal, canvassing the European law background and emphasising that the aims of Directive 2003/04 and the Aarhus Convention in ensuring effective public participation in environmental decision-making should not routinely be overridden by claims of commercial confidentiality, particularly where large amounts of public money are at stake.

The First Tier Tribunal General Regulatory Chamber (Information Rights) partly allowed the appeal. The decision made a number of key findings:

1. Although it was primarily an economic analysis, the viability assessment was ‘environmental information’ for the purposes of the EIR 2004 such that the EIR regime applied, rather than the Freedom of Information Act 2000. This was significant, because the absolute exemption in relation to disclosure of confidential information contained in the 2000 Act does not apply in the EIR regime, where all exemptions are qualified and thus require consideration of the balance of the public

130 EA/2013/0162 (9 May 2014).
interest in maintaining the exception or disclosing the information.

2. The information engaged a number of exceptions to the general right to environmental information in Regulation 12(5) EIR 2004, including reg 12(5)(c) (intellectual property rights), reg 12(5)(e) (commercial information) and reg 12(5)(f) (interests of the volunteer of the information), although it did not engage the exception in reg 12(5)(d) (confidentiality of proceedings).

3. The commercial interests of the developer were such as to engage its ECHR rights under Article 1, Protocol 1 and possibly Article 8, although it was doubted whether a properly conducted balancing exercise under reg 12 EIR would result in a decision contrary to the Human Rights Act 1998 and there was no breach in this case.

The key issues in the public interest balance were:

- the project must not be allowed to fail or be put in jeopardy
- the importance of public participation in decision-making
- the avoidance of harm to the developer’s commercial interests.

In a terse single paragraph, the tribunal accepted that the financial model developed by Lend Lease was a trade secret and held that the harm to Lend Lease’s commercial interests by its disclosure was not outweighed by the benefits of disclosure. The tribunal came to the same conclusion about information concerning sales and rentals, which would be the subject of commercial negotiation between Lend Lease and other businesses. Other information was held to be less commercially sensitive and required to be disclosed.

Unfortunately, the tribunal did not engage with any of the arguments on the European law elements of the case, and so the principled basis of the decision is rather obscure.

At least one other redevelopment scheme – the redevelopment of Earl’s Court – has been directly affected by this decision, as the Royal Borough of Kensington and Chelsea has withdrawn an appeal against a decision by the Information Commissioner that it make available parts of a confidential viability report (which had been produced alongside a pared-down public version).

This decision is of interest north of the border, given that the Environmental Information (Scotland) Regulations 2004 are very similar to the regulations applicable in England and Wales. It is also noteworthy because it shows the reach of ‘environmental information’ and the diversity of what is now encapsulated within environmental litigation. It is predicted that this trend will persist. As the force ebbs from some environmental challenges, so environmental litigation will flow into new areas, and the environmental law landscape will continue to expand.

Appendix

Civil Procedure Rules (England and Wales)

Extract from CPR Practice Direction 45

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

5.1 Where a claimant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is –

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

(b) in all other cases, £10,000.

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

Court of Session Rules (Scotland)

Extract from RCS Chapter 58A

Terms of protective expenses orders

58A.4 – (1) Subject to paragraph (2), a protective expenses order must contain provision limiting the applicant’s liability in expenses to the respondent to the sum of £5,000.

(2) The court may, on cause shown by the applicant, lower the sum mentioned in paragraph (1).

(3) Subject to paragraph (4), a protective expenses order must also contain provision limiting the respondent’s liability in expenses to the applicant to the sum of £30,000.

(4) The court may, on cause shown by the applicant, raise the sum mentioned in paragraph (3).