

**B E T W E E N :-**

**BADGER TRUST**

**Claimant**

**-and-**

**THE WELSH MINISTERS**

**Defendant**

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**CLAIMANT'S SKELETON ARGUMENT**

**For hearing 22-23 March 2010 (1½ days)**

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*Key documents:*

- *Witness statement of Dr Rosemary Woodroffe of 12 March 2010 [Bundle Tab A10]*
- *Witness statement of David Williams of 11 March 2010 [Tab A8]*
- *Witness statement of Gwendolen Morgan of 11 March 2010 [Tab A9]*
- *Advice to the Minister 23 March 2009 [Tab A7 - CG1 pp 23-60] (not released until 5 March 2010)*
- *Appendix 1: Programme Board Decision Paper [Tab A7 - CG1 pp 62-95]*
- *Ministerial Statement of 24 March 2009 [Tab C1]*
- *Consultation on the TB Eradication (Wales) Order 2009 under the Animal Health Act 1981 [Tab C3]*
- *Welsh Assembly Government official summary of Consultation responses [Tab C4]*
- *TB Eradication (Wales) Order 2009 of 28 September 2009 [Tab B1]*
- *Letter before claim dated 30 October 2009 [Tab D7]*
- *Welsh Assembly Government press statement of 4 November 2009 [Tab C10]*
- *Response to letter before claim dated 3 December 2009 [Tab D8]*

- *Bern Convention [Tabs E4, E9, E10 and E11]*
- *Protection of Badgers Act 1992 [Tab E3]*
- *Animal Health Act 1981 [Tabs E1 and E2]*
- *Witness statement of Badger Trust Financial Director, Jeff Hayden, dated 22 December 2009 [Tab A3]*
- *UK Government's observations to the Aarhus Convention Compliance Committee dated 28 July 2009 [Tab F1]*

## **Introduction**

1. As explained in the witness statement of David Williams [Tab A8], the claimant 'Badger Trust' is an organisation which promotes the conservation and welfare of badgers and the protection of their setts and habitats for the public benefit. It is the leading voice for badgers and represents and supports around 60 local voluntary badger groups. Badger Trust provides expert advice on all badger issues and works closely with Government, the police and other conservation and welfare organisations.
2. The defendant exercises statutory powers in relation to the protection of wild animals in Wales.
3. This matter comes before the court as a rolled up permission and substantive hearing pursuant to the order of Burnett J dated 2 February 2010<sup>1</sup> [Tab A6].
4. The claimant seeks permission to challenge and challenges the legality of an order [Tab B1] made by the defendant (by its Minister for Rural Affairs) which (in the defendant's words) "makes lawful" the culling of badgers in Wales. The defendant contemplates such culling as a way of reducing the incidence of bovine TB in cattle in the area of the cull.
5. The defendant's evidence in this matter was served on 5 March 2010. It included a document [CG1 pages 23-61 – Tab A7] which had been considered by the Minister who made the decision in question but which had not previously been made public despite the claim on the defendant's website that "In this section you can see all the papers presented to the Rural Affairs Minister that formed the basis of her decision on an Intensive Action Pilot Area." That document sheds new light on the defendant's decision-making

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<sup>1</sup> As considered further below, that Order (2 February 2010) was made at a time when the claimant was preparing a response to the defendant's Grounds of Resistance having been told by the Administrative Court [See witness statement of Gwendolen Morgan at Tab A9] that a response submitted by the end of 3 February 2010 would be taken into account in deciding on permission and other matters. Unfortunately, that did not happen. The issue which arises from that error relates to costs, and is considered at the end of this skeleton.

process (and the basis on which the decision was made) some which the claimant has sought, in the limited time available, to respond to below and in the witness statements of Dr Rosemary Woodroffe [Tab A10] and David Williams [Tab A8] which the court is asked to read in full.

6. Moreover, the copy of that document is redacted to conceal what is said to be legal advice in relation to which legal professional privilege is claimed (see thus Glossop para 31 [Tab A7]). That claim is, of course, unsustainable given that legal professional privilege attaches only to advice given by lawyers and not to advice – as this was – given by the defendant’s Chief Veterinary Officer.
7. In any event, as explained by David Williams [Tab A8], the claimant fully accepts that bovine TB is a significant problem in Wales (as it is in England). It also accepts that some action needs to be taken to address that problem and that, alongside “biosecurity measures” (i.e. measures relating to the way farms and farming operates) an intervention in the badger population may be appropriate.
8. However, crucially, there are perfectly viable options other than a non-selective cull of badgers as contemplated here including, most particularly vaccination (to take place alongside cattle control measures) which have not been lawfully evaluated by the defendant in reaching its decision and which have been impermissibly rejected by it<sup>2</sup> [Tab A10 – paras 13-20]. In that context, it is indeed notable that (as below), the advice to the defendant’s own “Programme Board” was that [CG1 page 326, Tab A7]

“alternative control strategies, such as vaccination and vaccination with selective culling may deliver greater benefits in cattle TB control than non-selective culling.”

9. Moreover, the defendant had commissioned its own modelling of the relative merits of different options which the (now released) advice to the Minister explained thus [CG1 page 36 – Tab A7]:

“This modelling exercise suggested that at least 40% of healthy badgers need to be immunized each year to eradicate bovine TB in the badger and that vaccination of badgers is a viable alternative to badger culling for the control of bovine TB in cattle.” [underlining added]

10. And thus [CG1 page 39– Tab A7]:

“The most recent model commissioned by the Welsh Assembly also included output comparing the effects of each control strategy on the incidence of cattle herd breakdowns.

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<sup>2</sup> A third option, a combination of culling and vaccination was evaluated but is not supported by either the defendant or Badger Trust

While the model cannot predict the time until benefits can be seen with each approach, the differences in reductions in cattle herd breakdowns between the cull only, vaccinate only and combined method without perturbation were minimal and unlikely to be detectable in the field. All three of these options resulted in a reduction in CHB of between 5% and 10% over 10 years.

There are assumptions and uncertainties within the majority of models to examine future outcomes of disease and potential management strategies, and the models reported here are no exception. However, all three models are based on all the most up-to-date scientific evidence on bovine TB dynamics in badgers and cattle and the potential efficacies of the suggested control options. The unknowns surrounding the perturbation effects in the combined strategy make it difficult to reliably determine where in the range of possible effects this option would fall.” [underlining added]

11. Against that background and in the light of the legal framework in play (as considered below) including (among other things) the legal requirements that badgers should only be culled:
  - (1) if such culling would “eliminate or substantially reduce” the incidence of TB in cattle;
  - (2) if such culling was “necessary” to achieve the elimination/substantial reduction in question;
  - (3) if there were “no other satisfactory alternative” ways of achieving that elimination/substantial reduction; and
  - (4) if the harm involved (i.e. killing over 1500 badgers<sup>3</sup>) had been properly balanced against (and justified) the potential benefit (which the defendant’s model predicted to be a reduction in the rate of cattle herd breakdowns of just 3 (CHBs) in 1000 farms per year<sup>4</sup>).

the claimant challenges the legality of the defendant’s decision to undertake a non-selective cull.

### **Background**

12. The defendant had first appeared to announce a decision to authorise a badger cull in Wales on 8 April 2008. By a letter of 13 May 2008, the claimant challenged the legality of that apparent decision [Tab D1].

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<sup>3</sup> This figure has been cited by the Minister in her statement of 13 January 2010 [Tab C11, p.75]. However, it seems that the figure may be closer to 2249 as 7.81 badgers were killed per square km in the RBCT and the IAPA spans 299 sq km.

<sup>4</sup> Exhibit CG1 page 172– Tab A7

13. However, in response, the defendant said that any such (JR) challenge would be premature because (so it said) the Minister had yet actually not authorised a badger cull “*nor has the Minister granted any licence under section 10 of the Protection of Badgers Act 1992*” (which would make killing badgers lawful) and “*we would stress there has been no final decision to cull badgers in Wales*” [Tab D2 paras 3-4 and 11].
14. On 24 March 2009, the defendant made another announcement which again appeared to authorise a badger cull [Tab C1]. The claimant sought information about the decision in order to consider the legality of the decision [Tab D4]. The responses [Tab D5 and D6] explained that the Minister had in fact (merely) published a consultation on a proposed draft Order (which, if made, would – as below – provide a legal underpinning for culling).
15. Some of the background papers which had informed that March 2009 decision were made publicly available in May 2009. But, as above, the key advice to the Minister was not made available (and is still, presumably, not publicly available having only been made available in the course of this litigation) until 5 March 2010. It provides the essential rationale for the decision that was ultimately taken and which is challenged here.
16. In any event, following that consultation, on 28 September 2009, the Minister made the Tuberculosis Eradication (Wales) Order 2009 [Tab B1] on which it now relies to make badger culling lawful in Wales. The Order of 28 September 2009 came into force on 21 October 2009 having been laid before the Welsh Assembly and considered by members of the Assembly in the interim.
17. On 13 January 2010, the defendant then identified an area of around 288 km<sup>2</sup> in North Pembrokeshire in which it proposes that culling should commence on 1 May 2010 [Tab C11]. As it happens, it has, however, refused to identify the boundaries of the area in question [Tab D13]. The defendant intends to kill around 1500 badgers (by trapping and then shooting or lethal injection) with a minimum of five culls taking place over four years [Tab C3, p.14, para 3.5]. As explained below, culling over that period is the only way in which even slight net-positive impacts on the incidence of bovine TB<sup>5</sup>.
18. An injectable badger TB vaccine (whereby badgers would be trapped and vaccinated rather than being trapped and killed) is already available and will be field tested in England from May 2010 (with an oral bait vaccine becoming available in 2014) [Tab C1]. Those are the methods which, as explained further below, DEFRA (which makes the equivalent decisions for England)

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<sup>5</sup> Exhibit CG1 page 73-Tab A7: “Culling was associated with a modest reduction in the confirmed incidence of cattle herd breakdowns inside the culled areas, but there was an increase in confirmed incidence on neighbouring land ...”

proposes to use in England alongside extended biosecurity and other cattle control techniques.

19. Although the Order (which covers the whole of Wales) also provides for badgers to be vaccinated, the intention, as the claimant understands it, is that, within the area of the cull, badgers will be killed, whereas vaccination may be used in other parts of Wales.
20. The Welsh cull will go ahead despite the fact that the most extensive and in-depth study in the UK (the Randomised Badger Culling Trials – RBCT) concluded that badger culling could not meaningfully contribute to the control of cattle TB in Britain, a message reinforced by the modelling commissioned by the defendant itself. The RBCT was established by the UK Government in order to provide a definitive answer to the point<sup>6</sup>:

“The Trial has been carefully designed to resolve the hotly debated question of the contribution that the badger may make to TB in cattle and the effectiveness of culling as a means of control.”

21. The RBCT was conducted over ten years. It cost £35 million and killed over 11,000 badgers. It involved over a hundred scientists, experts in their field, from many disciplines and countries. The Trial’s findings were released in four, yearly reports by the Independent Scientific Group on Cattle TB (ISG) which conducted the RBCT and in the Final Report, a 289 page document published in 2007, stated:

“SUMMARY OF SCIENTIFIC FINDINGS FROM THE TRIAL

Conclusions and recommendations

“...

Detailed evaluation of RBCT and other scientific data highlights the limitations of badger culling as a control measure for cattle TB. The overall benefits of proactive culling *were modest (representing an estimated 14 breakdowns prevented after culling 1,000km<sup>2</sup> for Five years), and were realized only after coordinated and sustained effort. While many other approaches to culling can be considered, available data suggest that none is likely to generate benefits substantially greater than those recorded in the RBCT, and many are likely to cause detrimental effects. Given its high costs and low benefits we therefore conclude that badger culling is unlikely to contribute usefully to the control of cattle TB in Britain, and recommend that TB control efforts focus on measures other than badger culling.*” [underlining added]

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[http://www.defra.gov.uk/foodfarm/farmanimal/diseases/atoz/tb/isg/report/final\\_report.pdf](http://www.defra.gov.uk/foodfarm/farmanimal/diseases/atoz/tb/isg/report/final_report.pdf)

22. The RBCT thus showed that the low cattle TB benefits seen within the area of the cull itself were offset by increases in TB in the surrounding areas due to “perturbation” – i.e. badgers ranging more widely and contacting more cattle herds as a consequence of the culling process.

23. A 2008 report [Tab C6] relating to the RBCT results showed that benefits continued in the period after culling stopped, while disbenefits did not. But (as at 2008) the reported period of net benefit was simply “more than one year after culling was discontinued.” The advice to the Minister (as only recently released) was that [CG1 page 35 – Tab A7]:

“The reported benefits of the RBCT, which was a relatively well executed cull were low (9% average reduction in the incidence of CHB). The benefits continued to accrue at an increasing rate in the two years post-trial. Further analysis is planned to determine if these trends continue in further years.” [underlining added]

24. But, as below, it is clear that the defendant proceeded on the basis that benefits would in fact continue. See thus:

(1) The modelling reports on which the defendant relied predicted that there would be a “long term reduction” [Tab A7 - CG1 p171]

(2) A letter of 27 October 2009 [Tab C9] in which the defendant explained that:

“Following the publication of the report of the Independent Scientific Group on cattle TB (ISG), further post-cull analysis was undertaken<sup>7</sup> which demonstrated a continued decrease in bovine TB in cattle in the areas concerned.”

(3) A press statement of 4 November 2009 [Tab C10, page 65], the defendant explained that:

“Continued analysis of data from the RBCT since the final report of the ISG was published show that the rates of bovine TB in the culling area continue to decline<sup>8</sup>, and the increase on the border of the culling area decrease significantly over time, leaving a substantial decrease in TB cattle breakdowns overall.”

25. At the time of the decision under challenge here, there was indeed not yet any published evidence as to whether that net benefit was sustained over time but, as explained below, the claimant has recently discovered that the

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<sup>7</sup> Presumably the 2008 report which the defendant has claimed as “the most up to date evidence”, as above.

<sup>8</sup> This is a serious error of fact: the benefits (relative to uncultured areas) may have continued but the rate of bovine TB was not declining. See witness statement of Dr Rosemary Woodroffe at Tab A10 - para 10.

defendant was in fact aware of follow up research (which has now been published) which showed that benefits were not sustained. But the defendant chose to ignore the results of that follow-up research (or – more particularly – the defendant’s officials decided not to place its conclusions - plainly material information - before the Minister for her to consider, as below).

26. In any event, this judicial review application is – of course – concerned with the legality of the defendant’s decision (as manifested in the Order) and on the basis of the position as known to the defendant (including its officials) at the time, not with the merits of culling.
27. The claimant challenges the legality of the Order on the grounds that in deciding to make the Order:
  - (1) the defendant unlawfully failed to take into account a material fact (namely that the benefits of culling would not be sustained) and/or proceeded on the basis of a material error of fact (ditto) and/or failed to take reasonable enquiries to ensure that it had proper information (ditto) on which to answer the questions before it<sup>9</sup>;
  - (2) the defendant misdirected itself as to the meaning of “eliminate or substantially reduce” in s21 AHA 1981 and/or (insofar as it reached a conclusion on that point at all which it needed to do but did not do) reached a conclusion that was unsustainable;
  - (3) the defendant unlawfully failed to consider, let alone reach any proper conclusion on the correct factual basis or a conclusion which was sustainable on the evidence as to whether a cull was necessary to achieve the limited benefit which culling might achieve;
  - (4) the defendant unlawfully failed to give effect to the requirements of the Bern Convention including in failing to reach any conclusion, let alone any proper conclusion or a conclusion on the correct factual basis or which was sustainable on the evidence as to whether there were satisfactory alternatives to culling which could achieve the limited benefit which culling might achieve;
  - (5) the defendant misdirected itself to the need to undertake, and in any event failed to undertake (let alone on a sustainable basis), a balance

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<sup>9</sup> As per Lord Diplock in *Secretary of State for Education –v- Tameside* [1977] AC 1014 at 1065, it was required to take reasonable steps to acquaint itself with the relevant information to answer the question before it correctly thus:

the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

of the limited benefit which culling might secure as opposed to the destruction of badgers which would occur to consider whether the former justified and was proportionate to the latter.

### Legal framework

(i) PBA 1992

28. As explained further below, badgers are specifically protected by section 1(1) of the Protection of Badgers Act 1992 (PBA 1992) which makes it an offence deliberately to kill a badger unless that is authorised by a licence under section 10 of that Act [Tab E3]. As mentioned above, the defendant had previously contemplated granting such a licence, or licences, but it has not in fact done so and has opted for a different legal course as below<sup>10</sup>.

(ii) WCA 1981

29. Section 11 of the Wildlife and Countryside Act 1981 (WCA1981) also prohibits the use of certain techniques for killing and capturing, specified wild animals, including badgers, other than in specified circumstances. [Tab E8]

(iii) AHA 1981

30. However, as above the defendant has now made an Order under section 21 of the Animal Health Act 1981 (AHA1981) to make culling lawful [Tab E1]:

“(1) This section--

(a) applies to any disease other than rabies which is for the time being a disease for the purposes of section 1(a) above; and

(b) is without prejudice to any powers conferred by other provisions of this Act on the Minister, the appropriate Minister and the Ministers.

(2) The Minister, if satisfied in the case of any area--

(a) that there exists among the wild members of one or more species in the area a disease to which this section applies which has been or is being transmitted from members of that or those species to animals of any kind in the area, and

(b) that destruction of wild members of that or those species in that area is necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area.

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<sup>10</sup> Albeit the defendant is still, potentially, contemplating issuing licences under the 1992 Act to the people who undertake the cull [Exhibit CG1 page 406 – Tab A7]

may, subject to the following provisions of this section, by Order provide for the destruction of wild members of that or those species in that area.

....”

31. The National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Article 2, Schedule 1 makes those powers exercisable in Wales by the National Assembly for Wales.

(iv) Bern Convention

32. However, all of that sits within the overarching legal framework provided by the Bern Convention on the Conservation of European Wild Animals and Habitats 1979, to which the UK is a signatory. [Tab E4]
33. Parliament is presumed to have intended to legislate in accordance with the UK’s international obligations and, as the Court of Appeal (Carnwarth LJ) recently noted in Morgan (as below), international conventions are to be taken into account in resolving ambiguities in legislation intended to give to them (see Halsbury’s Laws Vol 44(1) Statutes para 1439)).
34. But, as explained further below, the defendant’s stance on the application and effect of its provisions is confused, confusing and contradictory.
35. In any event, among other things the Convention says that [Tab E4]:

“Article 8

In respect of the capture or killing of wild fauna species specified in Appendix III and in cases where, in accordance with Article 9, exceptions are applied to species specified in Appendix II, Contracting Parties shall prohibit the use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species, and in particular, the means specified in Appendix IV.

Article 9

1. Each Contracting Party may make exceptions from the provisions of Articles 4, 5, 6, 7 and from the prohibition of the use of the means mentioned in Article 8 provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned:

- for the protection of flora and fauna;
- to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;
- in the interests of public health and safety, air safety or other overriding public interests;

- for the purposes of research and education, of repopulation, of reintroduction and for the necessary breeding;
- to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.

...” [underlining added]

36. Badgers are one of the species listed in Appendix III [Tab E9].
37. The list of proscribed methods in Appendix IV for mammals includes [Tab E10]:
- “traps ... If applied for large scale or non-selective capture or killing”
38. In the present case, the defendants precisely have in mind the use of methods capable of causing a local disappearance of populations of badgers (that is the purpose of the cull) and propose to do so using one of the specifically prohibited methods listed in Appendix IV. Accordingly, there is plainly a breach of Article 8 which can only be lawful if permitted under Article 9.
39. For that to be the case, the killing must be for one of the purposes specified in Article 9. The defendant relies on it being “to prevent serious damage to ... livestock”. In other words, the hope is that by killing badgers the defendant will prevent serious damage to livestock.
40. As to what is required to satisfy those requirements, the Bern Convention Standing Committee has explained (Resolution No 2 (1993)) [Tab E11]:
- “the adjective “serious” must be evaluated in terms of the intensity and duration of the prejudicial action, the direct or indirect links between that action and the results, and the scale of the destruction or deterioration committed.”
41. In other words, to comply with the requirements of Article 9, there must be an evaluation of the balance between the extent benefit (in terms of “damage to livestock”) and the extent of the harm (the killing of badgers). Article 9 can only be satisfied if, in the light of that evaluation, the former justifies the latter.
42. As for the benefit here (the reduction in damage to livestock) to be considered in that balance:
- (1) during the years of culling, the reduction in TB among cattle within the area of the cull will be offset by TB increases around the edge of the cull area;

- (2) the net benefit which arises once culling stops is not even sustained for 4 years (a fact which the defendant knew but chose to ignore);
  - (3) even on the assumption that the benefit would be open-ended in time terms, the defendant put the net benefit at no more than a 9% reduction in the number of TB infected cattle herds in the area; and
  - (4) that 9% figure is in fact an overestimate because:
    - (a) it refers only to confirmed<sup>11</sup> (as opposed to confirmed and unconfirmed) breakdowns which means (given that there is no evidence that culling impacts on unconfirmed breakdowns<sup>12</sup>) means the impact on all breakdowns would only be by some 6%; and
    - (b) it assumed that a reduction in TB would continue to be maintained over time (and indeed that it was a reduction in the incidence in TB rather than just a slowing of its growth, as below), which is not in fact the case (as officials knew but did not report to the Minister).
43. In any event, as explained below, the defendant in fact rejects the contention that a balancing exercise was even required and certainly did not actually undertake such a balancing exercise.
44. Moreover, for Article 9 to be satisfied there also, as above, needs to be a lawful consideration of, and conclusion to the effect that, there is “no other satisfactory solution” (which in the context here means no other satisfactory way of achieving what culling can achieve, namely a modest short term net benefit after 5 years of culling).
45. In the present case, that means there needed to be a lawful consideration of whether there was another satisfactory way (which would not involve killing) of achieving a modest, short term, reduction in the number of TB infected cattle herds in 5 years time. Only if it was shown that there was no other satisfactory way of achieving that limited benefit could Article 9 be satisfied.
46. The court should also note that the claimant has, in parallel with this judicial review application, made a complaint to the Standing Committee of the Bern Convention (which comprises representatives of the signatory countries to the Convention) arguing that the proposed Welsh cull is in breach of the Convention. That complaint will be subject to an initial consideration at a

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<sup>11</sup> This means TB incidents in which slaughtered cattle are subsequently confirmed to have been infected.

<sup>12</sup> ‘Unconfirmed’ means TB incidents in which cattle fail the skin test and so are slaughtered, but are not subsequently confirmed to have been infected. [See Tab A10 – para 7.]

meeting of the Committee on 29 March 2010. A previous complaint by the claimant's predecessor body relating to the (then proposed) RBCT was rejected by the Committee in the light of the fact that what was then contemplated was a scientific trial to establish the efficacy of culling. That has now happened, as above. What is now proposed is (as the defendant explains at paragraph 12, Tab D5) "to be implemented for the purpose of eradicating TB infection from the cattle population and are not to be applied as a scientific trial."

(v) s 21 AHA in operation

47. In any event, the particular statutory power being deployed here was that given by section 21 AHA1981. As above, an Order under section 21 could only be made if the defendant was properly satisfied:

"that destruction of wild members of that or those species in that area is necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area."

48. Understanding and applying that test raises the question of what is meant by:

- (1) "necessary"; and
- (2) "to eliminate or substantially reduce the incidence of...".

49. Even without recourse to the Convention to inform the interpretation of section 21, it is plain that something is only properly "necessary" if there is no alternative way of achieving what it achieves without adopting the discouraged course of action.

50. And (ditto) the question of whether something is "necessary" in order to "eliminate or substantially reduce the incidence of..." also involves:

- (1) Asking whether the reduction is indeed "substantial", with the word "substantial" to be understood:
  - (a) In the context of a statutory presumption against killing wild animals; and
  - (b) In the context of the phrase "eliminate or substantially reduce";

and

- (2) Considering the balance between the benefits and detriments – the scale of the reduction and the extent of the killing and properly considering whether the benefit outweighs the harm.

51. That analysis is reinforced and indeed required by reference to the Convention, as above (given the presumption of legislative consistency with treaties and the requirement to construe legislation in accordance with treaty obligations).

### **The issues**

52. The following issues thus arise<sup>13</sup>:
- (1) The fact that the defendant proceeded on the basis that the benefits of culling would continue when it had up to date evidence available to it which showed that not to be the case;
  - (2) “eliminate or substantially reduce the incidence of” in s21 AHA1981;
  - (3) “necessary in order to” in s21 AHA 1981;
  - (4) The Bern Convention;
  - (5) Whether (per the Bern Convention) there was proper consideration by the defendant of whether there are satisfactory alternative ways of achieving the benefit in question; and
  - (6) Whether (per the Bern Convention and/or s21 AHA 1981) the defendant undertook the requisite balancing exercise.

### **Issue 1: The basis of the decision**

53. In pre-action correspondence and in the grounds of claim, the claimant noted the limited nature of the evidence in support of the proposition that culling badgers reduces TB in cattle.
54. In response (Grounds of Resistance paragraph 6) the defendant referred to the RBCT (recognising that it showed that during the 5 year period of culling the increase in TB caused by “perturbation” in the surrounding area offset the reduction in the incidence of cattle herd breakdowns within the culling area). Then in paragraph 7 the defendant said this:

“However, in the years after the five year period, the incidence of cattle herd breakdowns in the area surrounding the trial area has reduced. An analysis published in 2008 concluded that if the five year period was considered together with the two years following the final year of culling the overall incidence of cattle herd breakdowns had been reduced by 9%. Whilst the claimant repeatedly refers to this as “limited evidence”, it is in fact the most up to date evidence available.”  
[underlining added]

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<sup>13</sup> Note that the claimant no longer pursues any arguments based on the Habitats Directive or the regulations which implement the Directive.

55. The following points arise:
- (1) The defendant proceeded on the basis that the benefit would be sustained (as set out in paragraph 24 above);
  - (2) The defendant took the 2008 analysis [Tab C6] (which specifically left open the question of whether the benefit would be sustained) as being the “most up to date evidence” on the point; and
  - (3) The defendant proceeded on the basis that the benefit in question would be a 9% reduction in cattle herd breakdowns.
56. However, as for (2), the defendant was in fact aware of the results of the follow up study to the 2008 analysis which showed that the benefits were sustained for no more than four years after culling stopped. The claimant, for its part, has only become aware of all that very recently. In particular:
- (1) The follow up study [Tab C13] was published (i.e. in the public domain and thus available to the claimant) on 10 February 2010 having been confidential to that point. It shows that the benefits which had previously appeared to be continuing had in fact ceased in two and a half years.
  - (2) However, as the claimant has recently discovered<sup>14</sup>, an author of that paper, had in fact given an advance presentation on a confidential basis at a meeting attended by a representative of the defendant on 22 September 2009 – i.e. before the defendant made the Order. As explained in the witness statement of Dr Rosemary Woodroffe, the critical – and dramatically new - fact of the benefits not being sustained was made clear (and was not subject to any caveat as to it being in any way provisional) on that occasion.
  - (3) Accordingly, as the defendant knew the 2008 report was not in fact the “most up to date evidence” and yet the defendant chose to treat it as such and proceeded on the basis that it was indeed the most up to date evidence.
  - (4) As the defendant was well aware – but did not take into account – its assumption that the benefits would be maintained was simply incorrect<sup>15</sup>.

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<sup>14</sup> See Freedom of Information letter from DEFRA dated 2 February [Tab C12]

<sup>15</sup> In evidence, the defendant says that the Minister has been briefed on the new material and it has not – apparently - caused her to alter her views. That cannot save the illegality here. And, in any event, what is clear from the Defendant’s observation that the new information “differs little from that provided in the 2008 paper” is that its officials have failed to appreciate the significance of the change which is now revealed and so any evaluation based on a briefing by them is clearly flawed.

- (5) Moreover, as for the 9% figure, as above, it is in any event an overstatement.

**Issue 2: Eliminate or substantially reduce in s21 AHA 1981**

57. As above, a lawful Order under s21 AHA1981 could only have been made if the culling was shown to “eliminate or substantially reduce the incidence of” the disease in the area.
58. As explained in the SGOR (Tab A5, para 17) the Defendant directed itself that “substantially reduce” refers to a reduction which is “more than insignificant or trivial”. In other words, anything more than a *de minimis* reduction will satisfy the statutory pre-condition to a lawful Order.
59. The defendant supports that construction of section 21 by what Baroness Hale said in paragraph 40 in Majorstake Ltd –v- Curtis [2008] 1 AC 787. But what she said does not, on analysis and when seen in context, support the defendant’s position. In particular, the House of Lords was there concerned with the application of the Leasehold Reform Act 1967. In paragraph 40 Baroness Hale said this:

“...It has hitherto been taken for granted that, if the premises are Block B, then two flats out of the 50 do not constitute "a substantial part of" the premises. Were it otherwise there would have been no point in the appellant pursuing matters to this House. The respondent has not hitherto sought to argue otherwise. In my view, it was right not to do so. "Substantial" is a word which has a wide range of meanings. Sometimes it can mean "not little". Sometimes it can mean "almost complete", as in "in substantial agreement". Often it means "big" or "solid", as in a "substantial house". Sometimes it means "weighty" or "serious", as in a "substantial reason". It will take its meaning from its context. But in an expression such as a "substantial part" there is clearly an element of comparison with the whole: it is something other than a small or insignificant or insubstantial part. There may be both a qualitative element of size, weight or importance in its own right; and a quantitative element, of size, weight or importance in relation to the whole. The works intended by this landlord are substantial in relation to each of the flats involved, but those flats do not in my view constitute a substantial part of the whole premises. I would not in any event consider it right to decide the case against the appellant on a point which was not taken against him in the courts below by a respondent who has been represented by expert counsel at all levels in these proceedings.” [underlining added]

60. Accordingly:

- (1) What Baroness Hale said was *obita*,

- (2) As she said, the word “substantial” can take a range of meanings including “almost complete” (as in “in substantial agreement”), and that it thus will take its meaning from its context.
  - (3) The context for her specific observations there was the expression “substantial part” and, of course, the wider statutory scheme in play in the particular case, and
  - (4) And, even on the basis of her view, in that context, that “a substantial part” was “something other than a small or insignificant or insubstantial part” 2 flats in 50 (i.e. 4%) was not “substantial”.
61. Here, on the other hand, the context is very different. The question arises here in the context of a framework of strong statutory presumptions against the wholesale killing of wild animals.
  62. And, more specifically, the question is whether the destruction in question is necessary “in order to eliminate or substantially reduce” incidence of disease in (other) animals. The expression “substantially reduce” thus sits alongside and must be construed alongside “eliminate”.
  63. In this context, the word substantial has the sense of “almost complete” (as per Baroness Hale above). In other words, section 21 allows for culling only where it would eliminate or almost completely eliminate. Certainly, “substantial reduction” means here more than merely “an insignificant or trivial” reduction (and also requires a true reduction in the incidence rather than merely, as here, a slight slowing of its increase).
  64. It thus follows that the defendant misdirected itself in law as to the meaning of “eliminate or substantially reduce”.
  65. In any event, in terms of the actual decision-making here, it is notable that even the Minister’s advisors did not even claim (or advise) that there would be a “substantial reduction” (that phrase was not used).
  66. Indeed, the advice to the Minister (now released) was that [CG1 page 35 – Tab A7]:

“The reported benefits of the RBCT, which was a relatively well executed cull were low (9% average reduction in the incidence of CHB). The benefits continued to accrue at an increasing rate in the two years post-trial. Further analysis is planned to determine if these trends continue in further years.” [underlining added]
  67. And [CG1 page 319– Tab A7]:

“It is apparent that while badger culling may have the potential to deliver a modest benefit in reducing TB incidence in cattle under some

circumstances, the outcomes of culling are not clear-cut and may include an increase in cattle TB." [underlining added]

68. And [CG1 page 336– Tab A7]

"The most recent results from the RBCT is that the overall benefits of culling remain modest due to the detrimental effects of badger culling during trial operations on land neighbouring proactive area." [underlining added]

69. Meanwhile the modelling which the defendant specifically commissioned advised that [CG1 page 171 – Tab A7]:

"It is important to note that the reductions in numbers of infected badgers in the control area [i.e. where the cull took place] did not "translate through" to reductions in CHBs over the whole grid to the same extent. In other words, very large reductions in the numbers of infected badgers in the control area in the model gave only small reductions in the overall numbers of CHBs. The model results strongly suggest that the long-term reduction of the confirmed-CHB rate for a 5-year control would be only about 10% of the no-control value. With a pre control CHB rate of around 5% of farms per annum, that would mean a possible reduction of the CHB rate from 5% to 4.5% – representing a saving of just five CHBs in 1000. The figure is even smaller if we consider both confirmed and unconfirmed CHBs, where the saving would be about three CHBs in 1000." [underlining added]

70. In any event, as Dr Rosemary Woodroffe explains [Tab A10, p.4, para 10]:

"When considering the entire area affected (culled and neighbouring lands), widespread culling achieved a modest reduction in cattle TB relative to no-culling, but did not cause an absolute reduction<sup>3</sup>; that is, culling slowed the rate of increase in cattle TB but did not cause TB to decline"

71. In other words, there was no reduction at all in the incidence of TB, which is what section 21 requires.

72. In any event, a "low" or "modest" benefit and a "small reduction" simply cannot lawfully equate to a substantial reduction within the meaning of section 21. The defendant has misdirected itself and its conclusion is, in any event, simply unsustainable.

### **Issue 3: "necessary in order to" in s21 AHA 1981**

73. As above, a lawful Order under s21 AHA1981 could only be made if the culling was "necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area" – in other words if there was no other way of achieving the benefit in question (namely a modest/low/small and short lived reduction in several years time).

74. But firstly, the defendant simply did not even ask itself that question in relation to the benefit in question because, apart from anything else, it had assumed the benefit was open ended (as above) so its consideration of other options was fundamentally flawed.

75. Secondly, even putting aside that fundamental flaw, even the advice to the Minister did not claim that a non-selective cull was “necessary”. Notably, the defendant’s GOR says (Tab A5 - paras 19 and 32) merely says that they were “entitled to conclude that vaccination was not a reasonably practicable alternative” which, of course, is not the same thing as saying such a conclusion was in fact reached (and there is no evidence that it was reached). Indeed, quite the contrary, the defendant actually publicly recognised that vaccination was a reasonably practicable alternative (i.e. even if the gloss “reasonably practicable” is implied into the statute) thus [Tab C1]:

“I recognise that vaccination is another potential tool to reduce risks of bovine TB and I will continue to work with the Department for Environment Food and Rural Affairs on research to explore the potential for the use of an effective badger vaccine. I welcome the confirmation that an injectable licensed vaccine for badgers is expected in mid 2010 and that an oral bait vaccine will be available by late 2014.”

76. Meanwhile, as above, the advice to the defendant’s own “Programme Board” had actually been that [CG1 page 326 – Tab A7]

“alternative control strategies, such as vaccination and vaccination with selective culling may deliver greater benefits in cattle TB control than non-selective culling.”

77. Moreover, the defendant had commissioned modelling which the (now released) advice to the Minister explained thus [CG1 page 36 – Tab A7]:

“This modelling exercise suggested that at least 40% of healthy badgers need to be immunized each year to eradicate bovine TB in the badger and that vaccination of badgers is a viable alternative to badger culling for the control of bovine TB in cattle.” [underlining added]

78. And thus [CG1 page 39]:

“The most recent model commissioned by the Welsh Assembly also included output comparing the effects of each control strategy on the incidence of cattle herd breakdowns.

While the model cannot predict the time until benefits can be seen with each approach, the differences in reductions in cattle herd breakdowns between the cull only, vaccinate only and combined method without perturbation were minimal and unlikely to be detectable in the field. All three of these options resulted in a reduction in CHB of between 5% and 10% over 10 years.

There are assumptions and uncertainties within the majority of models to examine future outcomes of disease and potential management strategies, and the models reported here are no exception. However, all three models are based on all the most up-to-date scientific evidence on bovine TB dynamics in badgers and cattle and the potential efficacies of the suggested control options. The unknowns surrounding the perturbation effects in the combined strategy make it difficult to reliably determine where in the range of possible effects this option would fall.” [underlining added]

79. Accordingly, not only was vaccination a perfectly viable alternative, but the modelling it had commissioned predicted that the difference in benefits was minimal and unlikely to be detected in the field.
80. Indeed, the fact that vaccination is an alternative (and non-selective culling is not necessary) is illustrated by the approach taken in England in relation to which DEFRA’s web site<sup>16</sup> says this [Tab C8]:

“The vaccine will be used in six areas of up to 100km<sup>2</sup> where there is a high incidence of bovine tuberculosis in cattle. Vaccination will start in 2010 and continue for at least five years.

It will be the first practical use of a vaccine for TB in badgers outside research trials.

The project will focus on developing practical approaches for use rather than developing further evidence of the effectiveness of the vaccine, although Defra will be monitoring any changes in cattle disease trends.”

And [Tab C7]:

We have invested £18 million in the last 10 years in vaccine development, which has delivered good results, including: evidence that vaccinating young calves is effective; making progress towards developing a test to differentiate infected from vaccinated cattle; showing that injectable BCG can protect badgers; and developing oral badger vaccine baits.

I [Secretary of State] now intend to increase significantly our spending on vaccines by putting £20 million into this over the next three years to strengthen our chances of successfully developing them. I will also provide additional funding to set up and run a practical project to prepare for deploying vaccines in the future.

It could be some time before an oral vaccine for badgers, or a cattle vaccine, becomes available, so for now we must reduce the spread of the disease, and try to stop it becoming established in new areas. We have cattle controls in place to tackle TB and have strengthened them in recent years with the introduction of pre-movement testing and the targeted use of the more sensitive gamma interferon test. But the

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<sup>16</sup> <http://www.defra.gov.uk/news/2009/090318a.htm>

action that individual farmers take, in particular to deal with the risk of importing disease into their herd, will also remain critical.

Disease control is not just a matter for Government, notwithstanding the considerable cost. Farmers have the main interest - the burden of controls falls most heavily on them - and they must be involved in working out how we go forward. It would be possible to tighten cattle measures still further - as recommended by the ISG Report - but this would come at a high cost, and whether it would be worthwhile is as much, if not more, a question for the industry as it is for Government. There is a choice to be made.

That is why I have also decided to set up a Bovine TB Partnership Group with the industry to develop a joint plan for tackling bovine TB. We will discuss with the industry who should be on the group and how it should work, and I want to get started as quickly as possible.

The group will have full access to information on the TB budget and will be able to make recommendations about its use. It will be able to propose further practical steps to tackle the disease, including, for example, whether there should be tighter cattle controls. It will help to reach decisions about the injectable vaccines deployment project.

And it will be able to look at ways of helping farmers to manage the impact of living under disease restrictions, for example by providing incentives for biosecurity, or maximising the opportunities to market their cattle by looking again at the restrictions around red markets and encouraging the establishment of more Exempt and Approved Finishing Units. I am prepared to make additional funding available to support such initiatives if the Group makes a strong case for doing so.

81. Indeed, the RBCT ISG had said, among other things that [page 21, final report<sup>17</sup>]:

“In contrast with the situation regarding badger culling, our data and modelling suggest that substantial reductions in cattle TB incidence could be achieved by improving cattle based control measures. Such measures include the introduction of more thorough controls on cattle movement through zoning or herd attestation, strategic use of the IFN test in both routine and pre-movement testing, quarantine of purchased cattle, shorter testing intervals, careful attention to breakdowns, in areas that are currently at low risk and whole herd slaughter for chronically affected herds”.

82. Accordingly, any conclusion that culling was “necessary” (and there is no reference to such a conclusion being reached in the papers put to the Minister) was not based on the evidence and not based on or sustained by advice to that effect.

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[http://www.defra.gov.uk/foodfarm/farmanimal/diseases/atoz/tb/isg/report/final\\_report.pdf](http://www.defra.gov.uk/foodfarm/farmanimal/diseases/atoz/tb/isg/report/final_report.pdf)

#### **Issue 4: The Bern Convention**

83. As above, the Bern Convention (and most particularly its Article 8 and 9) provide the overarching legal obligation here; and the domestic legislation is to be presumed to have been intended to comply with it, and ambiguities in that domestic legislation are to be construed in accordance with it.
84. As for the defendant's attitude to that, on 3 December 2009, in response to the letter before claim, the defendant said this [D8 para 11]:
- “... you have failed to explain how an alleged breach of an international treaty to which the United Kingdom is a party (and not the Welsh Ministers) and which has not been directly incorporated into domestic law can provide the basis for a claim in domestic law.”
85. Then in its GOR (Tab A5, para 27-30):
- “The fundamental problem with the Claimant's argument that the Bern Convention requires the reading of implicit conditions into s 21(2)(b) of the AHA 1981 is that it has not been incorporated into domestic law. .... There is simply no basis for contending that the Bern Convention can somehow require the implication of additional conditions into s 21(2)(b) in the manner suggested by the claimant.”
86. The defendant thus rejects the argument that it was required to give effect to the requirements of the Convention in making the section 21 Order.
87. But that rejection contrasts with what was said at the time, namely [Tab A7 – CG1 p.90]:
- “.... any breach or potential [breach] of the obligations under the Convention could....
- lead to a successful JR claim (on the basis that it is unreasonable or unlawful for the Welsh Ministers to do something that breaches the international obligations of the UK).”
88. The defendant nonetheless tries now to cover its position by saying in its GOR (para 31) that:
- “In any event, the Welsh Ministers did take the Bern Convention into account when deciding to make the Order, concluding that the Order would not give rise to a breach of the Bern Convention.”
89. The claimant asked the defendant to provide all documentary evidence evidencing that process and that conclusion (and the basis for it) [Tab D9]. In response, the defendant directed the claimant to a document on its web site titled “Techniques of badger culling” (i.e. trapping, snaring, shooting, poisoning, etc) and to the section on “legal advice” within it which mentions the Bern Convention and says this [Tab A7-CG1 p.344]:

### **“Legal Advice**

The lawfulness of any badger cull or culling techniques must be assessed in light of the requirements of the Bern Convention 1979 (the Convention), the Wildlife and Countryside Act 1981 (WCA) and the Protection of Badgers Act 1992 (PoBA). This paper does not make any recommendations as to whether or not a badger cull should be pursued, so it is not necessary to consider here the general issues surrounding the lawfulness of such a cull, should one be proposed.

The purpose of this paper is to make recommendations concerning the most appropriate culling technique, should a decision be taken at a later stage to pursue a cull. This paper does not prejudge that decision, but will be considered (along with other factors) as part of the decision making process in relation to any decision on whether or not to pursue a badger cull.

90. Accordingly, although the defendant now rejects application of the Bern Convention, it had previously accepted that the lawfulness of any badger cull or culling techniques needed to be assessed in the light of its requirements
91. And, in any event, it has not produced any contemporaneous documents evidencing such an assessment as even having actually been undertaken – there is no recommendation on the point in the officer papers to the Minister.
92. The defendant instead relies on its Chief Vet now reporting that the Minister has told her that she (the Minister) took the view that Article 9 applied “in that the culling of badgers would prevent serious damage to livestock and would be in the interests of public health [sic], and that there was no other satisfactory solution”. But that is not consistent with the contemporary documents showing the evaluation and advice at the time and in any event , of course, even what is now referred to says nothing about how the Minister understood or applied those requirements, which is key, as mentioned above and considered below.

### **Issue 5: Other satisfactory alternatives (per the Bern Convention)**

93. As above, the culling could only be lawful if it was shown that there was no satisfactory alternative way of achieving the benefit that culling would achieve.
94. The benefit in question was at best a modest and short-lived reduction starting in 5 years time. In other words, it needed to be shown that there was no other satisfactory way of achieving that.
95. But, firstly, the defendant simply did not even ask itself whether there was another potential way (such as vaccination) of achieving that benefit because, apart from anything else, it had assumed the benefit was open ended (as above) so its consideration of other options was fundamentally flawed.

96. Secondly, even putting aside that fundamental flaw, the defendant did not in fact actually conclude that there were no satisfactory alternatives (nor could it have done). Notably, the defendant's GOR merely says (Tab A5 - paras 19 and 32) that they were "entitled to conclude that vaccination was not a reasonably practicable alternative" which, of course, is not the same thing as saying such a conclusion was in fact reached (and there is no evidence that it was reached). Indeed, quite the contrary, as above, the defendant actually recognised that vaccination was an entirely viable alternative.
97. Although, after the event, the defendant claims matters "entitling it to conclude" that there was no satisfactory alternative to culling (per GOR para 8, Tab A5) those things were not put forward at the time to support any reasoning to that effect and are not said (in evidence) to have been the basis on which the Minister actually proceeded.
98. Moreover, of course, any proper evaluation of whether there were satisfactory alternatives would have needed to consider whether there were alternatives to a technique (culling) which only offered modest benefits in five years time which were then not maintained for more than four years. Given that the defendant chose to ignore the evidence to the effect that benefits were not maintained and, instead, proceeded on the basis that benefits were maintained, it cannot – in any event – claim to have conducted a proper and lawful evaluation of the point.
99. Accordingly, the defendant has not considered the "absence of satisfactory alternatives" requirement of the Convention on a lawful basis, let alone reached a conclusion which is sustained by the evidence before it.

#### **Issue 6: Balancing destruction of badgers against claimed benefits**

100. As above, implicit with section 21 AHA1981 (and to be read into it if not by virtue of Article 9 of the Convention) is a requirement to balance the harm caused by the destruction of badgers in a non-selective cull (against which there is a strong statutory presumption) against such limited benefits as arise from its use.
101. As for the defendant's attitude to that, on 3 December 2009, in response to the letter before claim, the defendant said this [D8 para 11]:

"We note that you appear to contend that the Welsh Ministers were not entitled to be satisfied that the destruction of badgers would eliminate or substantially reduce the incidence of disease because the beneficial effect would be "marginal, and the cost in terms of badgers ... is substantial". It seems to us that this is tantamount to an argument that s21(2)(b) of the AHA 1981 required the Welsh Ministers to conduct a balancing exercise between, on the one hand, the extent to which the destruction of badgers would eliminate or substantially reduce the

incidence of disease and, on the other hand, the likely number of badgers that would be destroyed. With respect we cannot see where in section 21(2)(b) you find words that mandate such a balancing exercise and we note that you have not pointed to any such words.”  
[underlining added]

102. That rejection is maintained (and applied to Article 9 of the Convention) in the defendant’s GOR (para 33) thus:

“... there is nothing in the wording of art 9 of the Bern Convention that requires the beneficial impact of the destruction of badgers somehow to outweigh the extent of that destruction.”

103. However, as above, that is not consistent with a proper understanding of section 21 (in isolation let alone read, as it must be, to give effect to Article 9) or Article 9 (particularly when seen in the light of what the Bern Standing Committee has explained, as above).

104. Consistent with the above rejection of the need even to consider the balance and reach a lawful conclusion, the defendant does not claim to have done so.

#### Grounds of challenge

105. Overall, therefore:

- (1) the defendant unlawfully failed to take into account a material fact (namely that the benefits of culling would not be sustained) and/or proceeded on the basis of a material error of fact (ditto) and/or failed to take reasonable enquiries to ensure that it had proper information (ditto) on which to answer the questions before it<sup>18</sup>;
- (2) the defendant misdirected itself as to the meaning of “eliminate or substantially reduce” in s21 AHA 1981 and/or (insofar as it reached a conclusion on that point at all which it needed to do but did not do) reached a conclusion that was unsustainable;
- (3) the defendant unlawfully failed to consider, let alone reach any proper conclusion on the correct factual basis or a conclusion which was sustainable on the evidence as to whether a cull was necessary to achieve the limited benefit which culling might achieve;

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<sup>18</sup> per Lord Diplock in *Secretary of State for Education –v- Tameside* [1977] AC 1014 at 1065, it was required to take reasonable steps to acquaint itself with the relevant information to answer the question before it correctly thus:

the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

- (4) the defendant unlawfully failed to give effect to the requirements of the Bern Convention including in failing to reach any conclusion, let alone any proper conclusion or a conclusion on the correct factual basis or which was sustainable on the evidence, as to whether there were satisfactory alternatives to culling which could achieve the limited benefit which culling might achieve;
- (5) the defendant misdirected itself as to the need to undertake, and in any event failed to undertake (let alone on a sustainable basis), a balance of the limited benefit which culling might secure as opposed to the destruction of badgers which would occur in order to consider whether the former justified and was proportionate to the latter.

### Overall

106. The claimant thus seeks:

- (1) permission for a judicial review of the legality of the Order;
- (2) a declaration that the defendant has acted unlawfully;
- (3) an order quashing the Order; and
- (4) such further or other relief as the court considers appropriate.

### Finally – Costs

107. The following submissions arise if the claim succeeds.

108. As explained above Mr Justice Burnett made his order before the claimant had submitted further representations (which the court had said it could make). The only residual point arising from that hiccup relates to costs and, more particularly, the Protective Costs Order (PCO) which was then put in place.

109. In its Grounds of Claim, the claimant explained why a PCO (limiting its costs liability to £10,000 in the event that the claim failed) was needed [Tab A2, paras 66-74].

110. The defendant's Grounds of Resistance agreed that the claimant's liability should be limited in that way but also proposed that its liability to the claimant (if the claim succeeded) also be capped at £10,000.

111. Without seeing the claimant's response to that proposals, Burnett J made an order in the terms proposed by the defendant but also said this [Tab A6]:

“The claimant trust applies for a PCO which the defendants do not oppose. The defendants have sought a reciprocal cap. Reciprocity is not always appropriate. The claimant has not commented upon the defendants’ proposal, with the effect that the order for a reciprocal cap should be treated as made on the court’s own motion. Should the claimant be dissatisfied with the reciprocal cap, it may apply to the judge at the hearing for it to be discharged or varied. Any arguments relating to that issue are to be set out in the skeleton arguments of both parties.”

112. The claimant was and is indeed dissatisfied with the reciprocal cap. Its arguments in opposition (as contemplated by the judge), which arise if the claim succeeds but not otherwise, are outlined below.
113. As explained in the claimant’s grounds of claim, its application for a PCO (which are incorporated here) was underpinned by the requirements of the Aarhus Convention.
114. In the terms of Article 9(3) of the Aarhus Convention, the reciprocal cap here exposes the Claimant to “prohibitive expense”, which the Aarhus Convention proscribes.
115. It is well established<sup>19</sup> that the prohibition on prohibitive expense for a case falling within the terms of Article 9 of the Aarhus Convention (which this one plainly does, as is not disputed) embraces all costs including court costs, own side’s costs and any exposure to the other side’s costs.
116. The claimant’s application and the witness statement in support of it [Tab A3] made clear that the claimant cannot afford to pay costs to the defendant of more than £10,000.
117. The Claimant has no difficulty in principle with the idea of a cap on what it can recover. But the purpose of such a cap would be to give the defendant a similar advanced certainty to that afforded by the principal PCO as to its exposure to costs, and not with a view to cutting the amount that the claimant can pay its lawyers. Any such cap should thus have been set at a level which was a reasonable pre-estimate of the Claimant’s likely reasonable costs. As the Court of Appeal put it in Corner House (para 76(ii)):

“The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant’s costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors’ fees and a fee for a single advocate of junior counsel status that are no more than modest.”

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<sup>19</sup> Morgan –v- Anor v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107; Commission –v- Ireland ECJ Case C-427/07

118. That is the position here.
119. Although the claimant does not criticise Burnett J, who took a pragmatic approach to the matter at the time, there was no basis whatsoever to set a cap on the Claimant's costs which is less than at the level of their reasonable costs reasonably incurred (on which Burnett J lacked submissions).
120. Such a figure could, in all likelihood, (as happened in Corner House itself) have been left to be agreed between the parties or assessed by a costs judge if that proved necessary.
121. The "Sullivan Report" on access to environmental justice (i.e. the report of the working group chaired by Sullivan LJ said this about the position where caps were set on the Claimant's costs which were set at lower levels):

"3. A major difficulty that has emerged relates to the nature of the cap imposed on the claimant's costs in PCO cases by the Court of Appeal in Corner House, referring back to Musa King v Telegraph.<sup>80</sup> In King, the requirement was that the costs capped in advance were to be reasonable and proportionate – rather than to be artificially limited by the term "modest" added in the Corner House judgment. It is difficult to see the justification for this further constraint on a claimant's costs.

4. As a consequence, caps on claimant costs are being set at levels that (in general even if not necessarily in each particular case) are unsustainable and as a result stifle litigation. If unrealistic caps are set on claimants' costs, lawyers who specialise in such cases will not be able to continue to work in this field. The impact of this requirement therefore threatens to undermine the contribution PCOs can make to access to justice generally and, if applied to environmental cases, to Aarhus compliance.

5. The Court of Appeal approach in Corner House, which limits capped costs to cover junior counsel only, also causes difficulties. By their very nature, complexity and public importance, a significant number of the cases worthy of a PCO will justify the instruction of leading counsel. Indeed, there will frequently be leading counsel instructed for the defendant (as well as the developer or other interested third party) and in such cases their automatic exclusion for claimants would result in substantial inequality of arms.

6. There is a fundamental difference in the ways in which the burdens of costs caps fall on the claimant and defendant. The PCO limiting the defendant's costs recovery is paid for by the defendant public body itself (in the same way as if the claimant were legally aided). There is no impact on the fees paid to the defendant's lawyers. Any cap on the claimant's costs is almost inevitably paid for by reducing the fees recovered by the claimant's lawyers. In effect, claimants' lawyers are bearing the burden of subsidising the provision of access to justice for their clients."

122. In this case, the claimant's lawyers are not acting pro-bono. But equally, they are not acting on a CFA, so there is no question of a basic rate being uplifted by a "success fee" (which might have been sought to be recovered). Accordingly, it would have been appropriate (and is now appropriate) for the defendant to be exposed to the claimant's ordinary reasonable costs of litigation.
123. Any other result (i.e. a cap on what the claimant can recover which is set at a lower level) would have the effect of meaning that the claimant's lawyers would be subsidising the litigation (by not being paid properly) or that the claimant would have to pay for bringing the case whether it wins or loses, which is wrong in principle.
124. The defendant correctly recognised (in its GOR para 39) that there is no legal basis for setting any cap on the claimant's costs at the same level as that on its costs. However, its argument (GOR para 38) was nonetheless that, because the claimant was prepared to risk its own costs plus £10,000, it was not unreasonable to cap what the claimant could recover from the defendant, if it wins, at £10,000. But, as above, that would mean that the claimant would be paying out to bring the litigation win or lose. Accordingly, even if entirely vindicated in its arguments (which are paradigm public interest arguments in a public interest case), it would still have substantially to pay the costs of doing so. As above, that is wrong in principle.
125. Once the legal and factual position is explained and understood (as was not the case before Burnett J as above), there was simply no basis in law for setting the level of any cap on the claimant's costs at the same level as that on that on the defendant's costs.
126. The claimant thus asks the court not to give effect to the reciprocal costs cap in the event that the claim succeeds and, instead, to order that the claimant is entitled to its ordinary costs to be assessed on the standard basis if not agreed.

David Wolfe

MATRIX

11 March 2010