Making Court Costs Reasonable in the UK in Environmental Cases

ClientEarth Consultation Response – Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations

February 2011

Introduction

1. The present Consultation is part of a historic process of reforming the costs rules in our legal system. There are many pressures to do so, all of them stemming from the perceived unfairness of the current system.

2. Our comments concern a specific class of cases: environmental cases. For these cases, the forces our legal system must adapt to are different from and more pointed than for any other class of cases. For environmental cases alone, there are external requirements our legal system must meet. These requirements flow both from EU law and the Aarhus Convention. These two sources of law that lie above our own domestic law in the hierarchy of laws require special consideration to be given to costs in environmental cases. Both EU law and the Aarhus Convention single out environmental cases from all other cases. Our England and Wales legal system is bound both by European law and by the Aarhus Convention, a treaty we have signed. These sources of law require low costs in bringing environmental cases as against all other cases. We therefore address our remarks to this class of cases.

3. We will demonstrate that for environmental public interest cases, the changes in costs rules outlined in the Consultation do not go far enough. The required changes are deeper and broader. Both conceptual and behavioural changes are needed. The conceptual changes involve recognising the unique nature of environmental cases in the public interest. The behavioural changes involve limiting English judges' discretion in the making of cost orders. Here a major shift will be required. We discuss it in detail below.

4. We will argue that true one way cost shifting is the most effective way to implement both EU law and the Aarhus Convention for costs in these cases. We will also propose a simple way to ensure that well resourced commercial interests do not benefit from one way cost shifting, to eliminate unfairness.

5. Our cost rules in the England and Wales legal system grew up in the thirteenth century. They cannot capture a new type of cases: public interest cases. In the last fifty years, a new type of litigation has emerged. In public interest cases, a claimant asserts not his own financial interest but a general interest which, if he wins, will be furthered. The two main areas where this litigation appears are in the human rights and environmental fields. Rights in these areas have been recognized and developed particularly in the last half century. Regarding the environment, the general interest in citizens having access to clean air, clean water, and other aspects of a healthy environment has evolved greatly in recent times and continues to do so.

6. It is a great advance in jurisprudence that we have come to recognize rights in environmental matters. Only by empowering citizens to fight for clean air, water and so on, can these interests be protected, because the environment is of course without any ability to speak for itself. If government actors do not fulfil their duties, it is only citizens who can make sure they do so through legal redress. This kind of redress is at the heart of a mature democracy. It was the recognition by many countries of the need to advance citizen's rights to protect environmental interests that the Aarhus Convention grew.

The Purpose of the Aarhus Convention

7. The purpose of the Aarhus Convention was to give citizens (and groups of citizens who form environmental charities, often known as NGOs) procedural rights in environmental matters. Specifically, the three pillars of the Convention give citizens and NGOs rights to: access to information; to participate in decision making; and access to justice, all regarding environmental matters.

8. The Aarhus Convention adjusted the powers between citizens and governments. That is its purpose. Its primary focus is to empower natural persons and non-governmental organisations promoting environmental protection (environmental organisations) to be able to defend the public's right to a healthy environment. So in the first pillar, it grants access by citizens to information generated by the government. It does not allow citizens rights of access to corporations' proprietary information, it is against governments and public authorities that the right lies. Similarly, the right to participate in environmental decision making is a right in respect of governmental processes. Finally the right of access to justice guarantees citizens and NGOs the right to judicial processes that are fair, timely and not prohibitively expensive.

9. By its terms the Aarhus Convention applies also to legal persons more generally, which means that the Convention's rights extend not just to private citizens and environmental organisations, but also to commercial undertakings. However, when setting out the public's rights under the three pillars, and particularly in relation to access to justice, which is the most important one in the context of this Consultation, rights are generally limited to the public 'affected by' or 'having an interest in' environmental decision-making or 'maintaining the impairment of a right'. Environmental organisations are deemed to be affected in this way by the Convention itself; not so commercial organisations.

10. Moreover, where the Convention provides the widest rights of access to justice, in relation to challenging breaches of national environmental laws generally, the Convention provides for this to be subject to criteria laid down by national law. Naturally such criteria have to be within the general objectives and intentions of the Convention and allow the public wide access to justice. In any case, commercial undertakings are very unlikely to take up such cases, which by their very nature will be in pursuit of the 'pure' public interest, rather than any commercial benefits.

Rights given to citizens and NGOs

11. So in all these rights, the Convention adjusts the boundaries of responsibility that governments owe their citizens and NGOs. Although the Convention includes 'legal' persons in the definition of the 'public' in addition to natural persons and NGOs, commercial organisations will only really fall within the Convention's ambit if they have a bona fide environmental interest or their environmental rights are affected (and the criteria for this are subject to national rules).

12. The distinction between giving rights to natural persons and environmental organisations, but not to profit making corporations is an important one when it comes to costs. Costs

come under the third pillar of Aarhus, the access to justice provisions. It is this pillar that comes into play in our response to this Consultation.

13. We brought a case against the UK in the Aarhus Compliance Committee on costs and won a ruling that the UK is presently in violation of its Treaty obligations. The ruling is a significant one, and helps to make clear that environmental cases are a special class of cases when it comes to costs. English law is familiar with special classes of cases, human rights being another such area.

14. With respect to environmental cases, cost rules must comply with the requirements of the Aarhus Convention and related EU law. The Aarhus and EU rules at the core of this (and of this Consultation) provide that costs in environmental cases may not be prohibitively expensive and must be fair and equitable.

15. We argue in this response to the present Consultation that the most certain way of complying with these obligations is to apply true one way cost shifting in environmental cases, not qualified one way cost shifting. The system of true one way cost shifting is simple, fair, and complies with the requirement of higher law.

The Problem of the Well Resourced Claimant

16. We have discussed the need for genuine one way cost shifting in environmental cases with many parties in the last year including English judges and the Ministry of Justice. A problem is raised repeatedly in these meetings: *How would we deal with the well resourced commercial litigant in an environmental case who may be facing an under resourced local authority.*

17. The paradigm of this situation is a supermarket chain in a planning case arguing against a competitor's application for more parking lots for a new development benefitting its competitor. It is perceived as unfair to give such a commercial claimant the benefit of true one way cost shifting. We agree.

ClientEarth's Proposed Rule

18. We propose a simple, bright line test for who may benefit from true one way cost shifting in environmental cases. The rule looks to the nature of the claimant rather than the nature of the claim. First, there must be a presumption that any case brought to protect or enforce the environment or environmental rights, automatically falls within the Aarhus Convention, is therefore automatically in the public interest, and is therefore subject to true on way costs shifting. However, commercial operators, that is, any profit making company, could be excluded from enjoying the benefits of true one way cost shifting (or they could be excluded unless they were able to show that they were acting in the public interest rather than to promote their commercial interests). So, natural persons and environmental organisations would automatically be protected by one way cost shifting in environmental cases, but commercial claimants would prima facie be excluded.

19. As explained above, the Aarhus and EU rules at issue here provide that costs in environmental cases may not be prohibitively expensive and must be fair and equitable. In

our opinion, our proposed rule would still satisfy these requirements if commercial organisations' claims were subject to a 'loser pays' costs rule, or a rule under which both parties bear their own costs, as long as those rules were clear and certain. However, to be absolutely certain of complying with the Convention in this regard, it would be possible to allow commercial profit-making entities to rebut the presumption against them, by proving that they were bringing the case not for commercial reasons but for the public benefit in order to rebut the presumption that they should not benefit from one way costs shifting as discussed here.

20. This change in rule would allow the English cost rules to do what the Convention and EU law really require: give access to justice to citizens and NGOs in environmental cases.

21. How would this rule work in practice? Because it focuses on the claimant, rather than the claim, it would be easy to apply, saving judicial resources.

22. At the permission stage in an environmental case, a claimant would have to certify that they were not a profit making entity and were not standing in for the interests of a profit making entity. In relation to commercial profit making entities, there would be a presumption against allowing one way costs shifting (although as discussed above, an exception could be introduced allowing such commercial claimants to prove that they were pursuing the public interest rather than commercial interests, though this would re-introduce some additional costs and time). That leaves only natural persons and NGOs which advance non-profit interests. Then if, during the course of the case, evidence arises that the claimant is in fact a profit making entity or is standing in for one, there is a prima facie case of bad faith, and they lose cost protection. We discuss other concerns below.

Fairness of the Proposed Rule

23. As long as profit making companies were subject to clear and certain costs rules, as suggested above, the Convention and EU law would be complied with and the system would be a fair one, particularly as commercial claimants do not generally bring public interest cases, whereas citizens and NGOs do.

24. 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; and the law in England & Wales needs to make clear that this is presumed.

25. The paradigm for a public interest case would be for a citizen or environmental group to sue the authorities for unhealthy air in London due to their failure to meet statutory air quality limits. This case raises an issue of broad public concern, in that the Government's statistics show both non compliance and a resulting rise in mortality among Londoners. The claimant does not stand to gain financially from the judgment. And the right the claimant asserts – the right to healthy air – is one they share with all other Londoners.

26. It is this kind of case that the Convention sought to make possible. The commercial operator will instead bring cases to forward their financial position, sometimes in an environmental context. Though these cases, for example planning cases, might fall within the ambit of environmental law (so there is a prima facie presumption that they are in the public interest), the commercial claimant is not asserting the non-commercial interests of a broader public in a healthy environment. It is thus fair and within both the spirit and the letter of the Convention to exclude commercial litigants from the benefits of true one way cost shifting. This would not, of course, exclude them from being able to bring the case at all – it would only affect the costs rules they were subject to, although it would also be possible to allow commercial entities to prove that they are acting in the public interest. Both of these outcomes would comply with Aarhus Convention rules.

The Case for One Way Cost Shifting

27. When we practice in our own legal system every day, we might not be aware of how other legal systems solve problems. Thus we might miss the most creative solutions to problems we face. True one way cost shifting is not a new idea. It has a long and very successful track record. For our examination of true one way cost shifting it will be salutary to look at the American system.

28. Beginning in 1970, a group of significant laws were passed that form the foundations of environmental protection in the United States. In these laws, a great advance was made for citizens' rights. Beginning with the Clean Air Act in 1970, and the Clean Water Act in 1972, Congress included 'citizen suit' provisions as an integral part of the law. Citizen suits offer the possibility of people stepping into the shoes of the attorney general to enforce the law against violators in actions in the federal courts. Hence they are often called 'private attorney general' actions. They also let citizens sue the government when it is alleged to be deficient in performing its statutory duties.

29. In these actions, citizens are allowed to request injunctions to require compliance, penalties (paid to the Treasury or a third party), and key to our present purposes, they are allowed costs and fees. This is a change from the normal American rule where each side bears its own costs. In environmental cases, costs shift only one way. The claimant may recover if it is successful but is insulated from costs if unsuccessful. The theory is that in bringing a case in the public interest, the claimant is doing a public service and should not be penalised with costs if they fail to make their case, but rewarded if they do. After all, if successful they have demonstrated to the satisfaction of the court that there was a breach of the environmental laws, with deleterious effects for the environment and the public. To win such a case is in the public's interest. It is in the interest of the public to bring such a case if the claim has merit, even if it does not succeed.

30. In the American system, there is a stage comparable to the permission stage in the English system, a hurdle the claimant must surmount in order to press the case. So in any case that goes to conclusion the court has judged to that the claimant raised a potentially meritorious claim

31. Congress decided to encourage the prosecution of environmental cases through the true one way cost shifting feature of citizen suits. It is worth mentioning that there was cross party

support for this idea, and it was in the conservative administration of Richard Nixon that these first citizen suit provisions were passed, and Nixon signed them, apparently with enthusiasm. Cross party support has continued, and there are now some 150 statutes in which true one way cost shifting has been included.

32. There is widespread experience over more than 40 years with true one way cost shifting in the United States. In this time they have become a proven vehicle for testing and enforcing citizens' rights in environmental matters. The judicial system has not been overwhelmed. Citizens have been allowed access to justice. Civil society has benefited through the democratic exercise of legal rights and environmental protection has been enhanced.

The England and Wales System Could Cope

33. Our system in England and Wales with respect to costs is the most punitive in the world to claimants, excepting some similar systems that inherited our system directly by being former colonies or similar. In no Continental system can a claimant be taxed with the prohibitive costs that he may in our system. Similarly it could never happen in the American system.

34. It is sometimes argued against greater access for citizens in environmental cases that there will be a flood of cases beyond the ability of the court system to cope if the cost barrier is reduced.

35. The evidence from other countries gives no support to this view. There was a study done by a group of law professors a few years ago for the EU which examined the number of environmental cases brought by citizens in a selection of EU countries. In each of these countries, the costs are much lower than in our system, and access to the courts is relatively easy. The number of cases comparable to our High Court cases is revealing. In Portugal, France, Spain, the Netherlands and Denmark, the average number of such citizen environmental cases is approximately 4 per year.

36. This number is hardly overwhelming. Why is the number so low? The answer is likely that even when shielded from paying the defendant's costs should they lose, the cost of mounting a case is high. The citizen or citizen's group may still have their own lawyers' costs to bear if they lose, and even the amount of time, expertise and energy it takes to mount a case is considerable. These factors have a certain self limiting quality and have prevented large numbers of cases from being brought.

37. Turning to the experience of the United States, when we look to 33 years of citizen suits for which there is good data, remove the kinds of cases not allowed in our England and Wales system, and correct for population size, we project that the American experience suggests that with true one way cost shifting, there would be approximately 4 cases a year brought in the UK. The statistics for both the European and American cases are presented in Annex I.

38. Neither the Continental nor the American experience supports a view that there will be a flood of cases if we make access to justice in environmental cases fundamentally fairer. In terms both of judicial resources and finances, we can afford to comply with EU law and the Aarhus Convention and make the system fairer. To do so will increase the values of participatory democracy. And empowering citizens to ensure the laws are complied with is perfectly in line with the Big Society values articulated by the present Government.

Summary Arguments

39. Recent recommendations made by the Aarhus Convention Compliance Committee[1] in relation to the costs rules of environmental cases in England & Wales and EU case law confirm that the costs rules in England & Wales are in breach of both the Aarhus Convention[2] and EU law because they are prohibitively expensive and involve the use of discretion thereby creating uncertainty (unlawfully).[3]

40. Neither the 'qualified' one way costs shifting approach (and alternatives) proposed by this Consultation and the Jackson Review, nor the proposals for the codification of rules on Protective Costs Orders (PCOs), increase in damages, or matters related to insurance in this Consultation are sufficient to ensure that English law complies with these international and EU law requirements, particularly as 'qualified' one way costs shifting would almost certainly result in a costs system that would – overall – still be prohibitively expensive and that would continue to involve the use of a great deal of discretion and uncertainty. Both of these outcomes are, in fundamental breach of the Aarhus Convention and EU law (see also paragraphs 67-71 below).

41. One way costs shifting, as applied in the USA, is the easiest and most direct way of ensuring compliance and we urge that the UK government should adopt a system of true one way costs shifting in environmental public interest cases rather than a system of qualified one way costs shifting which introduces means testing and involves discretion and uncertainty (see paragraphs 106-111 below).

42. Given the public interest nature of environmental judicial review, true one way costs shifting must apply to NGOs, as well as individual claimants (see paragraphs 119-128 below).

[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.
[2] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 28 June 1998.
[3] See C-427/07 *Commission v Ireland*, at paras 54-55 and 92-94.

Key Points – ClientEarth:

1. Supports true one way costs shifting in relation to public interest[4] environmental cases. This approach meets the requirements of the Aarhus Convention and EU law. Accordingly, ClientEarth disagrees with the introduction of 'qualified' one way costs shifting (QOCS) as defined in paragraph 135 of the Consultation, which does not meet the requirements of the Aarhus Convention and EU law.

2. Highlights the importance of the public interest nature of environmental cases. There should be true one way cost shifting (except in cases of bad faith) in relation to environmental cases, unless a claim is brought for commercial reasons.

3. Supports the US system, which effectively provides for one way costs shifting in relation to public interest environmental cases. In this context, we believe the UK should operate in a similar vein by introducing true one way costs shifting in order to comply with the Aarhus Convention and EU law.

4. Highlights the fact that other EU Member States already comply with the requirements of the Aarhus Convention: the loser pays principle either does not apply or the costs are de minimis, removing a significant cost barrier to access to environmental justice.

5. Strongly asserts that the underlying principles that should determine whether true one way costs shifting should apply to a particular case is compliance with the Aarhus Convention and EU law.

6. Agrees that one way costs shifting should extend beyond personal injury to include environmental public interest cases, but re-emphasises that one way costs shifting in environmental cases cannot be 'qualified' as set out in the Jackson Review and/or this Consultation, as such an approach will mean that the UK continues to be in breach of EU law and the Aarhus Convention.

7. Disagrees that one way costs shifting should only apply to individuals and urges the government to include non-governmental organisations (NGOs) within the new rules. The Aarhus Convention expressly includes environmental organisations within the description of parties who are given rights under the Convention. Treating individuals and environmental organisations differently will be in breach of the Convention. The financial means of the entity or person bringing such environmental cases is and should be irrelevant, unless the case is brought for commercial reasons (see above).

8. Asserts that all other relevant proposals contained in the Consultation do not address the real issue that the costs rules in England & Wales are prohibitively expensive and create uncertainty, in breach of the Aarhus Convention and EU law.

[4] See paras 51-64 for background on the public interest argument.

Question 28 (paragraphs 128 - 169, pages 46 -56):

Do you agree with the approach set out in the proposed rule for qualified one way costs shifting (QOCS) (paragraph 135–137)?

Key Issues – Question 28:

1. ClientEarth disagrees with the introduction of 'qualified' one way costs shifting (QOCS). The proposal for QOCS fails to adequately address:
    a) the public interest nature of environmental cases; and
    b) the recent findings of the Aarhus Convention Compliance Committee; and
    c) the issue of judicial discretion and uncertainty, which is in breach of the Aarhus Convention and EU law; and
    d) the distinction between environmental judicial review and other judicial review cases.
2. A true one way costs shifting rule in relation to public interest environmental cases is required in order to meet the requirements of the Aarhus Convention and EU law.
3. The US system effectively provides for a one way costs shifting in relation to public interest environmental cases. In this context, we believe the UK should operate in a similar vein with true one way costs shifting in order to comply with the Aarhus Convention and EU law.
4. Other EU Member States already comply with the requirements of the Aarhus Convention: the loser pays principle either does not apply or the costs are de minimis, removing a significant cost barrier to access to environmental justice. The alternative proposals that involve the introduction of a fixed minimum amount of defendant costs, costs cap or presumption in favour of the claimant all fail to meet the requirements of the Aarhus Convention and EU law.

43. ClientEarth welcomes the introduction of one-way costs shifting as a general approach. However, we disagree that it should remain a 'qualified' approach in that '*a claimant would have 'costs protection' and would not be liable to pay a winning defendant's costs unless (i) the claimant acts unreasonably (for example, by bringing a frivolous or fraudulent claim, or in conducting the claim unreasonably or abusively), and/or (ii) the claimant is sufficiently – or 'conspicuously' to use Sir Rupert's term – wealthy such that they are easily able to pay the winning defendant's legal costs*'.[5] (emphasis added)

44. In fact, the precise wording of the rule suggested is that '*Costs ordered against the claimant in any claim for … 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

[5] Proposals for Reform of Civil Litigation Funding and Costs in England and Wales, Implementation of Lord Justice Jackson's Recommendations (CP 13/10), November 2010, at para 135.

(b) their conduct in connection with the dispute to which the proceedings relate'.[6]

45. It is very clear from the way this rule is worded that in fact there is a presumption that there will be a costs order, but that the financial means of the party involved (and their conduct) can be taken into account. In legal aid cases (where this rule comes from – see section 11(1) Access to Justice Act 1999), where claimants do not by definition have any resources, this has meant that there has been a de facto costs shield. That would obviously not be the case where legal aid was refused (as in such a case a claimant would have some financial resources, though possibly only very few). In our opinion, extending the rule to non-legally aided cases will not per se change the current costs practices, and the rule as expressed would certainly not introduce a prima facie costs shield (see also paragraphs 73-79 below).

46. Instead, ClientEarth recommends that, in order to comply with the Aarhus Convention[7] and EU law,[8] true one way costs shifting needs to be introduced in relation to public interest environmental cases (except in cases of bad faith). The following considerations need to be taken into account:

The public interest nature of these claims

47. In our discussions with numerous parties, a number of questions commonly arise in relation to our recommendation for a true one way costs shifting system for public interest environmental cases.

48. First: *What do you do about the well-resourced financial organisations that bring judicial review cases in their own commercial interests, challenging for example, a planning application, which if it goes through for some development, will be injurious to their interest?*

49. In this scenario, the claimant will not get the benefit of one way costs shifting, for reasons explained below.

50. This question really goes to the heart of the issue when a case is genuinely in the public interest or whether it is brought for other reasons, e.g. for commercial advantage or financial gain. It can be addressed in various ways and we propose a very simple rule (see below). However, before doing so it is crucial to understand that under the Aarhus Convention (and also under EU policy) environmental cases are prima facie and by presumption in the public interest. It is precisely that presumption upon which all the rights given to the public in the Aarhus Convention is built.

51. As seen in the Introduction, the Aarhus Convention seeks to secure citizens' rights to a healthy environment by providing rights of access to information, public participation and access to the courts in relation to environmental matters. The interests which these rights relate to are not private property or financial interest. They are by definition public interest rights. Relevant cases are brought for the public benefit. This is something that the UK legal system does not yet take into account. Indeed, the Aarhus Convention Compliance

[6] Para 135 of the Consultation.
[7] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 28 June 1998.
[8] See C-427/07 *Commission v Ireland*, at paras 54-55 and 92-94.

Committee has criticised the UK costs system for not giving sufficient recognition to the public interest nature of environmental claims.[9] This means that any case brought in pursuance of rights granted by the Aarhus Convention, so really any environmental case brought by a member of the public rather than by a government agency or prosecutor, is by definition and automatically a public interest case.

52. The concept of public interest environmental litigation has been observed by the European Commission[10] as follows: that it is '*an important characteristic of environmental law'* that private interests frequently do not exist to drive its enforcement. Another common factor seen in public interest environmental litigation is a general wider public benefit from the outcome of the litigation. Both of these elements are clearly evident in relation to environmental judicial review claims (excluding those brought by commercial enterprises in e.g. a planning context). The archetypal public interest case would be the following: An organisation brings an action against the UK government to clean up the air of London. The organisation's concern in clean air is shared with every citizen; there are no pecuniary interests. The asserted interests are in health and in the Government fulfilling its duty to provide air of the quality the laws require.[11]

53. When we put aside the commercial claimants, the financial means of the entity or person bringing such public interest cases should be irrelevant. It is not fair or reasonable to expect private individuals or charities to put their assets on the line in litigation in the public interest.

54. All this means that it is not possible under the Aarhus Convention (and EU law), for example, to make artificial distinctions between private claimants and environmental organisations making claims. Neither is it possible to exclude claimants who may have a financial interest in the outcome of the case where the case is an environmental one (and therefore prima facie in the public interest). However, cases brought by commercial (for profit) companies bringing seemingly environmental cases for commercial reasons rather than for the public good, are not true environmental cases.

55. Therefore, and as already explained in the Introduction, we recommend that there should be a rule that stipulates true one way cost shifting (except in cases of bad faith) in relation to all environmental cases. However, claimants who are commercial profit-making companies (i.e. not non-profit organisations) could be excluded from the automatic application of the one way costs shifting rule (maybe subject to a condition that would allow one way costs shifting after all if the claimant could prove that its case was truly being brought for the benefit of the public and not to promote commercial interests). Similarly, one way costs shifting could be excluded in cases where the defendant can prove that the claimant is standing in for a commercial profit making company.

56. The second question commonly raised is *what restriction are you going to put on this pure one way costs shifting. Do you say there is one way cost shifting in every case which is in the public interest even if it is also in the claimant's interest, or do you say it is only one way costs shifting if it's simply in the public interest?*

[9] Findings of Case ACCC/C/2008/33, at para 134.
[10] Commission (EC): 'Implementing Community Environmental Law' COM (96) 500 final, 22 October 1996, [38].
[11] It is possible that there might be a pecuniary interest, but it would not be the main concern.

57. This question has really already been answered above. Any environmental case brought by a member of the public (whether individual or environmental organisation) is prima facie in the public interest, but if for example, the claimant has a competing commercial interest, then they will be excluded from benefiting from one way cost shifting as set out above.

58. In this context, it should be noted that in most environmental cases, for claimants to satisfy standing tests they must either be affected by an act or decision or have a sufficient interest (environmental organisations are presumed to have both under the Aarhus Convention). Being affected could involve a property or financial interest, particularly in relation to affected individuals. A blanket exclusion of financial or other personal interests is therefore completely impossible. For example, using the clean air example from paragraph 18, an individual bringing this action has the same interest as the public (who all breathe the air).

59. Finally, the third question that arises is this*: do you have a mechanism to determine whether the claimant should have any liability at the outset of the case, in which case you get into some variant of the PCO regime, or you have it at the end of a case?*

60. The determination whether or not the claimant is a 'public interest' claimant or a commercial claimant (and therefore whether or not true one way costs shifting should apply) will be made at permission stage, at the outset of the case. An exception would only occur in cases where, during the course of the proceedings, evidence comes to light that the claimant commenced the proceedings in bad faith. In this context, it is notable that in the United States, which has the benefit of 40 years of experience in a one way costs shifting system in environmental cases, instances of this kind have been very rare.

Jackson Review and updated Sullivan Report

61. In the UK itself, the Jackson Review[12] and updated Sullivan Report[13] both assert that only a form of one way costs shifting can ensure compliance with Article 9(4) of the Aarhus Convention. Thus the preliminary Jackson Report[14] states:

> *"We have arguably reached the position in this jurisdiction where the level of costs is so high that facing a full adverse costs order is likely to be a disaster for most ordinary citizens. This is so much so that litigation on behalf of individuals does not tend to happen these days unless a mechanism can be found to protect the claimant (either legal aid cost protection or after-the-event insurance). Even small corporate bodies like NGOs will not litigate on important issues if there is a risk of full costs exposure (see Corner House, which is discussed in chapter 35 above)."*

62. The (final) Jackson Review[15] also goes on to conclude that one way cost 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'*. However, we repeat that the concept of 'qualified' one way costs shifting would still be in breach of the Aarhus Convention and EU law requirements (see paragraphs 67-71).

[12] Review of Civil Litigation Costs: Final Report December 2009.
[13] Ensuring access to environmental justice in England and Wales Update Report, August 2010.
[14] Review of Civil Litigation Costs: Preliminary Report, May 2009, p475.
[15] Review of Civil Litigation Costs: Final Report December 2009, section 4(i), p310.

Failure to comply with the Aarhus Convention & EU law

63. We note that the notion of exercising judicial discretion regarding costs is an ancient practice in the UK courts. It will take conscious endeavour to change such long adopted behaviour. However, the situation in relation to costs in environmental cases has now changed and, because of the continuing exercise of judicial discretion rather than the adoption of a fixed and fair rule that removes prohibitive costs, the UK is currently not in compliance with the law. The recent findings of the Aarhus Convention Compliance Committee and the decision of *Commission v Ireland*[16] highlight the shift in the law and the need to change.

64. In October 2010, the Aarhus Convention Compliance Committee[17] found that current costs rules in England & Wales are both prohibitively expensive under Article 9(4) of the Aarhus Convention and do not '*remove or reduce financial […] barriers to access to justice*' as required by Article 9(5) of the Convention.[18] The Committee recommends that the UK '*review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures*'.[19] The UK is clearly in breach of its international law obligations.

65. The Aarhus Compliance Committee in its findings stated that it is judicial discretion in costs awards which *'leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest'*.[20]

66. Moreover, the European Court of Justice in *Commission v Ireland*[21] 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 (in this case a law implementing public participation rights[22] set out in the Aarhus Convention).

67. We understand that in order to comply with the findings of the Aarhus Convention Compliance Committee and the decision in *Commission v Ireland,* a major shift will be required in relation to the judicial exercise of discretion in environmental cases; however, this is a change that is necessary and compelled by law.

Uncertainty, judicial discretion and the interpretation of 'Reasonableness'

68. The following paragraphs will examine the important issue of judicial discretion and the interpretation of 'reasonableness' in the context of the proposed rule.

[16] C-427/07, *Commission v Ireland*.
[17] Findings and recommendations of the Aarhus Convention Compliance Committee with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom.
[18] Compliance Committee findings, para 145.
[19] Ibid.
[20] Ibid., para 135.
[21] C-427/07, *Commission v Ireland*.
[22] Directive 2003/35/EEC, providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

Key Issues

1. The proposed rule uses identical wording to s11(1) of the Access to Justice Act 1999; this is not suitable in the context of one way costs shifting in relation to public interest environmental judicial review. The wording of the proposed rule means that costs protection is *not* presumed as a starting point, and furthermore, the proposed rule presumes the starting point is that a costs order will in fact be made.

2. The proposed rule is dependent on an interpretation of what is 'reasonable' having regard to the claimant's financial circumstances and their behaviour, therefore, 'qualified' one way costs shifting would involve a financial assessment of the claimant's assets that would depend entirely on an interpretation of the meaning of 'reasonableness.'

3. The proposed rule and the potential interpretation of what constitutes 'reasonable' costs in the courts (*Rugby Cement*[23]*)* would clearly result in prohibitive costs in many (if not most) cases and would be dependent on judicial discretion, in breach of the Aarhus Convention and EU law.

4. The question of which test the court should apply to ensure that proceedings are not prohibitively expensive has been referred to the Court of Justice. Without prejudice to our recommendation for true one way costs shifting, only a purely objective approach to financial means testing would assist in ensuring compliance with the Aarhus Convention, not the mixed objective-subjective approach originally taken in *Rugby Cement*.

5. It is clear that the proposed rule in the Consultation would still involve a high degree of uncertainty and judicial discretion. Uncertainty in relation to the court's interpretation of the s11(1) words in the context of one way costs shifting, uncertainty of what a court would regard as 'reasonable' costs in an individual case, uncertainty as to 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). All of the above results in a failure to comply with the Aarhus Convention and EU law.

6. Only true one way costs shifting in relation to public interest environmental cases (except in cases of bad faith) will meet the requirements of the Aarhus Convention and EU.

69. The Consultation proposes the following rule:

> '*Costs ordered against the claimant in any claim [covered by QOCS] 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'*.[24]

[23] *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.
[24] Supra n5, para 135.

70. We note that in paragraph 165 of the Consultation states that '*A PCO ought to provide better costs protection than QOCS, because under a PCO it will be clear from the outset what costs the claimant would have to pay if the claim is unsuccessful'.* This statement clearly shows that QOCS is potentially prohibitively expensive due to the inherent uncertainty contained in the QOCS regime.

71. The rule proposed in the Consultation makes 'costs protection' (paragraphs 131 and 136) dependent on an interpretation of what is 'reasonable' having regard to the claimant's financial circumstances and their behaviour, and is therefore dependent on the assessment of a claimant's resources. The Consultation gives no indication of what 'reasonable' may mean in this context, and little indication at what level costs should be capped[25] by reference to the resources of persons of modest means. Moreover, the wording of the proposed rule and the potential interpretation of what constitutes 'reasonable' costs in the courts does not support the claim that there will be effective costs protection either (see below).

72. The wording of the proposed rule is identical to Jackson LJ's suggestion, namely that of section 11(1) Access to Justice Act 1999 relating to legally aided claimants, except that it is limited to any claim covered by QOCS, 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 advocated 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.[26]

73. The underlying legal aid rule in section 11(1) of the Access to Justice Act 1999: 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'*.[27] He also claims that '*the making of a costs order will be the exception, rather than the rule'*.[28]

74. 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'.

75. Yet, the wording proposed by the Jackson Review (and the Consultation) is largely 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 bad faith of cases), shows that there is no automatic legal presumption in favour of one way costs shifting.

[25] Para 165 merely states that *'it might therefore be appropriate, if a costs cap is to be introduced, to be set at different levels of cap for different levels of judicial review claim based on a proportion of the general level of defendant costs associated with different types of claim'.*
[26] Jackson Review, see paras 4.5 and 4.6, Chapter 19, p. 189.
[27] Ibid., see para 4.4, Chapter 19, p. 189.
[28] Ibid., see para 4.8, Chapter 19, p. 190.

76. As already mentioned in paragraph 49 above, the wording of the proposed rule in fact presumes that a costs order will be made. The first few words of the proposed rule ('*costs ordered against the claimant*';) make it very evident that there is acceptance presumption that costs will be ordered against the claimant. The proposed rule then goes on to state that costs '*...shall not exceed*'...- the implication again being that there will be costs. Moreover, the presumption of costs will depend on various circumstances (the rule states '...*having regard to* ***all*** *the circumstances*' - emphasis added). These circumstances may include (paragraph 162 of the Consultation), for example, the seriousness of the subject matter. Therefore, in light of all of the above, the proposed rule means that there is a presumption of costs having regard to a non-exhaustive list of circumstances. Accordingly, there is no certainty at the outset of the case, only uncertainty and a presumption that costs will be imposed.

77. 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. In addition, as already mentioned above, legally aided claimants are legally aided precisely because they do not have access to financial resources. That the rule applies as a costs shield in relation to claimants who have no financial resources is hardly surprising. However, the suggestion that the costs shield would also operate in relation to better resources (but not very rich) claimants does not follow, as the rule then requires the financial resources of the claimant to be taken into account, and it is unlikely that courts would significantly change their assessments (though this will partially depend on the outcome of the court's referral of the *Rugby Cement*[29] costs question to the Court of Justice.

78. 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.[30] 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.

79. 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

[29] *R (on the application of Edwards and another v Environment Agency and others* [2010] UKSC 57

[30] 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.

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.[31] That is, a court may make a costs order that will force the losing claimant to mortgage her house.

80. It is quite possible that this approach would be applied if the proposed Jackson rule was implemented (which is exactly what happened in the original *Rugby Cement*[32] 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 sections below.

81. Accordingly, 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.

82. In any case, regardless of all the above factors, the rule proposed in the Consultation does not remove discretion in a judge's costs awards (there are simply other considerations for judges to take account of) or provide certainty as to the amount of costs potential claimants in environmental public interest judicial review would need to pay if they lost. This means that, whatever the ultimate judicial interpretation and judicial practice in relation the proposed rule on QOCS, the UK will continue to be in breach of the Aarhus Convention and EU Law[33] due to the uncertainty created by the rule for claimants and the continuing dependence of claimants on judicial review discretion (as regards the definition of reasonableness[34]).[35] 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

83. 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'.[36] 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[37] - so much so that according to the Law Society:

[31] See reg. 7 of the Community Legal Service (Costs) Regulations 2000 and Section 21.12 of the Practice Direction about Costs.
[32] *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.
[33] Article 9(4) of the Aarhus Convention.
[34] See Case C-427/07 *Commission v Ireland*, at paras 54-55 and 92-94.
[35] See paras 67-71 as to why discretion is not allowed.
[36] Jackson Review, para 4.4, Chapter 30, p. 311.
[37] Ibid., see para 3.1 and 3.2, chapter 7, p. 68.

'*a substantial portion of middle England were financially not eligible for legal aid, yet could not afford to litigate*'.[38]

84. 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.[39] 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'.

85. 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'.[40] 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.[41]

86. 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.[42] Recall that under relevant costs rules, equity of more than £100,000 in a home can be subjected to mortgage 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'

87. 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.

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

89. There are huge costs potentially faced by claimants in English courts. 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[43] two protective costs orders were made limiting costs to £20,000. Similarly, in the *Bassetlaw*[44] case, costs of £50,000 were held to be reasonable in relation to

[38] Ibid., see para 2.3, Chapter 7, p. 67.
[39] 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.
[40] 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.
[41] 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.
[42] Jackson Review, para 5.3, chapter 9, p88.
[43] *R (oao Buglife The Invertebrate Conservation Trust) v. Thurrock Thames Gateway Development Corporation (D) and Rosemound Develop* [2008] EWCA Civ 1209.
[44] *Littlewood v Bassetlaw* [2008] EWCA Civ 1611.

an individual claimant. 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.[45]

The Rugby Cement case

90. The clearest indication of how the courts would probably interpret the Jackson rule comes from the recent costs decision in the *Rugby Cement*[46] 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.

91. The Supreme Court had originally held that the final costs should be determined *'taking into account the Aarhus principles'*.[47] In that context, the court discussed the meaning of 'reasonableness' in relation to costs. The final costs award has not been made yet and the matter has been stayed pending a reference to the Court of Justice.[48] The Supreme Court found that it remained uncertain which test the court should apply to ensure that proceedings are not prohibitively expensive, although '*the balance seems to lie in favour of the objective approach*'[49], which would be a test more likely to satisfy some of the concerns around prohibitive costs in the UK, but depending on what was held to be 'reasonable' even on an objective approach and depending on how much discretion and uncertainty was left in the costs rules, merely applying an 'objective' test to reasonable costs will not ensure compliance of costs rules with the Aarhus Convention and EU law.

92. In this context, the analysis set out above in relation to the original December 2009 judgement remains relevant. It would still represent how the courts would probably interpret the proposed rule, even if an objective approach is taken, as the wording of the proposed rule is almost identical to and, as already seen, is in fact based on s11(1) Access to Justice Act 1999. Accordingly, we will re-produce almost the entire passage of the Supreme Court judgment as regards 'reasonableness' here because of its potentially high degree of relevance in relation to the proposed new 'qualified' one way costs shifting rule in the Consultation and Jackson Review.

93. 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 (and thus the Consultation). The court in the *Rugby Cement* case states:

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[45] 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.
[46] *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.
[47] See Jackson Review, para 4.4 and 4.7, Chapter 19, p. 189-190.
[48] R (on the application of Edwards and another v Environment Agency and others [2010] UKSC 57, para 36.
[49] Ibid., para 31.

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...'

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'.[50]

This extract is important for a number of reasons:

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

b) The court cites *Morgan*[51] in referring to the Jackson Review as a potential solution, but in fact the court follows the identical approach proposed in the Jackson Review.

c) 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.

d) 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[52]) 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.

e) 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.

f) 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.

94. 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'.*[53] 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.

95. 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, and even if the Court of Justice returns a verdict in favour of an objective approach, the Supreme Court's approach in the Rugby Cement case is

[50] See paras 14 - 19, *Rugby Cement* case (January 2010 Judgement).
[51] *Morgan v Hinton* [2009] EWCA Civ 107.
[52] Jackson Review, paras 4.7 and 4.9, Chapter 30, p. 312.
[53] See *Rugby Cement* case, at para 25.

likely to 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.

96. 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. Without prejudice to our recommendation for true one way cost shifting, were another approach to be followed, only a purely objective approach to financial means testing, with certainty from the outset and no discretion, will assist in ensuring compliance with the Aarhus Convention, and only if the costs imposed are not prohibitive in practice to an 'ordinary' person. The reference to the Court of Justice is still awaiting judgement at the time of writing this response.

97. However, ClientEarth maintain that only true one way costs shifting in relation to environmental cases will meet the requirements of the Aarhus Convention and EU.

Failure to distinguish between environmental judicial review and other judicial review cases

98. Unlike the Sullivan Report,[54] the consultation and Jackson Review do not set out how to deal with the costs in environmental public interest cases in particular. As a consequence, the consultation and Jackson Review do not make separate recommendations in relation to environmental cases in spite of their special characteristics.

99. 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*'.[55] Moreover, the proposed QOCS approach 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 purely personal financial interest in a case, there is no such justification for environmental public interest cases, where there is no such financial interest, or any interest is merely secondary to the over-riding objective which is in the public interest, and where such an approach would be entirely counterproductive, most likely resulting in important environmental public interest cases not being brought.

100. Moreover, any perceived need to deter unmeritorious claims (paragraph 165) 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 consultation[56] - see paragraph 161 where it quotes Lord Justice Jackson commenting that the (permission threshold) is designed to '*weed out*

[54] Ensuring access to environmental justice in England and Wales Update Report, August 2010.
[55] See Jackson Review, para 4.1(ii), Chapter 30, p. 310.
[56] Supra., n5, para 160.

unmeritorious cases' - and Jackson Review itself[57]). This is confirmed by evidence that suggests[58] that the permission stage acts as an efficient filter for cases which do not deserve to be heard. Figures show that in 2008, of the 7,169 cases considered at the leave stage in all judicial review cases, just 12%, or 914, were allowed to proceed. 2009 statistics show that 862 of the 9,097 permissions to apply for judicial review were granted.[59] A very small percentage of these concerned the environment. This shows very clearly that the permission stage is a very effective filter and that unmeritorious and frivolous cases are not heard and shows that the concerns in paragraph 165 of the consultation are incorrect.

101. There is no good reason for insisting that all judicial review cases should be treated the same with regard to costs rules. Different cost rules already apply in legal aid and family proceedings for example. It would be entirely possible for English Law to make a special case for 'unqualified', true one way costs shifting in environmental cases, and thus comply with the Aarhus Convention. We fully support one way costs shifting in relation to environmental cases, as applied in the US, for example (see below).

Genuine one way cost shifting – the United States system

102. The US system effectively provides for a one way costs shifting in relation to public interest environmental cases. It is a system designed to give incentives to individuals to bring cases in the public interest in order to assist the state to fulfil its role in policing and enforcing environmental laws.

103. Unlike the UK, the general costs principle in the US (except, as will be seen, in environmental cases) provides that '*the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser*',[60] i.e., each side bears its own costs. However, there are Federal statutory exceptions to this rule – '*Generally, Congress permits an award for costs in circumstances that implicate public policy concerns or to help equalise contests between a private party and a corporate or governmental entity. Fee shifting is most commonly seen in legislation relating to civil rights, environmental protection and consumer protection, and the most important court decisions regarding cost awards have arisen under these types of statutes*'.[61] (emphasis added)

104. Specifically, the Equal Access to Justice Act 1980 authorises fee awards against the United States (5 U.S.C. § 504 and 28 U.S.C. § 2412(d)). '*These sections provide that, in specified agency adjudications and in all civil actions (except tort actions and tax cases) brought by or against the United States, the United States shall be liable for the attorneys' fees of prevailing parties, unless it proves that its position was substantially justified or that special circumstances make an award unjust'.*[62]

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[57] See Jackson Review para 5.8, p. xxi and para 4.1(iii), Chapter 30, p. 310.
[58] See Judicial and Court Statistics 2008, Chapter 1, p.27.
[59] See Judicial and Court Statistics 2009, Chapter 7, p.173.
[60] *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240, 247 (1975), as cited in Review of Civil Litigation Costs: preliminary report, volume 2, May 2009 p609.
[61] Review of Civil Litigation Costs: preliminary report, volume 2, May 2009 p611.
[62] CRS Report for Congress, awards of attorneys' fees by Federal courts and Federal agencies (94-970) June 2008, p6-7.

105. According to the Handbook on Access to Justice under the Aarhus Convention,[63] in the US,

> '*[t]here are approximately 150 federal fee-shifting statutes, including 16 major federal environmental statutes'*.[64]
>
> The Handbook also states:
>
> '*In all these fee-shifting provisions, the stated goal of the US Congress was to encourage citizen lawsuits in order to achieve compliance with federal statutory policies. The statutes seek to create an incentive for commercial and public interest lawyers to represent citizens pro bono by providing a structure where lawyers can be reimbursed for their legal services if victorious ... the American system has fostered public interest litigation and many public interest law organisations have come to rely on fee shifting to sustain their organisations. Fee shifting has been liberally allowed by most courts in public interest litigation, granting fee and cost recovery in cases where the parties settle in a manner favourable to the plaintiff and in cases where the plaintiff has partially prevailed'.*[65]

106. The fee-shifting approach will generally enable a successful claimant to recoup his costs from the defendant, as long as he has 'some degree of success on the merits'[66] (and/or has not acted in bad faith[67]). It is important to note that this fee-shifting regime goes only one way: successful plaintiffs can recover, but defendants cannot, even when successful.

107. In this context, we believe the UK should operate in a similar vein with a true one way costs shifting rule in order to comply with the Aarhus Convention and EU law. The current proposal for a QOCS is in breach of the Aarhus Convention and EU law.

Cost shifting in other EU Member States

108. The Milieu Study,[68] which produced a comprehensive study of the different measures adopted or in place in Member States to implement Article 9 of the Aarhus Convention, gives a general overview in this context. The loser pays principle does not apply in Belgium and Sweden. In other countries the loser pays principle is limited. The principle only applies in Spain where a party acted in bad faith, and the Netherlands only where a party unreasonably initiated a lawsuit. In Finland, the principle does not apply when actions are initiated against public authorities. In Portugal, NGOs litigating are exempt from the

[63] Edited by Stephen Stec; Szentendre, Regional Environmental Center for Central and Eastern Europe (REC) Hungary, March 2003.
[64] Chapter 7; Financial and other barriers; Lynn Sferrazza, p.57. In addition, '*[m]ost of the environmental fee-shifting statutes provide as follows: "The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines such an award is appropriate'*, Ibid.
[65] Ibid., p. 57.
[66] see *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), at 686, see also discussion in *Loggerhead Turtle v. County Council, 307 F.3d 1318 (11th Cir. 2002)*, at II, para. 11 – 13.
[67] *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 259, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (recognising the bad faith exception as an "assertion of inherent power in the courts").
[68] Summary Report on the Inventory of EU Member States' measures on access to justice in environmental matters, p20-21, available at http://ec.europa.eu/environment/aarhus/study_access.htm.

principle. Accordingly, in these Member States, there is little or no threat of having to pay the other side's costs, removing a significant barrier to access to environmental justice.

Other Comments

109. We note that in paragraph 143 of the Consultation, which introduces '*a presumption that the claimant would not be liable to pay the defendant's costs, unless the court – on an application by the defendant made as early in the proceedings as possible – orders that the financial circumstances of the parties are such that the claimant should be liable for all or a fixed amount of the defendant's costs if the claim fails',* would only apply to personal injury cases. In any case, introducing a presumption that a claimant would not be liable to pay the defendant's costs would - at best - only go some of the way towards satisfying the requirements of EU and international law, as the presumption is not unconditional (i.e., without scope for judicial discretion) and, moreover, even the claimants' own legal costs may be prohibitive. Therefore, even if this approach was extended to public interest environmental cases, it would still in breach of the Aarhus Convention due to judicial discretion.

110. We note that the Consultation proposes some possible refinements (paragraphs 144-146) to the qualified one way costs approach. We do not consider that introducing a fixed minimum amount of defendant costs which the claimant may be required to pay (paragraph 144) or a costs cap (paragraph 164) would offer any degree of certainty. Examples of instances whereby the claimant could be liable for more or less than the fixed amount, or have no liability at all (paragraph 145), and the fact there is little indication of what level a fixed fee[69] or costs should be capped[70] at only adds to the uncertainty.

111. The Consultation (paragraph 165) also refers to a variant in relation to environmental judicial review claims suggested by the updated Sullivan Report[71], – *'that an unsuccessful claimant should not be ordered to pay the costs of any party, save where the claimant has acted unreasonably in bringing or conducting the proceedings'*. This is similar to the US position which does not apply fee shifting in cases of bad faith. The Government's position on this (that this rule would encourage a significant increase in unmeritorious claims which would increase the costs of public bodies without any real benefits to claimants[72]) simply does not make sense. It is intrinsically illogical and unfounded, as the whole point of this condition is to achieve precisely that, to prevent 'unreasonable', i.e. unmeritorious or 'bad faith' in claims. It is also in direct contradiction of the earlier statement that the permission stage is an effective filter (see the consultation's own assertions at paragraph 160 above).

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[69] Para 144 merely states that '*the fixed amount should be set at an amount sufficient to deter frivolous claims but which is not so large that claimants would need to take out ATE insurance as they do now';* and para 147, '*different fixed amounts could apply to different categories of case and depending on the case tract (fast or multi track) to which the claim has been allocated'.*

[70] Para 165 merely states that *'it might therefore be appropriate, if a costs cap is to be introduced, to be set at different levels of cap for different levels of judicial review claim based on a proportion of the general level of defendant costs associated with different types of claim'.*

[71] Ensuring access to environmental justice in England and Wales Update Report, August 2010.

[72] Supra., n5, para 165.

Question 30 (paragraphs 159 - 167, pages 53 - 56):

Do you agree that QOCS should be extended beyond personal injury?

112. ClientEarth proposes that true one way costs shifting, except in cases of bad faith, rather than 'qualified' one way costs shifting should extend beyond personal injury to include environmental public interest cases (see above answer at question 28 for reasons).

Question 31 (paragraphs 128 - 169, pages 46 -56):

What are the underlying principles which should determine whether QOCS should apply to a particular type of case?

113. ClientEarth proposes that compliance with EU and international law requires true one way costs shifting, except in cases of bad faith, to be applied to environmental public interest cases.

Question 32 *Do you consider that QOCS should apply to*

(i) claimants on CFAs only or
(ii) all claimants however funded?

114. True one way costs shifting should apply to all claimants however funded, except for commercial profit-making organisations making claims for commercial reasons.

Question 33 (paragraphs 152 - 156, pages 51 - 52):

Do you agree that QOCS should cover only claimants who are individuals?

Key Issues – Question 33:

1. ClientEarth propose that true one way costs shifting, except in cases of bad faith, rather than 'qualified' one way costs shifting should apply to environmental NGOs and individuals.
2. The financial reality of NGOs is completely ignored, for example, the fact that a great proportion of an NGO's funds are reserved for designated charitable purposes and cannot be used in any other way.
3. The reasoning (that PCOs already exist to provide costs protection for NGOs) submitted by the government for not extending the proposal to cover NGOs is contradictory. The level of protection afforded under the PCO regime is widely recognised as inadequate.

115. ClientEarth does not agree with the Government's position that one way costs shifting should only apply to individuals to the detriment of non-governmental organisations (NGOs).

116. The Consultation (at paragraphs 152 and 166) states that the government is not persuaded that 'qualified' one way costs shifting should extend beyond individuals because '*organisations such as environmental groups and local residents associations would be able to apply, as now, for a Protective Costs Order (PCO) where the claim is brought in the public interest'.*

117. However, the Jackson Review condemns protective costs orders and states '*The PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value*'.[73] Sullivan LJ also comments in the foreword to the recent Update Report[74] that *'it is obvious that tinkering with the PCO regime will not be sufficient to address prohibitive costs and secure compliance with Aarhus'.*

118. The Consultation, at paragraph 165, goes on to say '*A PCO ought to provide better costs protection than QOCS, because under a PCO it will be clear from the outset what costs the claimant would have to pay if the claim is unsuccessful'.* This statement clearly shows that QOCS are potentially prohibitively expensive due to the inherent uncertainty contained in the in the QOCS regime (contrary to the statement made in paragraph 132 *'to provide access to justice for valid claims at proportionate costs'*.) However, it fails to acknowledge the many uncertainties and the high degree of judicial discretion involved in the PCO regime (even if codified).

119. Even if NGOs did in principle qualify for one way costs shifting, the financial assessment conditions that would probably be applied[75] are aimed at 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.

120. Contrary to paragraphs 152 and 166 of the Consultation, 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 designated charitable purposes and cannot be used in any other way. This point was also discussed in relation to existing costs orders in the hearing of *ClientEarth v UK* ACCC/C/2008/33 in the Compliance Committee's 25th meeting on 25 September 2009.[76]

121. The public interest nature of environmental cases should mean that the financial means of the entity or person bringing such public interest cases is and should be irrelevant. It is not fair or reasonable to expect private individuals or even charities to put their assets on the line in the public interest. In this context, the statement of the solicitor for WWF UK should be noted in the hearing of ClientEarth's Aarhus case against the UK. She stated that WWF

[73] Jackson Review, para 4.1(vi), p311.
[74] Ensuring Access to environmental justice in England and Wales: Update Report, August 2010.
[75] Jackson Review para 4.4 and 4.7, Chapter 19, p. 189-190.
[76] Available at http://www.unece.org/env/pp/compliance/CC-25/CC-25reportadvancecopy.pdf.

UK brought an action some ten years ago which resulted in costs of £100,000. As a result, the board decided that such litigation in the future would be too risky and this is despite the fact that WWF UK annual income is close to £50 million.[77] Moreover, WWF UK have yet to bring another action on their own. They brought no actions at all for ten years, until they recently bought one jointly with a group of other NGOs.

122. In paragraph in 167 of the Consultation, there is a proposal for a stricter public interest test based on the current PCO rules. The public interest requirement in PCO case law is subject to judicial discretion (thus uncertainty) and can be interpreted very restrictively.[78] Accordingly, this proposal would also be in breach of the Aarhus Convention and EU law because it would allow too much judicial discretion and uncertainty and a de facto tightening of standing requirements.

Charities Financial and Accounting Rules

123. 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 a particular 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 justify the holding of income as reserves, again making litigation reserves virtually impossible.[79]

124. Additional considerations mean that holding large cash reserves can provoke resentment against a charity and make it difficult to fundraise, as there will be an assumption that the charity does not need additional funds.[80]

Question 34

Do you agree that, if QOCS is adopted, there should be more certainty as to the financial circumstances of the parties in which QOCS should not apply?

125. ClientEarth's proposal for true one way costs shifting rather than 'qualified' one way costs shifting, would render irrelevant the requirement for more certainty as to the financial circumstances of the parties.

[77] In 2009, figures show a total resource of £ 46.4m. see http://assets.wwf.org.uk/downloads/2009_wwf_annual_report.pdf
[78] See, for example, *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change* [2010] EWHC 2312 (Admin) where permission was also refused on standing grounds.
[79] See Charity Commission Guidance CC19 on charities and reserves.
[80] Ibid.

126. The proposed QOCS rule is couched in uncertainty, especially as it would necessarily involve a financial assessment of the claimant's assets that would depend entirely on an interpretation of the meaning of 'reasonableness.' (see arguments at paragraphs 83 – 86).

127. Without prejudice to our starting position, in order to ensure certainty as to the financial circumstances of the parties, only a purely objective approach would suffice.

Question 35 (paragraphs 143 - 146, pages 49 – 50):

If you agree with Question 34, do you agree with the proposals for a fixed amount of recoverable costs (paragraphs 143–146)?

128. ClientEarth do not agree with the proposals for a fixed amount of recoverable costs in the context of environmental cases, and, in any event, the proposal itself is uncertain (see earlier arguments above at paragraphs 60-61).

Further comments

Key Issues

1. In relation to environmental nuisance cases, the consultation fails to even mention QOCS.
2. In respect of the suggestion that claimants should instead take out before-the-event legal insurance (BTE insurance) whether or not a claimant has taken out insurance cannot and does not determine whether costs are prohibitive or not.
3. In respect of the proposal for a general 10% increase of damages, we do not believe this to be the underlying issue. The true issue is that the UK is in breach of Article 9(4) of the Aarhus Convention by making costs prohibitively expensive, both in nuisance and judicial review cases. The quickest and easiest way to ensure compliance is by introducing true one way costs shifting.
4. Concerns relating to ClientEarth's proposal for a true one way costs shifting rule in public interest environmental judicial review cases are unfounded but in any case can be alleviated.

Nuisance Cases

129. In relation to environmental nuisance cases, the consultation fails to even mention QOCS. In paragraph 155 of the Consultation, it suggests that claimants should instead take out before-the-event legal insurance (BTE insurance). In respect of BTE insurance, the Jackson Review suggested that in the event that the claimant did not have BTE insurance, a 10% increase in the damages awards should be paid out (now in paragraph 95 of the consultation as a general increase in damages).

130. Irrespective of any increase in damages, neither insurance nor the 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 uncertainty in relation to the amount of potential adverse costs orders that can be expected. Therefore, the proposals in the Consultation do not comply with Article 9(4) of the Aarhus Convention in relation to environmental nuisance cases.

131. In this context, it should be noted that:

    a. 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);[81]

    b. BTE insurance is not compulsory in the UK.

    c. Even if BTE insurance was compulsory, the Aarhus Convention 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.

132. 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 and violates the recommendations of the Aarhus Compliance Committee in *ClientEarth v UK.*

133. Accordingly, in respect of question 19 of the questionnaire, we do not think that the real and underlying issue is a question of whether there should be a general increase of damages of 10%. The true issue is that the UK is in breach of Article 9(4) of the Aarhus Convention by making costs prohibitively expensive, both in nuisance and judicial review cases and higher damages will not help the UK comply with Article 9(4) of the Aarhus Convention. Therefore, we repeat our suggest that the quickest and easiest way to ensure compliance is by introducing true one way costs shifting.

Ministry of Justice Concerns

134. We note that at our meeting with the Ministry of Justice in November 2010 and in a recent seminar ClientEarth held concerning the Aarhus Convention, concerns were raised relating to our proposal for a true one way costs shifting in relation to public interest environmental cases; specifically, concerns that our proposal would allow the hypothetical situation of a commercial entity recovering its costs from a poor local authority. The following comments are relevant:

    a. This concern is alleviated by our proposed rule, which excludes commercial claimants from those who can benefit from one way cost shifting (see paragraphs 22-26).

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

b. The main aim is to benefit the wider public. In this context, a distinction should be made between public interest and tort claims. The latter is concerned with compensation, whereas environmental judicial reviews are purely concerned with wider public interests.

c. Moreover, any concerns relating to the floodgates argument (see annex I) are unfounded.

d. Under the current 'loser pays' system, the hypothetical commercial entity would also have its costs covered in the event it brings a successful action.

Yours sincerely

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Annex I

The floodgates arguments and costs

1. It is often said that making more equitable costs rules in environmental cases in the England and Wales legal system would open the floodgates to litigation, overwhelming the courts with the number of actions. No evidence supports such predictions.

2. It is possible, however, to show evidence to the contrary. Such evidence demonstrates that a fairer cost regime is not only possible but will not overburden the judicial system.

3. To generate this evidence, it is useful to look at the number of environmental cases brought both in the United States, and in eight EU Member States including the UK. The US and the other seven EU states all have fairer cost rules than the UK.[82]

4. We will begin by examining the situation in the United States. Citizen suits allowing one way cost shifting were introduced in 1970. A detailed analysis of 33 years worth of experience was made in 2003.[83]

5. The author gives two estimates of the number of citizen suits filed. "Likely more than 2000" over 33 years,[84] and "more than one a week."[85] These estimates work out to a similar number. Averaging 2000 suits over 33 years gives 61 suits per year. "More than one a week" is reasonable to take as a similar number.

6. In the United States, citizens may bring actions against companies who are polluting. In fact "the vast majority of citizen suits are filed against polluters".[86] This is relevant because in the UK one cannot bring judicial reviews against private parties, only the government. While no exact figure is available, let us assume that the "vast majority" of cases which are brought against polluters is about two thirds or 41 of 61 per year, leaving 20 per year brought against the government.

7. Those 20 cases are brought by a population of some 312,000,000. To extrapolate to England and Wales, with a population of some 54,000,000, one divides and gets 5.7. One then divides the 20 cases a year by 5.7 to adjust for population size, getting 3.5, rounding up to 4. So the population of the UK, if it is similarly litigious to the US, could be expected, based on the US experience with citizen suits, is likely to bring 4 suits even with true one way cost shifting.

8. Turning now to European countries, it is useful to examine how frequently environmental NGOs currently resort to civil actions in these countries[87], in particular civil actions brought by established environmental NGOs.[88]

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[82] See Summary Report of Milieu Study, Table 3: *Costs and legal aid schemes.*
[83] J.R. May, Now More than Ever: Environmental Citizen Suit Trends, 33 ELR 10704 (2003).
[84] Id. at 10704.
[85] Id at 10720.
[86] Id at 10710.
[87] Actions can also of course brought by individuals. Even if the cost rules were rewritten so that each side bore its own costs, however, the costs of one's own lawyers remains high, which acts as a natural deterrent to

9. A recent study is valuable for these purposes: the de Sadeleer Study[89]. Prior to the Milieu Study, the de Sadeleer Study was the most thorough study on barriers to environmental justice (and arguably it remains so on the numbers of civil cases in the eight Member States studied). The study's authors observe that:

    i. *[e]ven in countries which provide as a matter of law for a very broad access to the courts in environmental matters, the actual number of cases brought by NGOs is limited*.[90]

10. For England and Wales for the period 1995-2001, the de Sadeleer Study finds about 4 cases per year brought by "established environmental NGOs."[91]

11. For the seven countries with fairer cost rules, the number of civil actions was not much higher. The de Sadeleer Study findings show that:

    a) For Denmark, 4 civil cases were brought by NGOs between 1996 and 2002.[92]

    b) For the Netherlands, 4 civil cases were brought by NGOs between 1997 and 2002.[93]

    c) For Portugal, an average of between 2 and 3 civil cases per year were brought by NGOs between 1995 and 2002.[94]

    d) For Belgium, one civil case was brought by NGOs between 1996 and 2001.[95]

    e) For Germany 20 cases per year were brought by NGOs between 1995 and 2001.[96]

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individual actions. We assume that specialist environmental NGOs are the entities most likely to mount legal actions.

[88] Administrative actions may be brought by individuals, are often a way to resolve local disputes, and are not burdensome to the judiciary. Criminal cases are necessarily rarely brought by individuals or charities. Our main analytical interest for present purposes is civil actions.

[89] N. de Sadeleer, G. Roller and M. Dross, *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Groningen 2005).

[90] Ibid., at p. 167.

[91] Ibid., at p. 157, table 1. There were a smaller number brought by 'ad hoc identifiable NGO/environmental groupings', and more brought by individual claimants. Ibid. The study of the England and Wales system in de Sadeleer Study is particularly helpful in breaking down NGO actions into those brought by 'established NGOs', and those brought by 'ad hoc identifiable NGO/environmental groupings ('such as Surfers Against Sewage and The Crystal Palace Campaign') *ibid*. at n. 119. This distinction, which is not carried through in all the country studies, is useful because, once again, it is the established NGOs who will more likely have the expertise to launch impact litigation.

[92] Ibid., at p. 41. In Denmark, 'quasi-judicial bodies' handled a large number of administrative matters, *ibid* at 166 and n. 9.

[93] Ibid., at p. 110. During the same time, there were many administrative matters.

[94] Ibid., at pp. 108 and 130, reporting 15 civil cases, 41 administrative, and 6 penal cases during the period in which an NGO was a petitioner.

[95] Ibid., at p. 16. de Sadeleer writes that in Belgium [a]dministrative action aimed at preventing environmental harm is much more developed than litigation in the ordinary courts (civil and criminal). Ibid. During the same period, some 101 administrative actions were brought, or about 17 per year. Ibid.

[96] Ibid., at p. 74, n. 43.

f) For Italy, no civil cases are reported in the study for the period. There are 147 administrative cases from 1994 and 2003, or about 15 administrative actions per year.[97]

g) For France, the numbers are more difficult to tease out. Civil and criminal decisions combined for the period 1996-2001 totalled 237.[98] Of these, "[*c]riminal prosecutions were much more common than civil claims*".[99] So civil actions, though the precise count is not clear, cannot be very numerous.[100]

12. If you take the number of civil cases reported in the de Sadeleer Study as analysed above, and average them over the countries studied, how many cases are brought each year by recognized NGOs during the period studied? Fewer than 5 per year.

13. The authors of the de Sadeleer Study offer several observations on the value of citizen access to the courts:

i. 'The existing enforcement deficit with regard to environmental law could be tackled more successfully if more extensive litigation rights were conferred on NGOs'.[101]

ii. *'[L]itigation rights of environmental associations contribute to the democratic endeavours of the Aarhus convention….'.*[102]

14. The possibility for environmental associations to bring actions in the courts will generate public attention. Even if the response of the public in some cases might be to criticize the fact that a lawsuit was brought or the outcome of the actual court decision, the fact that the public is thereby informed on environmental issues may in itself be seen as a benefit of a legal action.[103]

15. In addition, the Sullivan Report confirms the conclusions drawn above from the de Sadeleer Study. Thus, the Sullivan Report states: *'It would therefore appear that the number of cases that may be affected by the conclusions of this report will not be unduly high, and it needs to be seen against the much larger number of judicial review applications handled by the Administrative Court as a whole. In 2005, 1,981 applications for permission (excluding immigration and criminal cases) were received, of which 412 were granted... It may be argued that the number of environmental cases pursued each year will substantially increase if costs barriers were removed or alleviated in the way we have suggested. However, the Working Group has found no basis for the 'floodgates' argument. Judicial review is not undertaken lightly by individuals or NGOs, and such cases are resource intensive and inherently high risk. It is essentially a remedy of last resort in every sense. Our judgment is*

[97] Ibid., at p. 90, table 1. Interestingly, of these 147 administrative actions, 133 were brought by 4 'recognized environmental organizations.'
[98] Ibid., at p. 59. These are the cases in the French ordinary courts. Under French law,'[c]riminal law provides for numerous offences against environmental law (though none has the status of a crime'. Ibid., at p. 52. That is, many penalty-generating offences come under criminal jurisdiction. Ibid
[99] Ibid., at p. 59. The study also reports some 954 administrative actions during this time, of which '40% focus on environmental matters as against 60% dealing with town planning.' Ibid., at p. 58.
[100] For present purposes we need to assign a value to the number of civil cases. We will assume that being 'much less common' than criminal cases, there were 70 civil cases out of the 237 combined group of cases.
[101] de Sadeleer et al. at p. 177.
[102] Ibid.
[103] Ibid., at p. 178.

that there would be a modest increase in environmental applications, but, particularly if our recommendations concerning improved case management were adopted, not so large that they could not be handled by the Administrative Court.[104]

[104] At p. 33, paras 105-106.