IN THE COURT Of APPEAL (CIVIL DIVISION) **CASE No.20150340A**
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

PERMISSION TO APPLY TO REOPEN FINAL APPEAL

SUPPLEMENTARY SKELETON ARGUMENT
including Further Developments to 22 September 2015

Introduction

1. Water is the most important phase change material effecting climate change, making water infrastructure technology best to mitigate, adapt and reverse global warming.

Permission to Reopen the Final Appeal should be granted as:

(i) the claim was brought in time (incl. ROB 9 p103-8 paras 1,3-6,9,14,22-24.) (GB B7 pB85 paras 5- 23 NB ppB86-7 para 12-15)
(ii) the case raises a point of law of general public importance (GB tab5 ppB62 para 22-25, tab5.i,ii.,iii, ppB68, B75, B77)
(iii) the result of the proceedings are so significant (GB tab5.i ppB68 para 8.on)
(iv) earlier Supreme Court considerations outweigh those of the Court of Appeal (GB GB tab5.i ppB68 para 7.)
(v) the claim is arguable ((GB tabB7 pB82 para13)
(vi) for reasons of exceptional public interest

2. The Application is supported by a bundle in 3 parts; the Applicant's Reopen Bundle "ROB" (coloured blue), that provided in assistance by the Government Legal Department "GB" (formerly Treasury Solicitor) on behalf of the SsoS, and files from the High Court Bundle "HCB", provided by Thames Water Utilities Ltd "TWUL", the Interested Party, for the 4 original Judicial Review claimants together, by their solicitors Berwin Leighton Paisner "BLP".

3. The Secretary of State for Energy and Climate Change "SoSDECC" did 'not wish to be added as an interested party' to appear for The Queen, on the application of Blue Green London Plan, under the Climate Change Act ('CCA"), Urban Waste Water Treatment Directive ("UWWTD"), Environmental Impact Assessment Directive ("EIAD") or the Aarhus Convention ("Aarhus")(ROB 10 p116 para 6) . That request is now for an Amicus Curiae in the public interest, such assistance will ensure my claim is properly arguable in law under Aarhus. (ROB 10 p116-118 para 4-14)

The claim was brought in time

4. Applying Mr Justice Lewis's 2 March 2015 finding of Parliament's intention (ROB tab.......), on proper constitutional interpretation my application was in time (ROB tab 9 pp103-8, N.B. paras 3-5) and overrules, under EIAD Direct Effect with Aarhus, all legal points on procedure and so far considered by the courts in this case, including the Secretaries of State's (SsoS's), the Interested Party TWUL's, Lewis J's 10 December 2014 Order, Mr Justice Ouseley and Lord Justice Sales' Judgements; holding the court had no jurisdiction, and could not create one, to hear my substantive arguments; that my Aarhus altruistic application was submitted out of time on 24, instead of 23, October 2014 as required by Section 118 (1)(b)(i) of the Planning Act 2008.

5. The SsoS confirmed in reply to Ouseley J that they had no objection if it were possible in law, to accept my application was in time, if that were Parliament's intention. ("GB" tab 22, Hearing Transcript, from Mr Harwood's last paragraph to my end statement)

6. As Lord Denning MR held, (ROB 9 para 14) it may be argued either way, but to be fair in all the circumstances and in equity, it would be wrong to favour the SsoS, who would thereby benefit from their wrongdoing, against an altruistic Aarhus LIP non-lawyer claimant,

7. Further, on the common law constitutional principle of legality, a fundamental right of access to justice to put evidence vital in the public interest and not over riding some basic tenet of the common law:

'where if Parliament is to legislate so as to deny or frustrate what the law recognises as a fundamental or constitutional right, the courts will look for specific provision or necessary implication to that effect ' *Sheffield City Council v Smart [2002] EWCA CIv 4 [2002] HLR639 at [42]* per Lord Reed.

In the Planning Act it is clear Parliament intended no such denial or frustration.

Further Facts on the '*one short but important point'*

8. The approved Judgment of Lord Justice Sales ("SJ", ROB 5 pp69-77), emailed from the Civil Appeal Office on 28 August 2015, confirms that he gave no reason for dismissing my skeleton

argument of 13 March 2015 (ROB 9), which argued Lewis J's Judgement reasoning "*The application raises one short but important point of statutory construction"* which during the hearing, I twice understood Sales LJ to have confirmed he accepted I had won.

9. The misunderstanding in court set out at para 1-5 of my 30 June 2015 grounds to reopen the appeal (ROB tab 1 pp3-5) are confirmed in Sales LJ's Judgement (ROB tab 5 pp8-9 para 24-32). In consequence of not receiving or being informed of Lord Justice Sullivan's directions-in-reply, to my submissions up to 5 June, until 23 June, the evening before the Hearing on 24 June, it was made impossible to comply and file further submissions to the court by 22 June, as directed by Sullivan LJ.

10. "*49. Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that art. 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law."* (GB B7 pB87 para 13 et al) also confirmed under Direct Effect of Art 11. of the Environmental Impact Directive (ROB p116 para 5b). The impossibility of compliance with Sullivan LJ's directions made the unfair hearing a real injustice, as argued in ground 1 (ROB p5 para 6(a)), denying access to a review procedure in order to exercise my right to apply for permission for judicial review.

11. "*Member States are responsible for ensuring that those rights are effectively protected in each case"* (HCB tab 7 pp B86-7 para 12-15pp) and *(*ROB tab10 p116 para 5). In rewriting the statute and issuing an unlawful invitation for judicial review in bad faith, the SsoS failed in their duty to protect my rights in this particular case.

12. We were in consequence talking at complete cross purposes in the court. Sales LJ was following Sullivan LJ's directions while I was arguing from my 13 March 2015 Skeleton. On 28 August I discovered Sales LJ was referring to winning my 'first point' as granting an extension of time, which I had written to the court on the morning of the hearing to say it would be clearly unfair to argue anything except my submissions filed up to 8.17am on 24 June; the day of the 9.30am Hearing. In particular as the Judges, Defendant's and TWUL had been maintaining for 8 months that the court had no jurisdiction to hear Sullivan LJ's directions I had requested *'whether the claim, if in time, is arguable and whether the permission to appeal or to apply for judicial review should be granted'.*

13. I have no acceptable explanation as to why or how Sullivan LJ's directions failed to reach me. From my correspondence with the Thames Blue Green Economy "TBGE", with whom I share common ground, and their legal team, I had assumed TWUL's solicitors, BLP, had simply been informed that Sullivan LJ had been assigned as judge. His directions were evidently issued to BLP between 5 and 16 June 2015, as I received the listing on 16th from CA Office, BLP refers to them on the 17th and I request a copy on the 18th, in exchange for sending to BLP my original request on 5 June 2015 for a judge (Sullivan LJ) to remake the decision of the Civil Appeals case management team.

The case raises a point of law of general public importance:

14. *"Equity will not allow a statute to be used as an instrument of fraud"*per Lord Eldon, <u>*Mastaer v Gillespie (1805) 11 Ves 621*</u> (ROB p6 para 12, GB tab5 ppB62 para 22-25, tab5.i,ii.,iii,

ppB68,B75,B77) How government and their lawyers process information with policy is of general public importance, in particular when attempting to avoid the Rule of Law.

15. In this case the Planning Act 2008 was used by government to construct the National Policy Statement for Waste Water ("NPS") as an instrument of fraud in:

(i) issuing the unlawful and untimely invitation in bad faith, denying over 8 million water customers of independent expert information in the public interest. (OJ *[2015] EWHC 495 (Admin)* ROB tab 14 pp151-3 para 47-67)

(ii) using the National Policy Statement for Waste Water ("NPS") as an instrument of fraud under the statute to avoid public consideration of a Blue Green London Plan, defrauding the UK, EU and all potential customers of the land, cost of unnecessary construction, a timely solution to Climate Change (including air and water pollution) and/or potential jobs involved in a chance to invest in the new Blue Green water industry. (ROB p55-58, HCB 'Witness Statement of Mr Ian Fletcher on behalf of the 1st Interested Party', tab 13 p585-586, ROB tab 4 10. p61-68 and tab 4 3. p35-36 para 26-29)

16. Using policy as an instrument of fraud in the particular political context binds the court in such exceptional circumstances to interpret Parliament's intention under the Act, EIA Directive and Aarhus Convention, as to hold the claim form was submitted within time on 24 October 2014 and reopen the appeal.

17. To avoid the real injustice of requiring the impossible; requiring the Aarhus claimant on 23 June 2015 to provide further submissions to the court to be filed by 22 June 2015, the case must be referred back to the High Court, as Natalie Lieven QC argued (ROB tab13 p137 para13), or the Court of Appeal substitute its own Order. (ROB tab 9 p104 para1)

The result of the proceedings are so significant

18. The Parliamentary Under Secretary replied to the Request to Review the NPS covering the 'Nationally Significant Infrastructure Project' "NSIP"of 28 November 2013 (PPL05) " I have considered your request carefully. Given the findings of the reviews carried out since publication of the NPS, however, I do not consider there has been a significant change in circumstances on the basis of which the Thames Tideway Tunnel policy was decided which would justify a review." (GB tab5.i ppB68 para 8.on). This key evidence, that the SsoS continued to 'shut their ears' for 5 years to expertise on 'blue green' technologies, and therefore could not possibly have understood the significance of change in circumstances before their 12 September 2014 DCO decision, has yet to be considered by a court.

19. The SsoS may yet understand the significance of that change if they listen to independent expert advice in evidence presented to the Supreme Court resulting in an Air Quality London Plan *R (on the application of ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs [2013] UKSC 25*. (GB tab B5.i. B68 para7, ROB.........} The court may grant a certificate for a hearing by the supreme court if it sees fit .

20. The significance is also to determine whether experts or lawyers decide between a dictated Tunnel or Blue Green London Plan based on public consultation with expert Best Technology Not Entailing Excessive Costs (BATKNEEC) required by the UWWTD. This case will review how best technology is continually incorporated into the Climate Change Act in the public interest (GB B68 para 24, ROB p55), decreasing deaths from pollution and increasing life expectancy. Experts know better which design solution complies with UWWT and EIA Directives as lawyers know best how to incorporate it, both without entailing excessive cost.

Earlier Supreme Court considerations outweigh those of the Court of Appeal.

21. Earlier consideration by the Supreme Court of evidence showing systemic technical, environmental and fiscal fraud in progress; BGLP has common ground with *ClientEarth v SoSEFRA[2013] UKSC 25 On appeal from: [2012] EWCA Civ 897* per Lord Carnwath at para 38-40. (GB B5 pB62 paras 22-25, B5.i. pB68 para 7., Bluegreenuk.com GAI21). The Order of the Supreme Court to make an Air Quality London Plan in compliance with the CJEU ruling by December 2015, now begun by US, UK and EU actions against the Volkswagen defeat device fraud worldwide. It only remains necessary to integrate this into a Blue Green London Plan as requested in remedy (GB B1 section 7)

22. The SsoS's conduct of the case, not disclosing to the court that Parliament intended the claim form was in time under Lord Denning MR's ruling is the basis for a wasted costs order (ROB tab 3 p23 paras 8-11).

The claim is arguable

23. BGLP shares common ground with TBGE that the claim is arguable. (ROB tab13 1-4, p137 paras 9-13, p138 paras3,5, (20, 22 April 2015)), resisting TWUL's submission to expedite: *"13. TBGE objects to the case being retained in the Court of Appeal. TWUL's interest in obtaining a quick decision would be guaranteed by an order to expedite; there is no need for the case also to be heard in the Court of Appeal. This would also deprive the TBGE of a right of appeal to the Court of Appeal should it not succeed at first instance..."*

24. And on arguability:*"11. This is a matter of statutory interpretation. To succeed, TWUL and the Secretaries of State must show that these considerations were irrelevant as a matter of law and that the scheme of the 2008 Act prevents a decision-maker from taking them into account. This is because this is the basis on which the SsoS and Panel refused to hear the evidence (see paragraph 33 of the judgment)."* (SsoS added)

25. The Ssos and TWUL have replied my claims are unarguable. Judgment is bound to find for the possible over the impossible, as under direct effect Member States '*50. It follows that ... it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in art. 9(3) of the Aarhus Convention.'*(GB tabB7 pB86 para13).

26. It is submitted that a purpose of the Aarhus Convention as transposed into the Planning Act 2008, is to reinforce non-lawyer LIPs equitable rights in interpretation of law against favouring government influence and argument, as held in *Padfield* per Upjohn LJ, in order to enable and

encourage public participation and consultation in planning their environment under the Act *EIA Directive 2011/92/EU Articles 1, 2.2, 2.3, 3, 5(c)(d), 6.4, 6.6, 7.4, 8, 11.1(a)(b), 11.5,* (HCB Authorities Vol 3 tab 56 p1459-64) .

27. Ouseley J and Sales LJ were misled in finding the SsoS's invitation clear when it was only clear to the legal profession and, secondly, did not require jurisdiction to be created to extend time or accept the claim was in time, only interpretation of Parliament's intention in good faith. (ROB tab 5 p77 paras 28-31, tab 14 p151 paras 47,52-58). Ouseley J and Sales LJ ought to have distinguished who the SsoS had a duty to be clear to. My UK and EU arguments hold (ROB tab 9) as their duty was to be, *'sufficiently clear to be understood by persons subject to them'* (ROB p110 para 36.) and no rights of the SsoS or TWUL were prejudiced.

28. In refusing permission, Sales LJ was wrong in finding no compelling reason why permission should be granted, for those reasons set out in my new grounds to reopen the Appeal.

29. The new evidence (ROB tab 1 p8-11, tab 2 p22-25, tab 4 pp 27-68) adds further argument to the original 4 grounds (GB ppB9-B13) continuing, together with that of the previously submitted further developments, in that the SsoS's fiscal fraud has now succeeded; with Ofwat issuing contracts in contempt of court (ROB tab 4 pp46-58). Without doubt, under further direction of the court, and legal research, the original 4 grounds may put an arguable cause(s) of action with a high likelihood of success.

30. The NPS defeats the Planning Act 2008, the UWWTD 1991, the EIA Directive with the Aarhus Convention and the European Convention on Human Rights, and therefore may not be used as an instrument of fraud, on the following Grounds.

Ground 1: non compliance with UWWTD, EIAD and TFEU.

31. The SsoS's DCO for the Tunnel failed to comply with the UWWT and EIA Directives in not achieving their objectives pursuant to *Art 191 TFEU* of the Treaty on the functioning of the European Union. The Tunnel design fails to sufficiently take into account the *UWWTD 91/271 Annex 1(A):*

'The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding: volume and characteristics of urban waste water,... limitation of pollution of receiving waters due to storm water overflows.'

32. Further, they failed to consider its true environmental impact, thus defeating the purpose of both Directives by not designing a solution according to the best technical knowledge. *Commission v UK C-301/10 18 October 2012*. (GB B1 para 9-15)

33. The Directives require a water collection and waste water treatment system which

'must... be examined in the light of protecting the environment...to conserve man, flora, soil, water, landscape...'.

To effectively transpose the Directives under subsidiarity the NPS need only to have regulated surface absorption characteristics of storm and urban waste water under the Act, as all that is necessary to provide clean water and environment for London (GB B1 para 9, ROB tab 4 1., 1(a), 8., 10. pp27, 27(a), 59-68), making the SsoS's decision irrational.

Ground 2: Omission of meaningful public consultation.

34. As the UK committed itself to the Tunnel solution on 26 January 2007 *Commission v UK para 20,* it could not possibly offer the public a timely choice in consultation, commissioning Thames Water to offer only one design (HCB Witness Statement of Mr Ian Fletcher on behalf of the 1st Interested Party, tab 13 p585-586) which included false information on competitive solutions and no fair opportunity for the public to understand the true environmental impact of the Tunnel proposal or reject it, in breach of the Act and EIA Directive *R (on the application of Moseley (in substitution of Stirling Deceased)) (AP) (Appellant) v London Borough of Haringey (Respondent)* (GB B2A, p17i document 11).

Ground 3: SsoS Decision.

36. The March 2012 NPS as used by the SsoS as a statutory instrument, defeats the Directives and Treaty to impose an unnecessary Tunnel for which there is no need in a democratic society, for an improper political purpose.

37. The SsoS failed in their duty by shutting their ears to the significance of vital expert information of the new water industry from 26 January 2007 *British Oxygen co v Minister of Technology [1971] A.c. 610.* They therefore failed to understand why Blue Green technologies better comply with the Directives than the Tunnel solution and used the NPS to corrupted the Act when they knew, or ought to have known, it contained false or misleading information that would defraud the London public *Mastaer v Gillespie (1805) 11 Ves 621*.

38. Their defense of being 'unaware of any law' requiring them to exercise their duty to recall the NPS of March 2012 as it was based on false information (as Thamesbank had requested (website Bluegreen.com at PPL05: Request for a review of the National Policy Statement for Waste Water concerning the Thames Tideway Tunnel under S.6 of the Planning Act 2008, 22 October 2013.)) allowed them to use the NPS under the Act as an instrument of fraud.

39. Although 'The lawfulness of an NPS may only be questioned by judicial review proceedings brought within six weeks of publication of the NPS (section 13(1)).' (GB tabB3 pB18 paras 14-21) they remained barred from using it as an instrument of fraud in granting the DCO. A fraudulent NPS is no defense, and is an improper reason for the SsoS's Decision *R v Minister of Agriculture and Fisheries ex p. Padfield [1968] UKHL 1 (14 February 1968)* per Upjohn LJ.

Ground 4: ECHR, HRA

40. The true environmental impact of the Tunnel would be for the UK to remain in breach of the UWWTD and polluting the environment, causing an increase of premature deaths and permanent maiming of children to the extent of reversing life expectancy in London. Family household poverty would increase to a level unnecessary in a democratic society with many inhabitants permanently deprived of their property. This breaches ECHR principles and HRA Articles 2, 8 and

Article 1 of the 1st Protocol. This, together with loss of an opportunity to substantially clean the environment to achieve objectives required by the UWWT and EIA Directives and *Art 191 TFEU ss (1),(2),(3),(4),(a),(c).*,

'not just protecting, but improving the quality of the environment and protection of human health, rational use of human resources... to deal with regional and worldwide problems... in particular, Climate Change.' (ROB tab 4 p27)

For reasons of exceptional public interest in the lawfulness of policy

41. Public consultation on the TTT is of exceptional public interest as it has been identified by experts as the most important political and technical policy decision to ensure a rational transition from the fossil fueled national power system to sustainable energy forms under the *Climate Change Act* (ROB tab 4 p27, 27(a)).

42. The SsoS may now understand the 'significant change in circumstances on the basis of which the Thames Tideway Tunnel policy was decided' if they listen to evidence that a German vehicle manufacturer has secretly and dishonestly developed a transport system which is delivering poison to every 'urban gas chamber' worldwide, formed where most shoppers congregate, resulting in 10,000 fraudulent deaths per year alone in London, making diesel infrastructure the key candidate for the continuous historical rise in life expectancy being reversed in London from 2011. (ROB tab 1 p10 para 3). It is known Blue Green infrastructure delivers, for example, increase in life expectancy (GB 2.i B14), including 40% absorption of diesel particulate matter; PM 10 and 2.5 (Bluegreenuk.com)

43. Ensuring national policy statements are based on true scientific expertise engages law, governance and social media in decisions preventing dictatorship of infrastructure. The present Government may be lawful in reversing it's sustainable policies on wind farms, Carbon Capture and Storage, 'Green Deal' for housing or Photovoltaic Farms, but using the current NPS for an unnecessary Tunnel for political reasons not BTKNEEC is fraudulent, as it is primarily based on false or no longer true technical statements.

44. More than an invitation to challenge the SsoS's decision of 12 September 2014, the resistance of the SsoS to the Rule of Law (ROB tab 4.1.) is a challenge to the courts not to stop the Tunnel on any account as Government has so much political credibility vested in it going ahead, it is asking to corrupt the courts to find against UK and EU law. Political embarrassment is an improper reason to implement an unlawful project *Padfield* per Upjohn LJ.

45. The SsoS's resistance to judicial review is a challenge to the UK legal system for constitutional governance of the country as to whether it has the power to prevent the dictatorship of infrastructure without meaningful public consultation facilitating environmental participation. In the interest of public participation, the Aarhus Convention urges government to welcome the opportunity to judicially review the lawfulness of their actions without bias, but with assistance and cooperation as a non adversarial exercise, in order to be able to develop and adapt an effective Climate Change Act to ever improving climate science.

46. That opportunity was lost by the Secretaries of State and TWUL by circumventing the public consultation, with the consequence that there was minimal comprehension of the importance or

opportunity of combining design of urban infrastructure with climate change, as experts recommend (HCB IPCC 5th Report GB tab 2B pB17(xx) para 4.1) The question is “Can the law prevent implementation of a wrong decision by the SsoS, by ordering the right decision, if the Rule of Law has not been followed? The health and lives of all Londoners depend to varying degrees on the answer.

48. Granting the case permission to apply for judicial review and sending it back to the High Court will signal the SsoS need to recall the NPS to consider the change in circumstance in the water industry. In any event, the interested party TWUL has now allocated £20million to London local authorities, inviting them to make proposals in line with a Blue Green London Plan and the appellant’s remedy. (bluegreenuk.com GB B1 pB3 section 7)

49. A separate complaint has been made to the Advertising Complaints Authority concerning Thames Water alarmist advertising, repeatedly maintaining to the public through the press that 39 million cubic meters of raw sewage flowed into the Thames every year. Annual average overflow volume of sewage heavily diluted with rainwater was estimated at 39 Mm3/year, but after the Lee tunnel is operational next year it is estimated to be 18 Mm3/year. However, the one CSO, West Putney, that was physically measured for 2 years, not theoretically modeled, was found to overestimate flows by 40%. It is unlikely that actual overflows are known with any degree of accuracy.

Conclusion

50. For the above reasons, there is at least an arguable case to answer on statutory and EU Directive interpretation, and, certainly with professional legal assistance to formulate the claims according to law, a good chance of succeeding. I therefore ask the Court to re-open the Appeal in the public interest and send it back to the High Court to apply for permission, or substitute its own Order.

51. For the Amicus Curiae request, it is customary to appoint the Attorney General to attend in person or by Counsel instructed on his behalf in the public interest.

Graham Stevens IP, LIP
(as **Blue Green London Plan)**
Aarhus Convention appellant

22 September 2015