Making Court Costs Reasonable in the UK in Environmental Cases

ClientEarth Consultation Response – Cross-undertakings in damages in environmental judicial review claims

February 2011

Introduction

1. This Consultation on cross-undertakings is in parallel to the Government's Consultation on costs in the England and Wales legal system.

2. ClientEarth recently had a case decided in their favour against the UK regarding both costs and cross-undertakings in environmental cases. We have previously responded to the costs Consultation.

3. In this response, we address the legal impropriety of cross-undertakings in damages in environmental judicial reviews. The authoritative Aarhus Compliance Committee has found that the UK is in violation of its treaty obligations by allowing courts to impose cross-undertakings.

4. Cross-undertakings in damages must now be eliminated in the England and Wales system in environmental judicial reviews. They are illegal under both the Aarhus Convention and EU law.

5. Moreover, cross-undertakings frustrate the exercise of rights of participatory democracy. In a mature democracy citizens must be able to use the courts to redress injuries to their interests. By making effective remedies impossible in some important kinds of judicial review cases, cross-undertakings fundamentally frustrate the participation of citizens and non-governmental organisations (NGOs) in defending their environmental interests. Because defending those interests is a public good that must be protected, cross-undertakings must now be abolished.

Key Points – ClientEarth:

1. Draws Defra's attention to the fact that cross-undertakings in damages are in breach of the Aarhus Convention and EU law because they are prohibitively expensive, involve the unlawful use of discretion and they prevent injunctive relief from being available under the Aarhus Convention (see paragraphs 8-10 below).

2. Recommends therefore that cross-undertakings in damages be abolished in environmental judicial review cases. There is already a precedent for this in relation to EU law cases (see paragraphs 28-31 below). This will ensure compliance with the Aarhus Convention and EU law.

3. Holds that if cross-undertakings in relation to injunctions in environmental judicial review cases are not abolished, according to current judicial practice the general position will continue to be that a cross-undertaking in damages will almost certainly be required in environmental judicial review cases where an interim injunction is requested, especially if third party commercial interests are concerned, and that this will be in breach of the Aarhus Convention and EU law as stated in paragraph 1 above.

4. Asserts that where a cross-undertaking cannot be given because of prohibitive costs, this will mean that the injunction is not given (a breach of Article 9(4) of the Aarhus Convention) and environmental damage is allowed to occur that the main claim is intended to prevent, thereby frustrating the claim and the claimant's right for the claim to be dealt with fairly and equitably as required by Article 9(4) of the Aarhus Convention. The first of these points is also a breach of EU law rights to injunctive relief if a breach of EU law is involved (see paragraphs 8-10 below).

5. Asserts that the conditions proposed in this Consultation to be taken into account by the court in deciding whether to issue an interim injunction without a cross-undertaking for damages in environmental judicial review proceedings are not in compliance with the Aarhus Convention and EU law.

The Aarhus Convention and EU law

8. The Aarhus Compliance Committee states that cross-undertakings are prohibitively expensive and *'lead to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest*[1]*'.* Accordingly, the requirement for cross-undertakings is in breach of the Aarhus Convention.

9. The Compliance Committee highlights the fact '*Judges enjoy a considerable amount of discretion as to whether a cross-undertaking for damages is required for the grant of an*

[1] *ClientEarth v United Kingdom*, see Findings and recommendations of the Aarhus Convention Compliance Committee with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom, para 133. Findings and all documents mentioned in notes below can be found at: http://www.unece.org/env/pp/compliance/Compliance%20Committee/33TableUK.htm, see particularly parts IV and V.

interim injunction'.[2] *Commission v Ireland*[3] holds that Member State's courts' use of wide discretionary powers in relation to costs rules leads to uncertainty, resulting in a breach of EU law (in this case a law implementing public participation rights set out in the Aarhus Convention). Accordingly, the requirement for cross-undertakings is, in addition to the Aarhus Convention, in breach of EU law.

10. Article 9(4) of the Aarhus Convention stipulates that each party shall '*provide adequate and effective remedies, including injunctive relief as appropriate, and be fair and equitable'.* This is clearly frustrated if injunctions are refused because no cross-undertaking in damages is given and the reason no cross-undertaking was given was due to it being prohibitively expensive.

11. In their observations made to the Aarhus Compliance Committee on 28 July 2009, Defra asserted that cross-undertakings in damages are not always required. It will be shown below (in the answer to question 1) that the general position is that a cross-undertaking in damages will almost certainly be required in environmental judicial review where an interim injunction is requested, especially if third party commercial interests are concerned.

Public Interest Nature of Environmental Cases

12. As long as cross-undertakings in damages in environmental judicial review cases are abolished, the Convention and EU law would be complied with and the system would be a fair one.

13. It is important to understand what a public interest case is. The concept of a public interest case is still novel in our legal system. There are three key elements: The case raises an issue of broad concern. Any personal or financial interest the claimant may have in the case is incidental or secondary to the public interest aspect of the claim. And the rights which the claimant asserts are shared equally with a broader public. Environmental cases which fall under the provisions of the Aarhus Convention are necessarily and automatically public interest cases.

14. The paradigm for a public interest case would be for a citizen or environmental group to apply for injunctive relief in relation to the authority's failure to include for example, a bank mudflat, which is an important component of an estuarine ecosystem, in the boundary of a special area for birds (SPA). This case raises an issue of broad public concern, in that the mudflats are important to the local ecosystem and would support the local biodiversity. The claimant does not stand to gain financially from the judgment. However, it is likely that a citizen or environmental group will be refused interim relief if they are not prepared to give a cross-undertaking in damages (because this would have covered an uncertain, but potentially large, commercial loss). In the meantime, a development would go ahead, and even if the citizen or environmental group won the case, the protected area in question is likely to have been destroyed by the development.

15. It is this kind of case that the Convention sought to make possible. The 'public good' will continue to be impeded unless the requirement for cross-undertakings in damages in

[2] Ibid., para 109.
[3] C-427/07, *Commission v Ireland*.

environmental judicial review cases is abolished. Indeed, the authoritative Aarhus Compliance Committee has categorically stated that the requirement for cross-undertakings in damages in environmental judicial review cases in the UK is illegal.

General Comments

16. The Consultation states (at paragraph 5) that the government *'believes that the law in England and Wales relating to judicial review generally meets the requirements of both the Aarhus Convention and the Public Participation Directive'*. This completely fails to acknowledge that in October 2010 the UK was found to be in breach of Articles 3(1), 9(4) and 9(5) of the Aarhus Convention by the Compliance Committee with regard to unfair and prohibitive costs rules and unfair rules on timing, largely due to the amount of discretion available to English courts in decisions on costs, on timing and because of the prohibitively high cost of bringing legal proceedings, as well as the lack of sufficient legal aid.[4]

17. The Consultation (at paragraph 9) states that in relation to a separate Consultation on qualified one way costs shifting (which ClientEarth has also responded to) '*we will consider in the light of that Consultation what further action should be taking in this area'*. In this context we would like to note that the proposal for 'qualified' one way costs shifting fails to comply with both the Aarhus Convention[5] and EU law[6]; and in order to comply, a true, unqualified one way cost shifting system is recommended in relation to public interest environmental cases.

18. The Consultation (at paragraph 30) describes a lack of certainty resulting in a 'chilling effect' that may deter claimants from pursuing a judicial review altogether due to the risk (of a prohibitively high cross-undertaking in damages). We agree with this assertion and in this context it is important to have regard to the fact that costs could potentially be as high as '*several thousand, if not several hundreds of thousands of pounds'*.[7]

[4] Supra n1.
[5] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 28 June 1998.
[6] See C-427/07 *Commission v Ireland*, at paras 54-55 and 92-94. The ECJ held that a Member State courts' use of wide discretionary powers in relation to costs rules leads to uncertainty, resulting in a breach of EU law.
[7] Ensuring access to environmental justice in England and Wales (May 2008), para 73.

Q1: Are you aware of specific examples of environmental judicial review where an interim injunction was requested? Where requested, was this subject to a cross-undertaking in damages? Please give details of any cases and their outcomes.

Key Issues

1. The general position is that a cross-undertaking in damages will almost certainly be required in environmental judicial review where an interim injunction is requested, especially if third party commercial interests are concerned. This is despite the fact that the costs concerned are prohibitively expensive, and combined with judicial discretion at all stages in respect of cross-undertakings, the UK is in breach of the Aarhus Convention and EU law (see paragraphs 8-10).
2. In exceptional cases (the claimant is so poor that the cross-undertaking is worthless), the courts do not require a cross-undertaking in damages. However, even then this is subject to judicial discretion and only applies if third party commercial interests are not at stake.
3. NGOs, who are intended by the Aarhus Convention to be important originators of environmental public interest cases, will rarely (if ever) qualify under the exception above, despite the realities of restricted funding. In effect therefore, the default general position applies.
4. In relation to EU law cases, requirements for cross-undertakings may not be required and this shows that it would be very easy to apply a rule under which cross-undertakings in damages are never required in relation to injunctions applied for in environmental judicial review cases.

General Position

19. The overall position, in relation to environmental judicial review, is that a requirement for a cross-undertaking in damages is a matter of discretion for the judge and, unless there are exceptional circumstances, the judge will almost always require the cross-undertaking to be provided.[8] If a third party is adversely affected, the court will treat the application as an application for an interim injunction against that party.[9]

20. In the *Sellafield litigation*[10], Greenpeace applied for injunctive relief in relation to a preliminary variation that allowed British Nuclear Fuels Plc (BNFL) to reprocess spent nuclear fuel. The application for interim relief was rejected by the Court of Appeal on the grounds that, *inter alia*, Greenpeace had failed to give a cross-undertaking in damages to compensate BNFL for any financial loss it might suffer. It should be noted that, as a result of a potential stay in proceedings, BNFL stood to lose an estimated £250,000 a day.[11] This was an amount that Greenpeace could not cover in a cross-undertaking in damages. The injunction was

[8] *R v Inspectorate of pollution and ex parte Greenpeace* [1994] 1 WLR 570, Scott LJ at 577.
[9] Ibid., Glidewell LJ at 573.
[10] Ibid.
[11] Ibid., at 574.

rejected, simply because Greenpeace could not afford the potential costs if they lost. Article 9(4) of the Aarhus Convention requires that injunctive relief be available.

21. In *R v Secretary of State for the Environment ex p Rose Theatre Trust Company*[12], Schiemann J held the court should be wary of granting an injunction without a cross-undertaking in damages.[13]

22. In the *Lappel Bank* case[14], the Royal Society for the Protection of Birds (RSPB) applied for injunctive relief in relation to the exclusion of Lappel Bank from a Special Area for Birds under the Wild Birds Directive. However, they were refused interim relief because the RSPB was not prepared to give a cross-undertaking in damages (because this would have covered an uncertain, but potentially large, commercial loss). The development went ahead, and by the time RSPB won the case where the Court of Justice ruled that the site should have received protective designation, the protected area in question had been destroyed and turned into a car park.

23. In this context, it should be noted that since the Court of Justice judgement in *Köbler*[15], the concept of state liability was extended to breaches of Community Law stemming from the acts of national courts adjudicating at last instance. Since this case, if for example, the Supreme Court (SC) is queried (as was the case in *Lappel Bank*) on whether a requirement for a cross-undertaking in the granting of injunctive relief in environmental judicial review cases conflicts with principles of EU law (i.e., right to an effective remedy in interim relief[16]), the SC would have a strong incentive to request a preliminary reference, as if they omit to do so, individuals and NGOs could in principle ask for reparation from the Member State.[17] Moreover, the fact that the potential costs of cross-undertakings in damages lead to injunctions being refused is clearly also a breach of Article 9(4) as regards the availability of injunctive relief, as well as in relation to prohibitive costs and the use of discretion as set out in paragraphs 8-10 above.

Exceptional Circumstances

24. The approach in *Lappel Bank* was followed in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment*[18] in which an environmental group sought to stay the construction of a dam in the absence of an adequate environmental impact assessment. The Privy Council refused the application for an interim injunction and stated that '*it does not appear to their Lordships to be a strong case on which to seek, without an undertaking in damages, an injunction which would halt a major construction*

[12] *R v Secretary of State for the Environment ex p Rose Theatre Trust Company (No 1)* [1990] COD 47.
[13] As cited in Gregory Jones, Remedies in judicial review proceedings for breaches of EU law, July 2010.
[14] *R. v Secretary of State for the Environment Ex p. Royal Society for the Protection of Birds* (RSPB) [1997] Env LR 431.
[15] C-224/01 *Gerhard Köbler v Republik Österreich.*
[16] C-213/89 *Factortame and Others* [1990] ECR I-2433.
[17] See Paul Wenneras, State liability for decisions of courts of last instance in environmental cases, J Env L 2004, 16(3), 329-340.
[18] *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* (1 W.L.R. 2839 (2004).

project for four months'. Wm Morrison Supermarkets plc v Competition Commission[19] confirms the approach taken in *Belize*.

25. Pertinently, the Privy Council, in its discussion of the law in the *Belize* case drew the distinction between a straightforward dispute between an authority and citizen on the one hand, and on the other hand cases where the commercial interests of a third party were engaged. For the latter, Lord Jauncey (at paragraph 440[20]) stated *'a cross-undertaking in damages (including to an affected third party) will ordinarily be required: even in a public law case with environmental implications, if the commercial interests of a third party are engaged'.* In respect of the former, in *Allen v Jambo Holdings*[21], Lord Denning said (at 1257) *'I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it'*. This means that many individuals of limited means are in effect, exempted from the need to give a cross-undertaking in damages (because it is of no real value), whereas for the very typical environmental judicial review cases often involving third party commercial interests in respect of land disputes, there is a requirement for a cross-undertaking in damages (even though it is usually prohibitively expensive).

26. In *Servite Houses*[22], concerning an issue of general public importance (the scope of judicial review where a public law function has been contracted out to a private law body), is another example where the courts do not require a cross-undertaking in damages if the undertaking is worthless. Arden LJ states (at paragraph 37) '*there is no point, as it seems to me, in requiring a cross-undertaking which would be worthless'*. In the instant case the claimants were elderly and did not have capacity to give a cross-undertaking in damages.

27. In this context, it should be noted that NGOs are not regarded by the courts as poor claimants. However, the reality is that charities' funding consists of restricted/endowment funds and unrestricted funds. Usually a large part of a charity's funding is restricted to certain programme areas. No charity is legally permitted to divert restricted and endowment funds to cover litigation costs or to build up reserves for litigation out of them. Any litigation costs must therefore come out of unrestricted funds/limited cash reserves or special fighting funds which are built up specifically for the purpose of litigation and which rely on public donations. Unrestricted funds are also governed by strict accounting rules and policies, and are generally needed to fund other programme areas, as well as staff salaries, so paying huge sums for court costs will result in charities' programme cuts, the downgrading of other conservation priorities and ultimately job losses. Moreover, charity law in general requires any income to be spent within a reasonable period of receipt and trustees should be able to

[19] *Wm Morrison Supermarkets plc v Competition Commission* [2009] CAT 33, para 13.
[20] *R. v Secretary of State for the Environment Ex p. Royal Society for the Protection of Birds* (RSPB) [1997] Env LR 431.
[21] *Allen v Jambo Holdings Ltd and others* [1980] 1 WLR 1252.
[22] *R v Servite Houses and Wandsworth LBC ex p. Goldsmith* (2000) 3 CCLR 354; also see *Oxy Electric Ltd v Zainuddin* [1991] 1 W.L.R. 115 where the court held that impecuniosity should not be a bar to participation in legal proceedings, which distinguished *Blue Town Investments Ltd v Higgs and Hill plc* [1990] 2 All ER 897, which held that the court would strike out a claim unless the claimant applied for an interim injunction accompanied by undertaking as to damages.

justify the holding of income as reserves, again making litigation reserves virtually impossible.[23]

EU law exceptions

28. There have been cases connected to EU law issues whereby the applicant has been granted an interim injunction without a requirement for a cross-undertaking in damages.[24]

29. For example, in *R v. Durham CC, ex p Huddleston*[25], the Claimant was unable to give a cross-undertaking in damages, yet the court granted an interim injunction. It is suggested that this is evidence of the court's willingness to grant interim injunctions where a person is seeking to enforce EU law (in the instant case it raised a wider issue of public interest involving EU law).[26] More recently, in *Morge v Hampshire CC*[27] concerning EU Law (the Habitats Directive), a local resident relied upon *Huddleston* and was able to obtain an interim injunction without giving a cross-undertaking in damages (at paragraph 22), prohibiting Hampshire County Council from carrying out works to implement planning permission granted to itself to construct part of a guided bus-way system.

30. Clearly there is a precedent in English jurisprudence that allows for the exemption of EU law cases from the general rule under the exception that means that injunctions are granted even without cross-undertakings in damages. Indeed, this is not surprising, as we have already seen, that the denial of an injunction in such circumstances is in breach of EU law. It is crucial that these precedents should be generalised and followed in all environmental judicial review cases to comply not just with EU law, but also with the Aarhus Convention, especially as other than the limited number of cases referred to here, there have been no other examples of interim injunctions being granted without a requirement for a cross-undertaking in damages on an EU law or any other basis.[28]

31. Current English law requires cross-undertakings in damages. This makes claimants subject to prohibitively high costs (in breach of Article 9(4) of the Aarhus Convention) and subject to judicial discretion, which also breaches EU law[29](see paragraphs 8-10 above). The refusal by courts to allow injunctions when cross-undertakings are not given, means that the requirements of the Aarhus Convention and of EU law are being breached. The fact that exceptions are made in relation to individuals too poor to pay (the cross-undertaking would have no real value) as long as no commercial interests of a third party are engaged and particularly the fact that in relation to EU law cases requirements for cross-undertakings may not be required (as shown above, this would be in breach of EU law and of EU law), shows that it would be easy to apply a rule under which cross-undertakings in damages are never required for injunctions applied for in environmental judicial review cases. The following

[23] See Charity Commission Guidance CC19 on charities and reserves.
[24] See *R v. Secretary of State for the Environment, ex p Rose Theatre Trust Company* (1990) COD 47; and *R v. Durham CC, ex p Huddleston* [2000] Env LR D21.
[25] *R v. Durham CC, ex p Huddleston* [2000] Env LR D21.
[26] Gregory Jones, Remedies in judicial review proceedings for breaches of EU law, July 2010, p26.
[27] *R (on the application of Morge) v Hampshire CC* [2009] EWHC 2940 (Admin).
[28] Gregory Jones, Remedies in judicial review proceedings for breaches of EU law, July 2010, p26.
[29] See C-427/07, *Commission v Ireland*, at paras 54-55 and 92-94.

quote aptly summarises the current position*: 'it can be argued...that if the courts grant final relief, it may be too little; if they refuse interim relief, it may be too late.'*[30]

Q2: Are you aware of specific examples of environmental judicial reviews where a claimant has been deterred from applying for either an interim injunction or a judicial review due to the potential to give a cross-undertaking in damages? Please give details of any examples and their outcomes.

Key Issues

1. There is a 'chilling effect' that deters claimants from pursuing an environmental judicial review altogether due the risk of a prohibitively high cross-undertaking in damages. As a result, there have been very few reported cases.

32. Other than the cases provided in answer to question 1, we are unable to add any further examples due to a lack of reporting. Indeed, it has been recognised that there is a general lack of reporting in respect of examples of interim injunctions being granted with or without a requirement for a cross-undertaking in damages.[31]

33. However, the arguments made in the paragraphs above show the general rule applies, particularly to NGOs. The UK approach to the granting of cross-undertakings in environmental judicial review is such (i.e., prohibitively expensive) that cases are rarely pursued. In this context we would note that if the RSPB, with an annual resource of £78.6m[32] (2007), was unable to afford to give an undertaking in damages in the *Lappel Bank* case, this would suggest that the reality is no other NGOs would be able to do so (also see paragraph 27 on financial accounting for NGOs). Where cross-undertakings have been required they have clearly been so prohibitively expensive that they would put off any reasonable claimant from even trying to apply for an injunction, which is satellite litigation and therefore also an additional expense. This is the same chilling effect caused by the 'loser pays' costs rule in relation to cases in general. The absence of cases is therefore not surprising, as no ordinary member of the public nor NGO would consider bringing such cases.

[30] Michael J Beloff QC, How green is judicial review?, ELM 16 [2004] 4.
[31] Gregory Jones, Remedies in judicial review proceedings for breaches of EU law, July 2010, p27.
[32] See 'facts about the RSPB' http://www.rspb.org.uk/about/

Q3: Do you agree that the factors to be taken into account by the courts in deciding whether to issue an interim injunction in environmental judicial review proceedings without a cross-undertaking in damages should be clarified? Please give reasons for your answer.

Key Issues

1. The proposal to clarify the conditions to be taken into account by the court in deciding whether to issue an interim injunction without a cross-undertaking for damages is insufficient and in breach of the Aarhus Convention and EU law.
2. To ensure compliance, there should not be a requirement for a cross-undertaking in damages in environmental judicial review, in any event, but particularly once it has been decided that an interim injunction is required to prevent an adverse environmental impact/environmental damage.
3. Other EU Member States are not in breach of the Aarhus Convention as they do not require a cross-undertaking in damages in environmental judicial review.

34. The costs of obtaining interim relief in environmental judicial review are prohibitively high and, combined with judicial discretion (and thus uncertainty) mean that currently, the UK is not complying with article 9(4) of the Aarhus Convention and EU law[33] in this context (see paragraphs 8-10 above). Accordingly, ClientEarth's position is that the proposal to clarify the conditions to be taken into account by the court in deciding whether to issue an interim injunction without a cross-undertaking for damages is insufficient and, in order to comply with article 9(4) and EU law, there should be no requirement for cross-undertakings in damages in environmental judicial review. Where the court accepts a (voluntary) undertaking from the defendant to refrain from action, the same would apply and there should be no requirement for a cross-undertaking in damages from the claimant.

Additional reasoning and explanations

35. Regarding costs, the Aarhus Compliance Committee states that cross-undertakings are prohibitively expensive and *'lead to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest[34]'.* Moreover, the Sullivan Report[35] (at paragraph 73) states that costs could potentially be as high as '*several thousand, if not several hundreds of thousands of pounds'*.

36. Judges have a wide discretion at all stages in respect of cross-undertakings in damages. The Consultation (at paragraph 28) highlights the court's discretion '*where an interim injunction is not subsequently upheld, the court has a wide discretion as to whether or not to enforce a cross-undertaking'* and the Compliance Committee highlights the fact '*Judges enjoy a considerable amount of discretion as to whether a cross-undertaking for damages is required*

[33] See C-427/07, *Commission v Ireland*, at paras 54-55 and 92-94.
[34] Supra n1, at para 133.
[35] Ensuring access to environmental justice in England and Wales (May 2008).

for the grant of an interim injunction'.[36] *Commission v Ireland*[37] holds that Member State's courts' use of wide discretionary powers in relation to costs rules leads to uncertainty, resulting in a breach of EU law (in this case a law implementing public participation rights set out in the Aarhus Convention).

37. The *Lappel Bank* case (discussed above)[38], highlights the fact that a cross-undertaking in damages is prohibitively expensive. Moreover, in the instant case, by the time the court heard the substantive merits of the case, irreparable damage had been caused, rendering it a moot point with little practical impact. Paragraph 29 of the Consultation describes exactly this event. Until situations such as the *Lappel Bank* case are avoided in its entirety, the UK will continue to breach the principle of effective remedies under the Aarhus Convention, article 9(4).

38. The England and Wales legal system is isolated in its imposition of cross-undertakings. In other EU Member States, there is no requirement for cross-undertaking in damages.[39] The only other EU Member State identified by the Milieu Study[40] with a similar approach to the UK was Spain. The Milieu Study produced a comprehensive overview of the different measures adopted or in place in the 25 Member States to implement Article 9 of the Aarhus Convention. The study highlights the fact that virtually all other EU Member States do not breach article 9(4) of the Aarhus Convention by requiring a cross-undertakings in damages in environmental judicial review. In this context, it should also be noted that in the US there is no requirement for cross-undertakings in damages.[41]

Q4: If you agree that the factors should be clarified, should they be set out in either the Civil Procedure Rules or a Practice Direction issued by the Master of the Rolls? Please give reasons.

39. The authoritative Aarhus Compliance Committee has categorically stated that the requirement for a cross-undertaking in damages in environmental judicial review cases in the UK is illegal (see paragraphs 8-9).

40. Neither clarification nor any tinkering of the factors to be taken into account by the court in deciding whether to issue an interim injunction without a cross-undertaking for damages in environmental judicial review proceedings will ensure compliance with the Aarhus Convention and EU law.

41. Accordingly, ClientEarth will not entertain any such modifications as they will continue to be in breach of the Aarhus Convention and EU law. It is therefore recommended that cross-undertakings in damages need to be abolished in environmental judicial review cases. This will ensure compliance with the Aarhus Convention and EU law.

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[36] Supra n1, at para 109.
[37] C-427/07, *Commission v Ireland*.
[38] *R. v Secretary of State for the Environment Ex p. Royal Society for the Protection of Birds* (RSPB) [1997] Env LR 431.
[39] Summary Report of Milieu Study, p15 under' *other costs*'.
[40] Inventory of EU Member States' measures on access to justice in environmental matters, available at http://ec.europa.eu/environment/aarhus/study_access.htm.
[41] Review of Civil Litigation Costs: preliminary report, volume 2, May 2009 p604.

Q5: Are these the right factors? If not how should they be amended and why?

42. Please see answer to question 4 above.

Q6: Do you consider that providing greater clarity and transparency increase downstream risks? If so, please set out what these are.

43. We welcome the recommendations made in paragraphs 40-42 of the Consultation in that the court should deal with cases quickly in order to mitigate disadvantage caused by an interim injunction granted with or without a cross-undertaking in damages.

Q7: If you consider that greater transparency will lead to additional problems, are there steps that could be taken by which these risks might be mitigated? If so, please set out what these are.

44. We do not believe greater transparency will lead to any significant additional problems.

Yours sincerely

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