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Justice for the Planet

Mr Jeremy Wates
Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
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Switzerland

29 January 2010

Dear Mr Wates

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with the scope of judicial review, costs, timing and other issues related to access to justice (Ref. ACCC/C/2008/33)

We are writing to you with regard to the following points:

- Lord Justice Jackson's final *Review of Civil Litigation Costs in England & Wales*[1] (the Jackson Review) was published on 14 January 2010. We had discussed a preliminary report dated May 2009 in earlier correspondence[2]. We would like to take this opportunity to update the Compliance Committee on Lord Justice Jackson's final recommendations (in so far as they are relevant to our second, costs-related, claim against the United Kingdom in case ACCC/C/2008/33). A summary of the most important issues raised by the Jackson Review follows in the next few paragraphs and a more detailed examination of certain issues, particularly in relation to financial assessment and the meaning or 'reasonable' costs, as well as in relation to uncertainty and discretion, is contained in Appendix I to this letter.

- On 28 January 2010, the European Court of Justice (ECJ) published its ruling in relation to the *Uniplex* case[3] on timing for claims to review decisions of public authorities. This

[1] http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf.
[2] See Appendix IV to letter of 9 June 2009 by ClientEarth to the Compliance Committee).
[3] Case C-406/08, *Uniplex (UK) Ltd v NHS Business Services Authority,* judgment dated 28 January 2010; http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=406%2F08&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submit.

case is directly relevant to the fourth claim in our original Communication in relation to timing rules in judicial review cases in England & Wales, and clearly and unequivocally confirms the arguments we have made. We attach a discussion of the ECJ judgment in Appendix II to this letter.

Introduction

As already mentioned in previous correspondence, the Jackson Review examines costs issues in connection with the entire system of civil litigation in England & Wales. Unlike the Sullivan Report for example, it is does not set out to deal with the costs in environmental public interest cases in particular. In fact, in his final recommendations, Lord Justice Jackson emphasises that costs in environmental judicial review cases should be treated the same as in other judicial review cases (and indeed in personal injury and clinical negligence cases). Other types of environmental claims, for example public or private nuisance cases in relation to environmental issues are also treated the same as general nuisance cases. As a consequence, the Jackson Review does not make separate recommendations in relation to environmental cases in spite of their special characteristics.

In addition, it should be noted that the Jackson Review is, as its name suggests, merely a review, albeit by a very senior English judge (as was the Sullivan Report). The recommendations made in the Jackson Review are not binding. There is no obligation on the Government to implement them.

On the other hand, any recommendations that the Aarhus Convention Compliance Committee may make in relation to any changes that may be necessary to the costs rules of England & Wales in relation to environmental cases, should have a direct impact on English law costs rules if the UK is to comply with its international law obligations.

Summary

The Jackson Review makes two main recommendations which affect environmental public interest cases:

1. **In relation to judicial review in general** (including environmental/public interest judicial review cases), it discusses a one way costs shifting rule (i.e. a rule that the defendant should pay the claimant's costs if the claimant wins, but if the claimant loses, the claimant need not pay the defendant's costs). The Jackson Review confirms that one way costs shifting would be the simplest way for the UK to comply with the Aarhus Convention. However, the proposed rule is a 'qualified' one in that

'*unreasonable (or otherwise unjustified) party behaviour may lead to a different costs order, and the financial resources available to the parties may justify there being two way costs shifting in particular cases*'.[4]

The actual rule proposed makes costs orders dependent on an interpretation of what is 'reasonable' having regard to the claimant's financial circumstances, and is therefore dependent on the assessment of a claimants' resources. The Jackson Review claims that this rule will afford legally aided and similar parties (who are of 'modest means'[5]) costs protection, but will force 'conspicuously wealthy'[6] parties to pay costs. However, other than referring to the current judicial practice giving costs protection to legally aided clients under the same costs rule, Lord Justice Jackson gives no indication of what 'reasonable' may mean in this context, or at what level costs should be capped by reference to the resources of persons of modest means.[7] Moreover, the wording of the proposed rule and the interpretation of what constitutes 'reasonable' costs in the courts does not support the claim that there will be effective costs protection either (see discussion of the *Rugby Cement*[8] case in Appendix I to this letter, which examines precisely this question, down to the basic rule on which Lord Justice Jackson's proposal is modelled).

In any case, regardless of:

- the exact conditions under which the proposed 'qualified' one way costs shifting rule would protect potential claimants from costs exposure;
- the circumstances in which a costs order would continue to be made; and
- the interpretation of what costs would be 'reasonable';

the Jackson Review does not:

- **provide certainty** as to the amount of costs potential claimants in environmental public interest judicial would need to pay if they lost; or
- **remove discretion** in judges' costs awards (there are simply other considerations for judges to take account of).

This means that, whatever the ultimate judicial interpretation and judicial practice in relation to the proposed rule on 'qualified' one way costs shifting may be, if Lord Justice Jackson's proposed wording is introduced into English law, then **the UK will continue to be in breach of Article 9(4) of the Aarhus Convention**, due to the uncertainty created by the rule for claimants and the

[4] See Jackson Review, at para. 2.6, p. xvii, Executive Summary.
[5] Ibid., at paras. 4.4 and 4.8, Chapter 30, pp. 311 and 312, for example.
[6] Ibid., at para. 4.8, Chapter 19, p. 190, for example.
[7] Indeed, he opposes costs capping (or what he calls a 'default position'), but suggests that if his view on this was rejected, and there was to be a default position, then the default position should consists of a practice direction (not a rule) imposing a **minimum** floor of £3,000 /£5,000 for the different parts of judicial review proceedings. See paras. 4.7 - 4.9, Chapter 30, p. 312.
[8] *R v The Environment Agency et al ex parte [David Edwards]Lilian Pallikaropoulos* (the *Rugby Cement* case), in the Supreme Court of the United Kingdom, hearing date 4 December 2009, judgment dated 15 January 2010.

continuing dependence of claimants on judicial discretion (as regards the definition of 'reasonableness') – see also *Commission v Ireland*[9] (see also below).

The issues at the heart of Lord Justice Jackson's recommendations on 'qualified' one way costs shifting in relation to environmental judicial review actions are discussed in more detail in Appendix I to this letter.

2. **In relation to nuisance cases**, the Jackson Review does not even advocate qualified one way costs shifting, although it is mentioned as a possibility. Instead it suggests that more householders should to take out before-the-event legal insurance (BTE insurance), with a higher level of cover (Lord Justice Jackson suggests £100,000 as sufficient). In the event of a potential claimant not having BTE insurance, he suggests the use of success fees to be paid out of increased damage awards (he suggests a 10% increase).

   However, irrespective of any increase:

   - in insurance cover, or
   - in damages awarded to potential claimants;

   neither insurance nor the actually very limited damages, if any (see below), available in nuisance claims **would**:

   - **make** the English costs system in relation to environmental claims **fairer**;
   - or **reduce the prohibitive cost or the uncertainty** in relation to the amount of potential adverse costs orders that can be expected.

   If the Jackson Review's alternative suggestion of qualified one way costs shifting was applied to nuisance cases too, the same comments would apply as already made in 1) above.

   Therefore, none of the Jackson Review's recommendations are capable of achieving UK compliance with Article 9(4) of Aarhus Convention in relation to environmental nuisance cases.

   In this context, it should be noted that:

   - The usual remedy in nuisance cases is an injunction and not damages. If damages are awarded they are usually relatively low (up to £2,000 per annum)[10];

[9] See CaseC-427/07 *Commission v Ireland*, at paras 54-55 and 92-94. See also the Jackson Review itself, at para 1.5, Chapter 30, p. 303, and discussion in previous correspondence, see paras 39 – 45 of letter of 9 June 2009 by ClientEarth to the Committee, and paras 12, 19, 32 and 35 of letter of 9 September 2009.

[10] See evidence from a firm of solicitors cited in Jackson Review at para. 3.24, Chapter 10, p. 106.

- BTE insurance is not compulsory in the UK.
- Even if BTE insurance was compulsory, the Compliance Committee has itself already heard that £100,000 cover would be insufficient: In the hearing on 1 July 2009 in relation to Case ACCC/C/2008/23, the Communicant's lawyer explained how in the particular nuisance case before the Compliance Committee, £100,000 insurance cover taken out by the Communicant had not been sufficient to cover all the costs of the case.

In our opinion, whether or not a claimant has taken out insurance cannot and does not determine whether costs are prohibitive or not. The fact that insurance may be available to cover (some of the potential) costs does not make prohibitive costs less prohibitive. In addition, putting on householders the certain (financial) burden of protecting themselves against uncertain potential adverse costs orders in relation to unknown potential future nuisance claims, which are actually in the public interest, is clearly unfair.

Clearly, therefore, this recommendation would not help the UK to comply with Article 9(4) of the Aarhus Convention either.

Conclusion

We would like to stress that we fully support true one way costs shifting in relation to environmental cases, as applied in the US, for example.

However, even though the Jackson Review claims, in relation to both judicial review and nuisance cases, that the recommendations it makes would enable the UK to comply with its obligations under the Aarhus Convention[11], this is not true. Neither 'qualified' one way costs shifting as proposed in the Jackson Review, nor additional insurance and possible increased damages to cover success fees, would address the fundamental failings of the UK system regarding the costs of environmental cases with respect to Article 9(4) of the Aarhus Convention, because the proposed system would continue to:

- depend on the exercise of judicial discretion (and therefore not only be uncertain, but also in breach of EU law, see for example *Commission v Ireland*)[12];
- impose potentially huge, i.e. prohibitive, costs which would be unquantifiable at the outset: these costs would create a strong deterrent for parties wishing to bring public interest environmental cases to the courts.

[11] See Jackson Review, para. 4.1(i), Chapter 30, p. 310 and para. 4.1, Chapter 31, p. 318, and para. 4.1, Chapter 31, p. 318.
[12] See footnote 9 above.

Some additional points

Some secondary points are worth making:

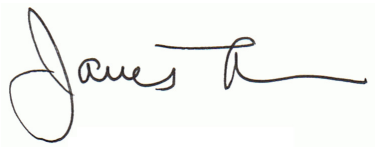
- The status of NGOs under the proposed 'qualified' one way costs shifting rule is not clear. The recommended new rule is based heavily on legal aid rules, which only apply to individuals. In addition the Jackson Review states that one way costs shifting should not apply to '*commercial and similar*' claimants[13], which could include NGOs as they are generally corporate entities.

- It would seem that the English courts are now accepting that they are obliged to comply with the principles of the Aarhus Convention (although still only in relation to EU Directives that implement provisions of the Aarhus Convention – *Morgan* and *Rugby Cement* cases). Moreover, Lord Justice Jackson acknowledges implicitly in the Jackson Review that the UK is currently not complying with the Aarhus Convention.

- We would like to emphasise that English courts and the UK Government have, in our opinion, always viewed, and will, in our opinion, continue to view, very high costs awards as reasonable, possibly because they feel the need to deter potential claimants from bringing unmeritorious claims, or possibly because they have a distorted view of what is an affordable and what is a prohibitive cost for 'normal' citizens. In our opinion, this means that they will continue to fail to understand why English costs rules do not comply with Article 9(4) of the Aarhus Convention. Only rulings/recommendations by international courts or committees, such as the Compliance Committee itself or the European Court of Justice are likely to change this.

We hope that these comments are helpful and would be happy to answer any questions the Compliance Committee may have in this regard.

Yours sincerely



James Thornton
Chief Executive Officer/General Counsel

[13] See Jackson Review, para 4.8, p.312, Chapter 5.

Appendix I

The following paragraphs set out some of the positive and negative aspects of the Jackson Review in more detail, particularly in relation to discretion/uncertainty and in relation to financial assessment and the concept of what are 'reasonable' costs.

The positive aspects of the Jackson Review

The Jackson Review

- implicitly accepts that the UK is in breach of the Aarhus Convention[14] by saying that the ('qualified') one-way costs shifting is the '*simplest and most obvious way* ***to comply with the UK's obligations under the Aarhus Convention*** *in respect of environmental judicial review cases'* (emphasis added), thereby implicitly accepting that the UK is not currently in complying with the Convention.
- recognises that protective costs orders are not effective to protect claimants against excessive costs liability;[15]
- favours one-way costs shifting as a general approach to ensuring compliance with the Aarhus Convention (but see negative aspects in relation to financial conditions and uncertainty set out below);[16]
- recognises that the permission requirement in judicial review cases is '*an effective filter to weed out unmeritorious claims. Therefore two way costs shifting is not generally necessary to deter frivolous claims';*[17]
- recognises that '*it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risk involved*';[18]
- acknowledges that '*[o]ne way costs shifting in judicial review cases has proved satisfactory in Canada*';[19]
- recognises that '*the costs rules are such as to generate satellite litigation*';[20]
- recognises that '*the costs shifting rule* [loser pays rule] *creates perverse incentives*;[21]
- recognises that the '*current level of court fees is too high and the current policy of full cost pricing is wrong*'.[22]

[14] See Jackson Review, para 5.8, p. xxi and para 4.1 (i), Chapter 30, p. 310.
[15] Ibid. see para 4.1(vi), Chapter 30, p. 311.
[16] Ibid. see first bullet and para 4.1 (v), and introduction to para 4.1, Chapter 30 on pp. 310 and 311.
[17] Ibid. see para 5.8, p. xxi and para 4.1(iii), Chapter 30, p. 310.
[18] Ibid. see para 4.1(iv), Chapter 30, p. 310.
[19] Ibid. see para 4.1(v), Chapter 30, p. 311.
[20] Ibid. see para 3.1(iii), Chapter 4, p. 43.
[21] Ibid. see para 3.1(viii), Chapter 4, p. 43.
[22] Ibid. see para 3.1(xv), Chapter 4, p. 43.

The negative aspects of the Jackson Review

The proposed new costs shifting rule

The Jackson Review proposes the following rule:

'*Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:*

(a) the financial resources of all the parties to the proceedings, and

(b) their conduct in connection with the dispute to which the proceedings relate.'[23]

This wording is identical to that of section 11(1) Access to Justice Act 1999 relating to legally aided claimants (wording set out in the case excerpt below), except that it is limited to personal injuries, clinical negligence or judicial review claims, whereas section 11(1) applies more widely, as long as the claimant is legally aided.

In order to prevent frivolous claims/applications in relation to personal injury cases, the Jackson Review advocates that this 'qualified' rule from the Access to Justice Act 1999 also be applied to non-legally aided personal injury cases, as well as to judicial review cases, as a qualification to 'pure' one way costs shifting[24].

However, the following considerations are relevant in this context:

1. **'Qualified' one way costs shifting would still depend on judicial discretion and would be subject to substantial uncertainty.**

   <u>The underlying legal aid rule in section 11(1) of the Access to Justice Act 1999</u>

   According to the Jackson Review, '*[w]hilst on its face section 11 of the 1999 Act appears to give the court a wide discretion to order costs to be paid, in practice the section operates as something very close to complete immunity from costs liability*'.[25] He also claims that '*the making of a costs order will be the exception, rather than the rule*'[26].

   The implication is that the proposed 'qualified' one way costs shifting rule would change the law's approach by extending one way costs shifting beyond legally aided claimants to others 'of modest means'.

   Yet, the wording proposed by the Jackson Review is the same as that used in section 11(1) of the Access to Justice Act 1999 in relation to legally aided individuals. The use of the phrase '*something very close to complete immunity from costs liability*' in the first sentence cited above, and the fact that section 11(1) is expressed as a rule setting out the circumstances and conditions for ordering costs against a claimant, rather than as a fundamental presumption that claimants be generally excluded from costs liability (in all but a limited number of cases), shows that there is no automatic legal presumption in favour of one way costs shifting.

[23] Ibid. see para 4.5, Chapter 30, p. 311.
[24] Ibid. see paras 4.5 and 4.6, Chapter 19, p. 189.
[25] Ibid. see para 4.4, Chapter 19, p. 189.
[26] Ibid. see para 4.8, Chapter 19, p. 190.

If legal practice shows that there is something close to complete immunity from costs liability in legal aid cases, then this is because courts have interpreted the rules accordingly (exercising their discretion to do so), not because there is a presumption to that effect in the rules.

The Jackson Review also recommends that consequential provisions will be necessary as regards the new costs shifting rule '*of the kind that currently exist to enable section 11(1) of the 1999 Act to be operated*' and that a '*broadly similar degree of protection against adverse costs*' be given[27]. However, naturally the supplemental rules referred to are also all targeted at individual (human) legal aid claimants with no or very limited financial assets. None of them are intended to cover claimants who are not legally aided, and they are therefore not suitable to be applied more generally.

Yet, there is no explanation in the Jackson Review how these rules would be extended to a wider class of claimants who do not qualify for legal aid.

Crucially, under the consequential rules referred to by the Jackson Review in relation to section 11(1), the financial assessment of a claimant's resources underlying a decision as to what would be a 'reasonable' costs order in section 11(1) of the Access to Justice Act 1999 takes into account **all of a claimants assets excluding the first £100,000 of the value of the claimant's interest in their home, and except in exceptional circumstances, the claimant's clothes, furniture and tools of trade**. The rules do not allow a costs order to lead to the sale of a claimant's property, but they do allow a charge on the property to be made in order to satisfy the claimant's costs liability.[28] That is, a court may make a costs order that will force the losing claimant to mortgage her house.

It is very likely that this approach would be applied if the proposed Jackson rule was implemented (which is exactly what happened in the *Rugby Cement* case – see below).

Ultimately this would mean that costs orders would depend on a judicial interpretation of what is to be understood as 'reasonable' costs in particular cases, which is discussed in more detail in the next section below.

NGOs may not qualify at all for one way costs shifting

As already seen, the recommended new rule is based heavily on legal aid rules, which only apply to 'human' individuals. In addition the Jackson Review states that one way costs shifting should not apply to '*commercial and similar'* claimants[29], which could include NGOs as they are generally corporate entities.

Even if NGOs did in principle qualify for one way costs shifting, the financial assessment conditions that would probably be applied (as already discussed, and see also next section below[30]) are aimed at 'human' individuals and are clearly unsuitable for assessing what would be a reasonable costs order in relation to an NGO in an environmental public interest case.

[27] See Jackson Review, para 4.4 and 4.7, Chapter 19, p. 189-190. For example, costs would probably be ordered and assessed at the conclusion of the case meaning that potential claimants would not at the start of the case be able make a judgement on the costs they may face and decide whether they were willing to take the risk of incurring these costs; see also description of relevant procedures in para 4.4, Chapter 19, p. 189 as referring to the Community Legal Service (Cost Protection) Regulations 2000 (as amended), the Community Legal Service (Costs) Regulations 2000, regs 6-13, and section 21-23 of the Practice Direction about Costs.

[28] See reg. 7 of the Community Legal Service (Costs) Regulations 2000 and Section 21.12 of the Practice Direction about Costs.

[29] See Jackson Review, para 4.8, p.312, Chapter 5.

[30] Ibid. see para 4.4 and 4.7, Chapter 19, p. 189-190.

Yet, the Jackson Review does not give any indication that there should be differentiated rules in this regard. Therefore, it is likely that most (even small) NGOs would never actually qualify for one way costs shifting, as their funds would be too great to qualify as poor or of 'moderate means'. This would continue to ignore the financial reality of NGOs completely, for example the fact that a great proportion of an NGO's funds are reserved for certain purposes and cannot be used in any other way. This point was also discussed in relation to existing costs orders in the hearing on case ACCC/C/2008/33 in the Compliance Committee's 25th meeting on 25 September 2009.

An additional issue arises in relation to protective costs orders. As already seen, the Jackson Review seems to indicate that where 'qualified' one way costs shifting does not result in complete costs protection, two way costs shifting would continue to apply.[31] What is not clear is whether that would mean that the rest of the existing costs rules would also continue to apply. The Jackson Review condemns protective costs orders as ineffective, but it does not indicate whether they would still be available to claimants not meeting the financial requirements for one way costs shifting. Although protective costs orders would obviously be unnecessary in a true system of one way costs shifting, in a 'qualified' one way costs shifting system the abolition of protective costs orders would remove potentially valuable protection from public interest claimants.

This could leave individuals and NGOs in a worse position than they are in now.

Conclusion

What is absolutely clear from this discussion is that the proposed rule in the Jackson Review would still involve a high degree of uncertainty and judicial discretion. Uncertainty that exists in relation to the current 'loser pays' rule, combined with the hope for a protective costs order would merely be replaced by the uncertainty of what a court would regard as 'reasonable' costs in an individual case, whether one way costs shifting would be applied at all and, if it was not, what, if any, other costs rules would be applied (e.g. protective costs orders).

In any case, whatever the answer to these questions, the UK would continue to be in breach of the Aarhus Convention.

[31] Ibid. see para 2.6, p xvii.

2. 'Qualified' one way costs shifting would involve a financial assessment of the claimant's assets that would completely depend on an interpretation of the meaning of 'reasonableness', which could, and most probably would, still involve prohibitive costs in many (if not most) cases and would be dependent on judicial discretion.

Background statistics

The Jackson Review explains that the legal aid costs shield was designed '*some sixty years ago so that it only avails claimants of modest means.*'[32] However, also according to the Jackson Review, when legal aid was first introduced, up to 80% of the population was eligible for it (and therefore presumably 'qualified' as 'of modest means') whereas by 2007 the figure was down to 27% (back up to 36% in 2008/09 due to the recession) and the financial eligibility criteria for legal aid are continually being tightened[33] - so much so that according to the Law Society

'*a substantial portion of middle England were financially not eligible for legal aid, yet could not afford to litigate*'[34].

At the same time the Jackson Review mentions that 73% of households have less than £10,000 savings. The same statistical source shows that, in fact, 48% of households have less than £1,500 savings[35]. Yet, legal aid is only available to 27-36% of the population. These figures show how restrictively the English legal regime views persons of 'modest means'.

However, statistics also show that the UK population's main measure of wealth is tied up in their houses, and that in 2006/08, '*[p]roperty-owning households had a median property wealth of £150,000 or less, after mortgage liabilities were taken into account*'[36]. Scotland had the lowest median property wealth with 65% of households owning property in 2006/08 with a median net property wealth or £100,000.[37]

Put together, these figures show that there is a relatively high number of households in the UK with between £100,000 and £150,000 equity in their homes, yet with minimal savings. This is extremely relevant to what courts would regard as 'reasonable' costs, particularly considering the current rules regarding section 11(1) of the Access to Justice Act 1999, on which the proposed 'qualified' one way costs shifting rule is based. Recall that under relevant costs rules, equity of more than £100,000 in a home can be subjected to mortage to pay legal fees. The resulting mortgage may be higher than the person can carry, thus requiring the losing claimant to sell her house to pay legal costs.

The interpretation of 'reasonable'

Particularly in relation to claimants who do not receive legal aid, the crucial deciding factor in relation to any costs order will rest on the interpretation of the word 'reasonable' in the proposed rule**.**

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[32] Ibid. see para 4.4, Chapter 30, p. 311.
[33] Ibid. see para 3.1 and 3.2, chapter 7, p. 68.
[34] Ibid. see para 2.3, Chapter 7, p. 67.
[35] Ibid. see para 1.2, Chapter 19, p. 184 and Social Trends 39, Chapter 5 Table 5.21, available at www.statistics.gov.uk/socialtrends39.
[36] See paras 1, p. xxii, *Wealth in Great Britain – Executive summary: main Results from the Wealth and Assets Survey 2006/08'*, Office for National Statistics. Please note that 'median' wealth means that this was the value of property of half the relevant population, and also that property ownership is higher in some regions than others.
[37] See paras 1 and 2, p. xxii, *Wealth in Great Britain – Executive summary: main Results from the Wealth and Assets Survey 2006/08'*, Office for National Statistics.

The main problem here is that the word 'reasonable' once again gives the court a potentially wide discretion in relation to costs awards.

We have already referred to the huge costs potentially faced by claimants in English courts in our previous correspondence. The mere fact that the courts have made such costs orders implies that they thought it was reasonable to do so. Thus, in the *Buglife* case[38] two protective costs orders were made limiting costs to £20,000. Similarly, in the *Bassetlaw* case, costs of £50,000 were held to be reasonable in relation to an individual claimant.[39] Indeed, in Chapter 30, when considering what should happen if his recommendations are not followed and a 'default position' was preferred, Lord Justice Jackson himself recommends that there should be a floor on claimants' adverse costs liability of '***no less than'*** £3,000 and £5,000 for permission proceedings and for the full case respectively, i.e. suggesting a minimum costs liability rather than an upper costs limit, and yet again favouring a more flexible and uncertain instrument.[40]

The *Rugby Cement* case

The clearest indication of how the courts would probably interpret the Jackson rule comes from the recent costs decision in the *Rugby Cement*[41] case. Here, the claimant, who was an individual (Mrs Pallikaropoulos) took over a public interest judicial review claim at the appeals stage that was first brought by a legally aided claimant. She was asked to provide security of £25,000 to the court in relation to a potential costs claim of £88,100 for a three day appeal hearing. Mrs Pallikaropolous had to take out a loan to raise that security.

The final costs award has not been made yet. The Supreme Court held that the final costs should be determined '*taking into account the Aarhus principles*'[42]. In that context, the court discussed the meaning of 'reasonableness' in relation to costs.

We will re-produce almost the entire passage of the Supreme Court judgment as regards 'reasonableness' here because of its high degree of relevance in relation to the proposed new 'qualified' one way costs shifting rule in the Jackson Review.

The court's examination of 'reasonableness' in relation to costs starts with an examination of section 11(1) Access to Justice Act 1999, which, as we have already explained, is the basis for the proposed new rule in the Jackson Review. The court in the *Rugby Cement* case states:

'14. ...Reasonableness can mean different things in different contexts. We draw an analogy here with what happens when costs are awarded against a party who was legally aided for some but not all of the proceedings covered by the order for costs. Section 11 of the Access to Justice Act 1999 provides that costs ordered against a legally aided party:

> *"... shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including –*
>
> *(a) the financial resources of all the parties to the proceedings, and*
> *(b) their conduct in connection with the dispute to which the proceedings relate..."*

[38] See paragraph 20 of our letter of 09 September 2009 to the Committee.
[39] Ibid. see also *Littlewood* at para 27 in Defra's Annex III.
[40] See Jackson Review, para 4.7 and 4.9, Chapter 30, p. 312. In addition, he says that this should be included in a practice direction, not a rule, because a practice direction can be more easily amended.
[41] See footnote 8 above.
[42] Ibid. at para 27.

15. The Legal Aid Regulations now leave the task of making that assessment to the Costs Officers of the courts in which those costs were awarded. In this court paragraph 4 of Practice Direction 13 requires the Costs Officers to assess the sum reasonable for a legally aided party to pay as part of the detailed assessment proceedings. Since, in most cases, the reasonable sum is nil [for a legal aid claimant]*, the assessments of reasonableness vary substantially between periods when a losing litigant was legally aided and when he was not.*

16. In our judgment the factors we ought to take into account in implementing the EU Directives are not wholly dissimilar from the factors we have to take into account in applying section 11 of the Access to Justice Act when it applies ...

17. We take the view that in deciding what costs it is reasonable for the Respondents to obtain we will disallow any costs which we consider prohibitively expensive...

18. The passages from Morgan ... indicate that the EU Directives here in question have not yet been implemented by Parliament or by the Civil Procedure Rule Committee. In Morgan the Court of Appeal expressed the hope that the current Jackson Review may consider the Aarhus principles and stated that it was not appropriate to give guidance in the context of Morgan. In the absence of authority we are presently minded to adopt the test of "prohibitively expensive" which was propounded in the 2008 Sullivan Report:

"...costs, actual or risked, should be regarded as "prohibitively expensive" if they would reasonably prevent an "ordinary" member of the public (that is "one who is neither very rich nor very poor, and would not be entitled to legal aid") from embarking on the challenge falling within the terms of Aarhus."

19. That seems to us to require us to start by making an objective assessment of what costs are reasonable costs. However, any allowance or disallowance of costs we make must be made in the light of all the circumstances. We presently take the view that we should also have regard to the following:

(i) The financial resources of both parties.

(ii) Their conduct in connection with the appeal.

(iii) The fact that the threat of an adverse costs order did not in fact prohibit the appeal.

(iv) The fact that a request to waive security money was refused and security was in fact provided.

(v)The amount raised and paid for the Appellant's own costs.[43]

This extract is important for a number of reasons:

1. The judgment was handed down on 15 January 2010, one day after the publication of the Jackson Review.

2. The court cites *Morgan*[44] in referring to the Jackson Review as a potential solution, but in fact the court follows the identical approach proposed in the Jackson Review.

[43] See paras 14 - 19, *Rugby Cement* case.

[44] *Morgan v Hinton* [2009] EWCA Civ 107, discussed in detail in paras 5 – 25 in our letter of 9 June 2009 to the Committee.

3. There is a very clear analysis of the term 'reasonable', which starts at exactly the same reference point with regard to reasonable costs as the Jackson Review – with section 11(1) Access to Justice Act.

4. The judgment then goes on to analyse costs in the event that a no costs order is unreasonable (i.e. no legal aid). Given that the Jackson Review does not suggest (and in fact resists[45]) any clear upper limits for the new rule to apply (see also fall-back position of a 'minimum' costs floor referred to above), the only way for a court to assess when costs orders should be made and what 'reasonable' costs are, is to follow precedent, which would presumably mean applying the same approach to determine reasonable costs.

5. Four out of the five considerations ultimately taken into account by the court in *Rugby Cement* either relate to the parties' conduct or their financial resources (thereby meeting the qualifications suggested by the Jackson Review), including considering the fact that the claimant was not in fact put off by the threat of an adverse costs order and that she managed to raise £25,000 security and the money to pay her own costs. The only other point considered was the refusal of a previous court to waive the security payment.

6. This means that it is likely that similar considerations would be relevant in relation to Lord Justice Jackson's proposed 'qualified' one way costs shifting rule.

7. Later in the judgment the court adds that **'[w]*hilst it is difficult to imagine circumstances in which it would be appropriate for us to allow less than £25,000 if the Respondents costs would otherwise reasonably exceed that sum*,** *it is not in theory impossible that we should do so'*[46] .

It should be added that the claimant is applying to have her costs waived, but if that is not accepted she is asking for a costs cap of 70% of the Respondent's costs (i.e. more or less £60,000) and that she be allowed to pay any costs beyond the £25,000 security by yearly £5,000 instalments.

Conclusion

In our opinion, in the absence of any guidance from Lord Justice Jackson explaining how the practice under section 11(1) of the Access to Justice Act 1999 would or should be changed to encompass non-legally aided claimants, the Supreme Court's approach in the *Rugby Cement* case may reflect the judicial approach that would be taken in such cases, particularly because the court in this case actually followed exactly the approach proposed by Lord Justice Jackson.

However, from a common sense 'ordinary' member of the public's point of view, the potential costs being discussed in the *Rugby Cement* case are clearly prohibitive and unreasonable. Any 'ordinary' member of the public would not risk their own financial assets in the public interest to this degree. Moreover, the claimant's level of exposure to adverse costs would still be wholly uncertain (see also point 1 above).

[45] See Jackson Review, paras 4.7 and 4.9, Chapter 30, p. 312.
[46] See *Rugby Cement* case, at para 25.

3. Failure to distinguish between environmental judicial review and other judicial review and even personal injuries cases

The failure of the Jackson Review's recommendations to ensure compliance with the requirements of the Aarhus Convention could be due to the unwillingness of the courts to distinguish environmental public interest cases from different forms of judicial review and tort claims.

Thus, the Jackson Review endorses the view that '*it is undesirable to have different costs rules for (a) environmental judicial review and (b) other judicial review cases*'.[47] Moreover, the rule actually proposed not only treats all judicial review claims equally, it also treats them the same as personal injury and clinical negligence cases. This equates cases brought in the public interest to protect the environment with cases which involve a personal (financial) interest to a claimant. Even if it were justified to impose a degree of costs risk on claimants with a personal financial interest, there is no such justification for environmental public interest cases, where there is no such financial interest, and where such an approach would be entirely counterproductive, most likely resulting in important environmental public interest cases not being brought.

Moreover, any perceived need to deter unmeritorious claims does not apply in the same way to judicial review cases, as it may do in personal injury cases, as the permission stage of a judicial review case serves to prevent just such cases from being brought (as recognised in the Jackson Review – see positive aspects list above[48]).

<u>Conclusion</u>

There is no good reason for insisting that all these cases should be treated the same. Different costs rules already apply in legal aid and family proceedings for example, and in relation to other aspects of judicial review, for example, human rights legislation is treated as a special case and is subject to less strict rules[49].

Therefore, it would be entirely possible for English law to make a special case for unqualified, true one way costs shifting in environmental cases, or otherwise comply with the Aarhus Convention, as discussed in our original Communication.

[47] See Jackson Review, para 4.1(ii), Chapter 30, p. 310.
[48] Ibid. see para 4.1(iii), Chapter 30, p. 310.
[49] See original Communication, paras 28, 40, 78, 88, 90 168-176 and Annex II.

Appendix II

On 28 January 2010, the European Court of Justice (ECJ) published its judgment in the *Uniplex* case[50]. This case relates to English law rules on time limits for reviewing public authority decisions in public procurement actions. The timing rules at issue in this case are identical to the ones discussed in Claim 4 – Rules on Timing in our original Communication[51] and the points discussed are part of the ones argued in Claim 4. Therefore, the ECJ's decision in the *Uniplex* case is directly and crucially relevant to Claim 4 and, in our opinion, hugely helpful in considering and resolving the relevant issues.

Uniplex (UK) Ltd v NHS Business Services Authority

Background

Uniplex is a reference to the ECJ for a preliminary ruling concerning the interpretation of Directive 89/665/EC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. Although it relates to public procurement proceedings, the case is of wider concern because the underlying issues (and the text of the relevant national legislation) are the same as the wider issues in relation to, and the text of, the rules regarding the time limits for judicial review cases under CPR 54, which is at the core of our Claim 4.

The rule being questioned in *Uniplex* is Regulation 47(7)(b) of the Public Contracts Regulations 2006 which states that '*proceedings are to be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period'.*[52]

Thus, the ECJ is asked to decide

i. whether time limits for proceedings to review public authority decisions (in relation to awarding contracts under public procurement rules) start '*to run from the date of the infringement of those rules or from the date on which the claimant knew, or ought to have known, of that infringement';*[53]

ii. how the requirement for promptness is to be interpreted in light of EU law (general principles and Directive 89/665);[54]

iii. how EU law (here Directive 89/665) affects the discretion conferred on national courts to extend periods within which proceedings must be brought.[55]

[50] See footnote 3.
[51] See paras 161 -178, Original Communication.
[52] *Uniplex*, at para 24(a).
[53] Ibid. at paras 24(1) and 25.
[54] Ibid. at paras 24(b), 36 and 37.
[55] Ibid. at paras 24(b), 36 and 44.

The ECJ's ruling

The ECJ ruled that:

i. The '*period for bringing proceedings seeking to have an infringement of the public procurement rules established* [i.e. to review the public authority's decision] *or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement*'[56], rather than from the date when grounds for the bringing of proceedings first arose, as this was necessary to guarantee that there would be **effective procedures** for the review of infringements, which is a requirement of Directive 89/665 (and a general principle of EU law).[57]

The ECJ also commented that before that time there would have been insufficient information to enable the plaintiff to establish whether there had been any illegality in the proceedings or to form an informed view.[58]

Relevance for case ACCC/C/2008/33:

We raised this issue in our original Communication[59]. Clearly, the requirement to guarantee effective procedures for review is not just a requirement of Directive 89/665, but it is a general requirement of Community law - pursuant to the principles of legal certainty, effective legal protection and effectiveness[60]. Therefore, it must apply to all cases where there is any right of review of public authority decisions, including in relation to rights under Article 9(2) and 9(3) of the Aarhus Convention, which is, as discussed in previous correspondence, an integral part of EU law[61].

Therefore, *Uniplex* confirms that the period for bringing judicial review procedures in relation public authority decisions should start to run from the date on which a claimant knows or ought to have known of the cause of action, rather than from the time of the act or decision that the complaint is made against (the latter is the case in English law in relation to judicial review).[62] Current English legal practice is in breach of these principles, and is therefore unfair and in breach of Article 9(4) of the Aarhus Convention, but also of Articles 9(2) and 9(3) which require there to be access to justice in relation to reviewing the acts and decisions of public authorities. That access to justice needs to be effective is implicit in the purpose and objectives of the Aarhus Convention, as witnessed for example by the reference to Principle 10 of the Rio Declaration on Environment and Development in the preamble to the Aarhus Convention itself[63].

[56] Ibid. at para 35.
[57] Ibid. at paras 24, 26, 28 and 32 – 35.
[58] Ibid. at paras 30 and 31.
[59] At para 167ff.
[60] See for example Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, at para 76, Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 33; *Uniplex* at paras 24(a) and 40, and see also para 20 of our letter of 9 June to the Compliance Committee responding to the Committee's questions.
[61] See para. 15 - 25 of our letter of 9 June to the Compliance Committee responding to the Committee's questions.
[62] See *R v Cotswold District Council, ex p. Barrington* (1998) 75 P&CR 515, as referred to in para 167 of our original Communication.
[63] At para 2, and confirmed, for example, in Article 30, Declaration of the Third Ministerial Conference on Environment and Health.

ii. The same requirement that '*decisions of contracting authorities can be subjected to effective review'* (in this case under Article 1(1) of Directive 89/665), allows Member States to

'*require traders to challenge promptly preliminary measures or interim decisions taken in public procurement procedures*[64]*,*

but

'the objective of rapidity ... must be achieved in national law in compliance with the requirements of ***legal certainty****. To that end, Member States have an obligation to establish a system of limitation periods that is* ***sufficiently precise, clear and foreseeable*** *to enable individuals to ascertain their rights and obligations ... [f]urthermore, the objective of rapidity ... does not permit member States to disregard the* ***principle of effectiveness****, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from the Community law, a principle which underlies the objective of effective review proceedings ...'.*[65] (emphasis added)

It goes on to state that:

'*A national provision such as Regulation 47(7)(b) of the 2006 Regulations, under which proceedings must not be brought 'unless ... those proceedings are brought promptly and in any event within three months', gives rise to* ***uncertainty****. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made 'promptly' within the terms of that provision ... a limitation period, the duration of which is placed at the discretion of the competent court, is* ***not predictable*** *in its effects';*[66] (emphasis added)

and that:

'It follows that ... Article 1(1) of Directive 89/665 precludes a national provision ... which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.[67]

<u>Relevance for case ACCC/C/2008/33</u>:

In our original Communication we argue that the requirement of promptness under CPR 54.5 is in breach of Article 9(4) of the Aarhus Convention because it is unfair. [68] The requirement for promptness under Regulation 47(7)(b) of the 2006 Regulations which is discussed in *Uniplex* is the same as in CPR 54.5. The same reasoning applies: It gives rise to uncertainty and unpredictability and is in breach of the principles of certainty and effectiveness.

As already explained above, these are fundamental principles of EU law and therefore also apply to the Aarhus Convention (as an integral part of EU law).

[64] Ibid. at para 38.
[65] Ibid. at paras 39 and 40.
[66] Ibid. at para 41 and 42.
[67] Ibid. at para 43.
[68] See para. 161ff of our original Communication.

Moreover, as already seen, effectiveness is fundamental to and implicit in the objectives of the Aarhus Convention. Certainty and predictability are both fundamental principles of the rule of law, and are implicit in the requirement for clarity, transparency and consistency in Article 3(1) of the Aarhus Convention. Therefore, time limits have to be sufficiently precise, clear and foreseeable, and the requirement for 'promptness' in CPR 54.5 is in breach of EU and international law, including the Aarhus Convention.

iii. '*Directive 89/665 requires that the national court, by virtue of the discretion conferred on it, to extend the limitation period in such manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.*[69]

Relevance for case ACCC/C/2008/33:

This confirms that it is the duty of national courts to ensure effective legal protection for potential claimants in proceedings challenging public authority decisions under EU law. If national laws do not allow this, then national courts must not apply the relevant requirements and must, instead, apply EU law in such a way as to ensure that a claimant's rights are under EU law are protected.

As already mentioned above (and in previous communications – see also above), the Aarhus Convention is an integral part of EU law. Therefore it is the duty of the UK courts to apply rules relating to time limits with regard to environmental judicial review cases so as to ensure that they comply with EU law. In this case, this means that there must be effective access to justice and that rules are certain and predictable. Moreover, the underlying principles are again implicit in the rule of law and in the wider purpose of the Aarhus Convention.

[69] Ibid. at para 50.