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 THE REFUSAL OF PERMISSION TO APPLY FOR JUDICIAL REVIEW

AMENDMENTS TO SECTIONS 9 and 10 IN ADDITION FOR APPELLANT'S NOTICE (22 May 2015)

Introduction

1. On 15 January 2015 Mr justice Ouseley held the Secretaries of State ("SsoS") made an error of law in changing the wording of the Planning Act for inviting public participation challenges, resulting in the exclusion of the claimant, now appellant, from access to a hearing of Blue Green

London Plan's substantive arguments for permission to apply for judicial review of the SsoS's 12 September 2014 decision granting development consent to a Thames Tideway Tunnel .

2. The claimant also argued successfully that it would be unfair for Blue Green London Plan ("BGLP") to pay costs for the Secretaries of State's error of law.

3. It is denied the appellant's notice was submitted out of time. The court fee receipt is dated 21 January 2015, six days after Mr Justice Ouseley's judgement. The Civil Appeals Office instructed that the appellant's notice included the Order dismissing permission, approved by the judge, when it became available. The Order was dated 15 January 2015, stamped 28 January 2015 by the Planning Court, received on 3 February 2015, lodged with the Appellant's Notice and stamped 3 February 2015. As the Civil Appeals officer knew, the fee receipt is issued on handing the Appellant's Notice to the court fee officer, and so was handed back on 21 January by the Civil Appeals officer to await completion by the confirmed judges Order. On 22 January I again presented form N161Appellant's Notice for lodging at the Civil Appeals Office. I wrote the same day to the Court and SsoS informing them l was lodging in cooperation with the court.

4. It is agreed by all parties that this is an Aarhus Convention claim as stated on the originating judicial review claim form.

Joining parties

5. On 1 December 2014 Blue Green London Plan, in compliance with CPR 19.4(2)(b) invited the Secretary of State for Energy and Climate Change ("SoSDECC") to join BGLP as an Interested Party. The effect of this would also be to level the playing field under the Overriding Objective, comply with the Environmental Impact Directive and objectives of the Aarhus Convention, for example; Articles 1,3,6,7,8,9 and 15. In particular, Art.9 Access to Justice, 9.2, ensuring members of the public (a) Having a sufficient interest and

b) *Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, to have access to a review procedure to challenge the substantive and procedural legality of any decision, act or omission... '*
Art 9 corresponds to Art 11.1 of the Environmental Impact Directive, with Direct Effect.

Also in particular, *Art 3.2*

'*Each party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters'*

6. On 19 March 2015, the Secretaries of State wrote in reply:

'In respect of Mr Stevens' other applications in section 9 of the appellant's notice the cases can be dealt with separately at present and no order on joining parties is required. The Government's interests are adequately represented by the inclusion of the two Secretaries of State who made the decision and the Secretary of State for Energy and Climate Change does not wish to be added as an interested party.'

In so doing, the SsoS again raise a doubt as to whether they were assisting the appellant in good faith in '*facilitating participation in decision-making and seeking access to justice in environmental matters'*. It is contended that with Aarhus Convention Art 15 'Review of Compliance' language of *'consensual basis....non confrontational, non judicial and consultation nature for reviewing compliance with the provisions of this Convention.'* The SsoS can persuade their govenment colleague the SoSDECC to be joined as an interested party, with all the advantages for court time cost and complexity that would bring to enable the court to deal with the case justly. The importance of the case in the public interest demands their assistance under Art 9 of the Aarhus Convention.

7. The 3 February 2015 Appellant's Notice Section 9 'Other Applications' Part C 2. is now amended to read ' I apply for an order that The Secretary of State for Energy and Climate Change be joined as an Interested Party under CPR 19.4A(4), together with 19.4(6)(c) '

Extending time to join the Secretary of State for Energy and Climate Change

8. Further, the Part B box is now amended as ticked in compliance with the Civil Appeals Case Management letter of 14 April 2015. I apply for an extension of time for filing my appeal notice jn order for the Secretary of State for Energy and Climate Change to join as an interested party in order to ensure, in the first instance, that the appellant's bundle contains all the necessary arguments and documents from DECC to enable the court to deal with the case justly under CPR PD 54E 3.1-6.

9. I must now set out, in this attached Section 10 Evidence in support, the reasons for the delay and what steps I have taken since the decision I am appealing.

Delay in government consulting on 'Significance' of the new water industry

10. The first reason for delay is therefore the failure of the SsoS to consult in good faith with their government Department for Energy and Climate Change as to legal compliance with Parliament's Climate Change Act. This is a direct result of the SsoS failing to understand the significance of the new water industry. From my discussions with the Secretary of State and his Climate Change Committee , they do have an interest in the new blue green water industry as the basis for solutions to Global Warming. Further, the new SoSDECC of the new government may decide to accept the invitation.

11. The issue is whether lawyers or specialized experts are deciding. Whether the new SoSDECC is listening to Best Technical Knowledge Not entailing Excessive Cost (BTKNEEC), required by the UWWTD, from independent experts worldwide linking the new blue green water industry with climate change. Professor Chris Binnie, Independent Chairman, Thames Tideway Strategy Steering Group 2000-2005, lead signatory of the open letter to the SsoS on the publication of their Decision on 12 September 2014, (Blue Green London Plan's Judicial Review Claim Form, Statement of Grounds and Facts, p 6) had complained as far back as 13 March 2012, that:

"Herewith my report on the legal aspects.... under the Whitburn AG ruling, the tunnel would not be needed.
However, I am a water engineer not a lawyer so, with defra lawyers saying implacably that a collecting system that only spilled under unusual storm conditions is required, then I have had to withdraw my report which is attached. This must be brought out to whoever you pass this

document." (para 24, 'Request for a Preliminary Reference to the Court of Justice of the European Union'. put in evidence as requested by the ExA ,when referred to at the Westminster Hearing, 5 February 2014)

12. In the light of that evidence, the court is bound to ask whether the parties without the SoSDECC as an interested party is adequate to enable the court to deal with the case justly under CPR PD 54E 3.1-6.
BGLP have received no answer to my invitation to join as an interested party directly from SoSDECC, except an automatic acknowledgment to reply within 15 days, or to service of the Appellant's Notice

13. Further letters to the court of, SsoS on 14 May, TWUL 18 May, SsoS 19 May 2015 again ask that TBGE and BGLP be denied a court hearing for the same 'Totally Without Merit' reasons On the 14 May 2015 the SsoS suggested 'it is a matter for you to decide which documents you feel will assist the Court in considering your application. ' With the greatest of respect, for a NSIP it is properly for the SoSDECC to show good faith in assisting the court with the most appropriate documentation to deal with the case justly in compliance with the Climate Change Act in the context of this Aarhus Convention application.

14. As the new blue green integrated water technologies are also the solution to global warming, affecting all Member States, independent experts have identified the decision as the key decision indicating the Government's intention to fulfill the Climate Change Act 2008 in good faith, after the ex SoS proclaimed it should be 'torn up'. The SoSDECC's interest is therefore served by joining to explain to the SsoS the reasons their decision is so bad for the economic interests of the country. It is for this reason the learned judge was wrong in not allocating more time to considering EID, Human and Aarhus Rights for the applicant's right to a hearing of the 'particular circumstances' part of his arguments. Bad faith defrauds the public of their say in democratically rejecting dictatorship of infrastructure and choosing their most beneficial infrastructure.

"totally without merit" ("TWM") Order

15. The SsoS and TWUL in their resistance documents and application by letter for expedition of 13 and 17 April, replied to in full on 19 April and again on 23 April following TBGE's reply, ask under CPR 23.12.2 for a "totally without merit" ("TWM") order, and under 54.12.1 for a permission Decision without a hearing and 54.12.(7) permission Decision without hearing, barred from re-consideration at a hearing. The proper Test being "bound to fail" preventing court resources being wasted, to which I replied on 6 May explaining my blue green promotional visit to Venice and Pompidou Paris from 28 April-6 May 2015 in connection with the coming December COP21 Climate Change conference in Paris, in which the SoSDECC will also be participating.

16.`Under CPR 52.15.(3) the court may give permission to apply for judicial review, suggested if there is a real prospect of success, and therefore be arguable. as it is in the skeleton argument lodged on 13 March. Blue Green London Plan is bound to succeed in the public interest as an altruistic environmental action on behalf of all Londoners. If not, the law or its enforcement are manifestly inadequate for protecting the public interest.

17. If properly argued, the case is bound to succeed, as the SsoS have failed to follow correct legal procedure for consenting to a nationally significant infrastructure project which would have a detrimental effect on London for more than a 120 years. They have clearly failed to understand its' significance for the obvious reason that they refused to listen to independent expert advice that a blue green London plan was a new and far better solution which, additionally, complied with far more english and european law, including providing a solution to climate change. Instead, they only listened to legal arguments to benefit a government licenced monopoly private company instead of the public interest.

18. In the words of Mark Mallone, Vice President of CDMSmith, who, when faced with a comparable (in spite of the SsoS's and TWUL's misrepresentations in denial) and parallel choice between Tunnel and blue green solutions for Philadelphia, successfully argued their Tunnel solution was 'insane'. The Philadelphia public are now extremely happy with the wealth, environmental impact of cleaner air and water and greener city of the Philadelphia story of which he was in charge of implementing. We have written on the legal fact that 'insane' in english law is termed 'Wednesbury unreasonableness' or '*manifest absurdity.' R (Greenpeace) v SoS for Trade and Industry [2007} EWHC 311 (Admin), [2007] Env LR 29 note108 para 54*

Common ground with Thames Blue Green Economy

19. In their 20 April 2015 reply to TWUL's 13 April 2015 letter requesting expedition, TBGE also assessed their prospect of success:

'10.Mr Justice Ouseley held that TBGE's application for judicial review was arguable if evidence on need and strategic alternatives were relevant considerations under section 104(7) of the Planning Act 2008 (see paragraph 35 of the judgment).
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 Panel refused to hear the evidence (see paragraph 33 of the judgment).
12. This is at the very least arguably wrong, see paragraphs 20-33 of TWUL's skeleton argument. As a result, permission should be granted on the papers.'

20. As BGLP has adopted the arguments of TBGE in shared common ground, if they now win in the Court of Appeal, BGLP also wins.

21. In 'LIST OF ESSENTIAL DOCUMENTS FOR ADVANCED READING', filed 7 November 2014, the Appellant argued that in C-301/10 *Commission v United Kingdom* [2012] ECR, 18 October 2012:
'2.6 The question arrises, whether the BTKNEEC requirement can in effect impose a yardstick or measure of legality against which the SsofS's decision can be assessed so, for example, if the Cost Benefit Analysis demonstrates that the cost is disproportionate, the decision would be illegal. The answer is given in para 67 above; always return to the principles of BTKNEEC, and, by the process of reiteration, arrive at the solution with the highest benefits at proportionate cost.
2.7 It will be argued that this process was reduced and finally abandoned by both government and TWUL in the period 2000-January 2007, when the decision was unlawfully made, para 20, in misleading the ECJ that the subsidiarity powers of the UK enabled a decision to be made without an EIA or consulting London inhabitants:

20. At a meeting on 26 January 2007, representatives of the Commission and the United Kingdom discussed the two possible options for London, which had been suggested by the TTTS report, and the United Kingdom decided to opt for the single 30 km tunnel along the length of the River Thames and the separate tunnel for its tributary, the River Lee. The whole project was to be completed by 2020.' Commission v United Kingdom [2012] ECR

22. In the present appeal Skeleton argument filed on 13 March, para 47. is amended to read: '47. The unlawful decision to announce a solution to the CJEU before consulting the public. BGLP argues the conduct of the SsoS, from 26 January 2007 until the DCO and invitation on 12 September 2014, is conclusive evidence that they made their invitation for public consultation and participation under the Planning Acts, Aarhus Convention and Environmental Impact Directive in bad faith, knowing no public challenge would affect the choice of a Tunnel over a blue green London plan.'

23. As with TBGE, this is a matter of statutory interpretation. To succeed, TWUL and the Secretaries of State must also show that these considerations are untrue; that is impossible for them to do against the Planning Act, Aarhus Convention, Environmental Impact Directive and *Moseley, Greenpeace et al*. The law requires Londoners have a meaningful consultation for choosing nationally significant infrastructure Projects (NSIPs); The SsoS are therefore bound to lose.

24. Parliament requires Government departments to follow our Treaties and Acts in good faith; Therefore the SsoS are again bound to lose.The CJEU has already found our legal system not to have fully transposed the Aarhus Convention sufficiently into our legal system *Commission v United Kingdom* [2014]. In the public interest, the SoSDECC needs to assist the court in helping to review this particular government NSIP's compliance with the EID and parliamentary Acts and not leave it to a legally unqualified LIP without the assistance of a legal team.

Postal and communication problems

25. There have been some problems with receiving post from the court and respondents. The court's 'What you must do next ' letter of 13 February 2015 was addressed to 'Ajmdpaeric Industries' and delivered by the postman to a neighbour, who only passed it on to arrive on Friday, 10 April. From Monday, 13 April- 23 April the Appellant was responding (twice, 19, 23 April) to TWUL's 13 April expedition request letter.

26. On 28 April, the date the court's 'unless' letter posting, The Appellant left for Venice and Paris to promote blue green at the Venice Biennale and in preparation for the COP21 Climate Change conference.

27. Before leaving the Appellant requested an email to be sent when post had been sent by the court, as was the practice of the Respondents. On 8 May the Appellant received an email informing him that the SsoS had sent a bundle to be completed, requested by the court to be by 15 May.

28. On return to the UK on 13 May, the 'unless' letter was received and a full letter of explanation for absence sent to the court, Respondents and IP, with evidence of the reason.

29. After speaking to the court by telephone and receiving the SsoS letter stating the limit of the assistance they were able to provide, the Appellant wrote to the court requesting an extension of time for completing the bundle.

30. In researching the law to do this, it again became clear it would be unfair to speak on behalf of the SsoSDECC when they were in the best position to overcome the bad faith of the SsoS in not listening to the best independent experts to solve the most serious environmental problem faced, not only by all Member States, but in proportion, extending the NSIP considerations to their impact on global warming itself, meriting far more time for the court to spend on judicial review. and with the appropriate parties.

31. For the absence of any doubt, I have no hesitation whatsoever in requesting all assistance allowed under the EID, Aarhus Convention and Planning Act to avoid the SsoS benefitting from their omission of a meaningful public consultation and participation procedure in bad faith to prevent the substantive BTKNEEC arguments, based on those of the world's leading independent experts, from being judicially reviewed in an English court for compliance with the UWWTD.

Graham Stevens IP, LIP
Aarhus Convention appellant

22 May 2015