IN THE COURT OF APPEAL (CIVIL DIVISION) **CASE No.20150340**
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

BETWEEN:

THE QUEEN

(On the application of

BLUE GREEN LONDON PLAN (as GRAHAM STEVENS))

Appellant

-and-

(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS
(2) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Respondents

-and-

THAMES WATER UTILITIES LIMITED

1st Interested Party

-and-

SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

2nd Interested Party

APPLICATION FOR PERMISSION TO APPEAL TO THE COURT OF APPEAL AGAINST THE REFUSAL BY THE HIGH COURT TO GRANT PERMISSION TO APPLY FOR JUDICIAL REVIEW

SKELETON ARGUMENT FOR BLUE GREEN LONDON PLAN
(draft for 27. February 2015)

Introduction

1. The Claimant seeks to challenge the decision of the Secretaries of State ("SsoS ") dated 12th September 2014 to make the Thames Water Utilities Limited (Thames Tideway Tunnel)

Development Consent Order 2014 (the "Order" or "DCO"). It is claimed the SsoS's accompanying letter, inviting Interested Persons (PB, tab B2 pB17 para 161- Annex C) to challenge their decision, as given in bad faith, therefore unlawfully, thereby void and a nullity, to be substituted by the Court under CPR 54. 19(2)(b) with its own decision to Order a 'Blue Green London Plan' '*...as the only substantive decision capable of being made and a waste of time sending back to decision-making body.' per May LJ, R (on the Application of Dhadly) v London Borough of Greenwich [2001] EWCA Civ 1822 para 16 (Ch 8.A, R. Moules, Environmental Judicial Review p148)("RM, EJR")*

2. The Order grants development consent under the Planning Act 2008 (the "2008 Act" Nationally Significant Infrastructure Projects ("NSIPs")) for the construction and operation by the Interested Party ("Thames Water Utilities Limited" ("TWUL")) of a waste water scheme in London known as the Thames Tideway Tunnel (the "TTT") at a cost in excess of £4.1Billion (2011 prices), to be completed some time after 2023. The SsoS, however, 'shut their ears' *British Oxygen Co v Minister of Technology [1971] A.C. 610. (V1, p71 para 6 - p72 para2)* to the 'significance' of the new water industry (PB, tab B2 pB14-15). The evidence shows that at no time, from 26 January 2007 onwards, (V1, tab 29, p596 para 20) did the SsoS have any intention of considering any challenge from the public as to a better solution than their NSIP for London, the UK and Europe, up to and including their invitation at Annex C.

3. Permission to apply for judicial review was refused as both the SsoS and the IP claimed the Application must be dismissed (PB, tab3 pB22) as:

> ' (i) the claim has been brought out of time and
>
> (ii) it is unarguable.'

4. It is only the first, argument (i), the Appeal is against, as it will necessarily lead to considering the second as a reconsideration for permission. The judge held he only had jurisdiction of the Planning Court to find on the first question. In his Judgement on 15 January, (yet to be approved)delivered after lunch, Mr Justice Ouseley found the UK had made an error of law in not properly transposing and following the Aarhus Convention (V2, tab 42) in the newly created Planning Court (CPR 54.21). The SsoS informed the Court they had immediately corrected Planning Court procedure during the lunch recess, following the morning arguments.

5. The Planning Act currently reads that the claim form must be:

> *'filed during the period of 6 weeks beginning with ... the day on which the order granting development consent is published'.*

The Criminal Justice and Courts Bill, which is almost at the point of Royal Assent, will amend the deadline in the Planning Act (and several other acts). Section 91(4)(c) will change the above text to the claim form. It must now read:

> *'filed before the end of the period of 6 weeks beginning with the day after ... the day on which the order granting development consent is published'.*

6. It was held that this did not help the claimant as the SsoS's error of law in not following the Aarhus Convention did not allow the judge to accept the arguments on the particular circumstances

of the case made by the claimant under UK, EU and ECHR law, as argued by the initiating Judge under *Barker v Hambleton District Council[2012] EWCA Civ 610.* (PB, tab B6 pB79-81)

Ground 1 of Appeal

7. Arguments are made on claim form N461 that the DCO contravenes the Aarhus Convention (PB, tab 1, pB3 s.6, 10) and section 10 'Application to extend the time limit for filing the claim form' was left blank, but implied an offer. The Claimant's subsequent s.10 Application (PB, tab B5, pB62, paras 1-17, 20-26) arguments and the supporting evidence in the Claimant's 'Request for a Preliminary Reference to the Court of Justice of the European Union' submitted to the Examination Authority's public consultation on which the SsoS's DCO was based ("ExA") (PB, p B68-B75) are repeated here.

8. The Claimant's arguments in his 'Request... for Reconsideration (PB, tab 7, pB84 - B91) are repeated here, particularly at para 13.'48'; EU (principle of effectiveness) and 26. Only a Blue Green London Plan remains necessary to integrate air, water and energy infrastructure...

9. The Claimant's arguments for the hearing of 15-16 January 2015 Paras 1-7, 17-20 are repeated here. (to be inserted in the Bundle as B'180-185)

10. The case involves *'a breach of the most elementary principle of natural justice, the right to be heard'* and Munby LJ confirmed *'the jurisdiction which is here invoked is exercisable even if the tribunal has behaved with complete propriety' R (Harrison) v Birmingham Magistrates' Court [2011] EWCA Civ 332 . (13.3.3 n3 Judicial Review, Supperstone 5th Ed)(JR, S5th)*

11. For the SsoS to invite Claim form N61 section 6 Aarhus Convention claims for permission to apply for judicial review by a date not *'sufficiently clear to be understood by persons subject to them' R (B) v Chief Constable of Avon & Somerset [2001] All ER 5,* raises the question of vagueness, uncertainty and procedural impropriety in unfairly taking advantage of Interested Parties, who are Aarhus litigants in person without legal advisors, *'the test for the court is to resolve whether the words used are too vague or uncertain' (13.4.2 JR, S5th)*

12. Judicial review against a development consent order

' can only be brought under s.118(1)(b)

if the claim form is filed during the period of 6 weeks beginning with (i) the day on which the order is published'

Whereas the SsoS's decision letter reads: 'the period of 6 weeks from the date when the order...' 'from' implying 'following', or 'after' in the ordinary meaning of words which the claimant complied with.

13. As the SsoS had consistently 'shut their ears' to publicly available expert advice on the new water industry over a period of 3 years, showing no intent of considering any EU or UK expertise other than that of government departments or the Applicant TWUL, *'the SsoS were not giving effect to Parliamentary intention.'* in issuing their DCO letter in bad faith by using vague and unclear terms. *' Parliament is to be presumed not to have intended to authorise the subordinate legislation authority to make changes in the existing law which are uncertain.' per Diplock LJ Mixnam's Properties Ltd v Chertsey Urban District Council [1964] 1 QB 214 at 237 - 238 '* the SsoS's claim

and the judges finding that the Claim Form had been 'filed out of time' is thereby bound to be *'held void for uncertainty' per Wilmer LJ (13.4.4 n1,2, Judicial Review, Supperstone 5th Ed)*

14. ' vagueness is a ground for judicial review' in itself, *R (Wheeler) v Metropolitan Police Association [2008] EWHC 439*, *(13.4.5 JR, S5th)* and under the principle of certainty, in the common law for legality, in European law and The European Convention on Human Rights. Lack of certainty is also a ground for judicial review *R (Gul) v SsoS for Justice [2014] EWHC 373 (Admin) at [53] - [58] (13.4.1 n.6, JR, S5th)*

15. Ground 1 of Appeal is that had he done so at the oral hearing during argument, the judge, by referring back to the LIP's earlier lodged arguments and reconsidering them, would have been able to find he had the jurisdiction to make a judgement on the particular circumstances of the case, as the unlawfulness of the procedural rule of the Court had been identified. The SsoS and the IP would have been bound to accept and withdraw their first ground, allowing the SsoS's second ground, that the claim seeking permission to apply for judicial review was unarguable, to be heard.

16. The Claimant had argued the corruption of court procedure by the SsoS's imprecision entitled the right to be heard to be immediately reinstated under the particular circumstances of the Claimant taking the SsoS to be using the ordinary meaning of words. *R (Greenpeace) v SoS for Trade and Industry [2007} EWHC 311 (Admin), [2007] Env LR 29* is distinguished, as the *" decision was of ...preliminary nature...not just clearly and radically wrong,.. to require the intervention of the court at this stage ...the error of law could be remedied at a later stage"* as could not have been the case in the court system, with "day on" having to be immediately replaced with "day after", as was done by the SsoS during the lunch break.

17. The question for the Court of Appeal is whether Blue Green London Plan, as an Aarhus claim under Direct Effect of the EIA Directive, has a right to be heard in the new Planning Court after faithfully following instructions of the SsoS on the claim form. And as promised by the Examining Authority of the Planning Inspectorate, on behalf of the SsoS, in their documents *'Advice Notes 8.1-5 ( )and meetings, from April 2012 onwards, for public participation by Interested Parties in their decision-making procedure for the Thames Tideway Tunnel planning Application. Alternatively, whether the SsoS consistently acted in bad faith in consulting the public.

18. The ECJ held in *Kraaijeveld v Gedeputeerde Staten van Zuid-Holland [1996] ECR I - 5403 Case C-72/95, para 56 (RM Ch 16 EJR p298)*

'As regards the right of an individual to invoke a directive and of the national court to take it into consideration... it would be incompatible with the binding effect attributed to a directive by Article 189 [now 288 TFEU] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from the relying on it before the national courts.'

19. The subsequent case of *Case C - 435/97, WWF v Autonome Provinz Bozen [1999] ECR I - 5613 para71 (RM Ch 16 EJR p298)* held:

'*Articles 4(2) and 2(1) of the Directive are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislation or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, it is for the authorities of the Member State to take, according to their relevant powers , all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment, and if so, to ensure that they are subject to an impact assessment.'*
Refusing to apply EIA direct effect is another ground for judicial review.

20. The 'significant' effects on the environment the claimant is calling upon the SsoS, and now the Planning Court to mandate the examination of, are those differences in effect between the Tunnel project and a Blue Green London Plan, as held by the CJEU in their Judgement C- 310, to include climate change effects in line with Parliament's Climate Change Act 2004.

21. The DCO being made for an application is the last chance to object. The SsoS claiming the claim form had been filed out of time is further evidence that they had no intention of listening to any expert evidence given on their invitation under the Aarhus Convention. The SsoS knew they had "shut their ears" to the law requiring comparison with Blue Green technologies, therefore had not satisfied the legal requirements of balancing the benefits of the dictated Tunnel against chosen Blue Green solutions. Not properly considering public rights or less public rights or even practically impossible rights to enforce, while under the Direct Effect of the EIA Directive is
"...Different if the failure relates to what I described in arguments as a 'show stopper' that is a policy or factual consideration which makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether without further ado.. failure to reopen consultation on new aspects of Climate Change was not a show stopper...bad faith or manifest absurdity is.' R (Greenpeace) v SoS note108 para 54

22. The advantage to the Court in allocating time and resources in relation to the importance of the case under the CPR , the relevant parts of which now have to be law in the Planning Court, is that the UK would not have to be declared to be refusing to apply EU law under the Treaty, as under Subsidiarity, the UK court has the jurisdiction to judge the particular circumstances in this case and grant permission to apply for Judicial Review.

23. Refusal to follow EU Treaty law *In Re McFarland [2004] UKHL 17 [2004] 1 WLR 1289 at [7]*
Lord Bingham *"Just as the courts must apply acts of parliament whether they approve of them or not, and give effect to lawful official decisions whether they agree with them or not, so Parliament and the executive must respect judicial decisions whether they approve of them or not, unless and until they are set aside" (13.1.3 M Fordham, Judicial Review Handbook 6th Ed)(MF, JRH6th)*

Technical summary for the Court.

24. Global warming was first calculated by Nobel Laureat Svante Arrhenius in 1898; that if CO2 in the atmosphere doubled, global mean temperature at the Earth surface would increase by 4oC. The 'Keeling curve' has been recording atmospheric CO2 rise since 1958, it now stands at 400ppm, from 280ppm in the 1750's. Global surface temperature has risen 1oC. The water cycle transforms

through solid, liquid and gas phases as it transports water and nutrients through the air, land, sea and biosphere, interacting with photon energy from the sun to become an energy source (eg steam engines or biomass). Photon energy arriving at the Earth surface in 3 days is equivalent to all the coal, oil, and gas gas underground.

25. The Victorian engineer Sir joseph Bazelgette acknowledged that combining rainwater runoff with sewage was the second best technical knowledge for his system of Combined Sewage Overflow ("CSO").

26. **The 'significant' change not understood by the SsoS, (as they 'shut their ears').** The blue green water industry technologies are designed using systems theory to realize best performance in integrated. infrastructure. They are predominately above ground not under, and comprise of a wide mix of smaller scale technologies distributed locally over the whole surface area of London, much of it already in place, including natural vegetation and 'ecosystem services', rather than a single, large scale capital project, and may be implemented incrementally and continuously, as infrastructure updating and maintenance. Best technical knowledge may be integrated as it advances, including, for example, economic theory for financial performance and customer benefit. Most significantly, it integrates large numbers of low and high skilled local jobs with advanced technical knowledge to make all infrastructure productive in growing the national economy and reversing global warming.

Ground 2 of Appeal

27. In making their 'out of time' argument in bad faith, the SsoS had no longer observed the Constitutional Separation of Powers that the LCJ Woolf had warned of in a danger leading to 'elective dictatorship'. (B p) The Planning Court had been incorrectly designed to be an instrument of the SsoS, taking away the Claimant's CPR rights and giving the judge no jurisdiction to find against the SsoS, an error of law under the Direct Effect of the EIA Directive and Aarhus Convention, which places reliance in the Treaty on each Member State maintaining its separation of powers for decisions under Subsidiarity.

28. Inconsequence of SsoS shutting their ears' they had not understood the design effectiveness of the new water industry.

29. LCJ Wolf 'elective dictatorship' may be made up of smaller. initiating forms; 'corporate dictatorship', 'Dictatorship of monopoly distortion with maximum consumer loss' 'infrastructure dictatorship' initiated by unfair courts, DCO's for an improper purpose of extending corporate monopoly under guise of UWWTD compliance. As it is of key importance to national security, it is in the public interest to be argued in open court.

30. This is the 'show stopper', as it allowed the SsoS to make a decision in bad faith and which was clearly a manifest absurdity in the context of the ever greater urgency to apply Parliament's will in it's Climate Change Act. Only a Wednesbury unreasonable or biased mind denying the dis-benefits of Climate Change could refuse the far greater benefits of Blue Green technologies in their 2 stage balancing procedure of the SEA, ExA under the NPS and the SsoS DCO decision. Blue Green technologies can reverse Global Warming.

31.'*The duty of a public body invested with statutory powers to act reasonably was 'involved in' its duty to act in good faith... in order to establish lack of good faith it had to be shown that the Corporation were intent upon achieving an improper purpose 'under colour and pretence' of a proper purpose. Lord Macnaghten* Westminster Corpn v London and North Western Railway[1905] AC426,430 *(13.2.1 JR, S5th)*

32. 'A decision in bad faith will be a nullity' Lord Reid in Anisminic Ltd v Foreign Compensation Commission[1969] 2 AC 147,171 *(13.2.1 n2 JR, S5th)* as it acts outwith and has not given effect to the Parliamentary intention, presumed in 'good faith'.*(13.2.2 JR, S5th)*

33. Khan (Bagga) v SoS for the Home Department [1987] Imm AR 543, 555, *Bingham LJ ' If a procedural mishap occurs as a result of misunderstanding, confusion, failure of communication, or even perhaps inefficiency, and the result is to deny justice to an applicant, I should be very sorry to hold that the remedy of judicial review was not available' (13.2.1 JR, S5th)* relied on in Amao v Nursing and Midwifery Council [2014]EWHC 147 (Admin)

34. The SsoS's Decision to object to the Court hearing the Claimant present the expert advice is perverse in the Wednesbury sense. No reasonable person would prefer not to hear cost benefits of a demonstrated proportion of a new $10 Trillion market for Blue Green technologies compared to £180m, Prof Binnie's estimate of the tunnel's benefits.

35. *R v HM Treasury, ExParte Smedley [1985] QB 657, 666C-D* Sir John Donaldson MR *" it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to ultimate rights of Parliament.....I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing upon the province of the courts" (13.1.3 MF, JRH6th)*

36. In these circumstances the LIP would ask the court to dismiss the SsoS's first argument as an error of law, or, in the alternative, void and a nullity as not being given in a properly constituted court.

Evidence

37. The extensive evidence for the SsoS using the Planning Court as an unseparated instrument of Parliament can be found in the conduct of the SsoS's with the IP TWUL from the inception of the Project in 2000, as argued in the Claimant's substantive arguments, to be heard later. This is now also put in evidence for the unlawfulness of essential legal aspects of the decision making process from 2007, corrupting the design and operation of the Planning Court and it's decisions, specifically:

38. The unlawful decision to announce a solution to the CJEU before consulting the public.

39. Throughout the design and timing of the consultation to omit meaningful consultation with the public to enable them to properly consider the alternative of a Blue Green London Plan, persuading them to wait until the opportunity for Judicial Review to make the arguments in a court.

40. Designing the EIA to omit informing the public of the Climate Change Act context of high air pollution with PM10 and 2.5 and greenhouse gases, omitting quantifying information on blue green technologies demonstrating superior benefits in reducing such pollution.

41. With the oxymoron of only one choice of a Tunnel for the public to choose in the 2 public consultations,

42. omitting integration of the public consultation for the NPS on Water with Justine Greening MP's Thames Tunnel Working Group, from 2011 onwards.

43. Designing the NPS specifically to exclude the significant change in the water industry; Blue Green technologies.

44. The refusal of the SsoS to call in the NPS by 'shutting his ears' to leading expert advice worldwide that a new water industry had arrived,

45. with economic benefits for local authorities, London and the national economy far outweighing any from the Tunnel.

46. In persistently refusing to take legal advice from the CJEU on how to comply with the UWWTD using BATNEEC, accepting SecondBATKNEEC.

47. In "Shutting their ears" to comparative Blue Green BATKNEEC from Philadelphia, New York, Portland, Singapore, Copenhagen and worldwide implementation of Blue Green technologies generally.

48. In refusing to release information held by the Environment Agency that the Thames was already compliant with the UWWTD, subsequently released by Prof Chris Binnie and Lord Berkeley.

49. Refusing to follow design advice contained in the EU Commission 'Blueprint for Water'.

50. In summary, setting up courts to 'Shut their ears' to the Blue Green Independent Expert Team and other's advice to compare and balance the benefits of BATKNEEC applied to a Blue Green London Plan under the Planning Act, for example, s104(7).

51. The SsoS had embedded bias into the decision making procedure of court procedure and their balancing exercise of the dictatorship of infrastructure verses public participation in the design of legal and water systems, and so was able to refuse acceptance of an application for permission to judicially review the SsoS's DCO.

52. On the allowing of this Appeal under his European rights, the Claimant will continue with his substantive arguments on the errors of law in the SsoS's DCO.

Further developments since start of claim

53. 'Putin ready to turning off Europe's gas supply' The Times 26 February 2015. MI5 may still be advising the SsoS that Blue green technologies are 'against the economic interests of the country'. (Skeleton Argument 15 January 20150). The UK and Europe need infrastructure policy to ensure energy security, which it could have had by now by starting in 1975.

54. ‘Charles: treat the planet like a sick patient’ Front Page headline, London Evening Standard 25 February 2015. ‘The Prince of Wales... in a keynote speech to the Royal Society will today urge health practitioners to be bolder about highlighting the links between the effects of climate change on clean air, water and our wellbeing’ London Evening Standard 25 February 2015. HRH The Prince of Wales illustrated his Dimbleby Lecture some years ago by holding up the Claimant’s ‘atmospheric water condenser membrane’, the subject of MI5’s concern in 1974.

55. ‘Our six-point plan to make London the world’s greatest city’ by Chancellor George Osbourne and Mayor Boris Johnson. Comment feature article, Evening Standard 20 February 2015.
‘The final part of our Long Term Economic Plan for London is to give more power to Londoners to control their city’s future, with new powers for the Mayor to support economic growth and skills as well as new planning powers’

56. A cross-party coalition has agreed a non partisan approach. ‘Climate change is more than an environmental issue. Global Warming affects the economy, migration and living standards too, says Labour Leader Ed Miliband.’ Comment feature article, The Observer 22 February 2015.
*‘ As the floods in Britain showed last year, this is an issue of national - as well as global - security. We must be guided by the science, which shows that emissions are higher than anticipated and some effects are coming through more quickly than foreseen. As the IPCC has said, if the world is to hold warming below 2C, global emissions need to peak not long after 2020... A strong coalition...agreement ... *emission targets...based on scientific assessment... *A goal of net zero global emissions in the second half of this century. *Transparent, universal rules for measuring, verifying and reporting emissions with all countries adopting climate change adaption plans...’*

57. The relevant issue for this case is: can these last two policy statements be credible to London water bill payers with the SsoS’s coalition DCO decision and as new Planning Court powers take away Aarhus Convention and EIA Directive participation rights from Londoners in defiance of European law and with still no Blue Green London Plan? Governments have more legal accountability than advertisers.

58. On dismissal of the SsoS and IP’s first argument the court would then be able to hear the substantial arguments to grant permission to apply for judicial review under the original 4 Grounds for an arguable case.

59. In the alternative the Claimant renews his Request for a Preliminary Reference to the Court of Justice of the European Union (CJEU) (PB, p B68-B75), made to the Examining Authority but without answer before the DCO.

60. For the high importance of the arguments expressed above, however inadequately formulated in legal terms, under the purpose of the Aarhus Convention, and with apologies for the odious task of wading through a LIP’s arguments, Blue Green London Plan humbly asks for the consideration of the Court.

61. As the approved Judgement or transcripts have not yet been released, this skeleton argument is submitted in draft to be updated and improved on receipt of the Judgement for the Court’s convenience.

62. The intention of the Blue Green parties is to seek a case management conference to best decide how to combine arguments of all parties making application for permission in the wider public interest and to keep court time and cost to the minimum.

Graham Stevens IP LIP

Friday, 27 February 2015