



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0182

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS5029426
Dated: 5 October 2010**

Appellant: Michael Bruton

Respondent: Information Commissioner

Second Respondent: The Duchy of Cornwall

Third Respondent: The Attorney General to HRH the Prince of Wales

Heard at: Field House London

Date of hearing: 20 and 21 September 2011

Date of decision: 3 November 2011

Before

John Angel
(Judge)

and

Rosalind Tatam
Pieter de Waal

Attendances:

For the Appellant: Karen Steyn and Mr Joseph Barrett (instructed by Harrison Grant)
For the Respondent: Robin Hopkins (instructed by the Information Commissioner)
For the Second Respondent: Jonathan Crow QC and Ms Amy Rogers (instructed by Farrer & Co)

Subject matter: Environmental Information - Reg 2(2) EIR (definition of “public authority”)

Cases: *Network Rail Ltd v IC EA/2006/0061 & 62*
 Port of London Authority v IC EA/2006/0083
 Cross v IC EA/2010/0101
 Aston Cantlow & Wilmcote with Billesley Parochial Church Council v
 Wallbank [2004] 1 AC 546
 R (on the application of Akester) v Department for the Environment, Food
 and Rural Affairs [2010] EWHC 232 (Admin) [2010] Env. L.R. 33
 Smartsources v IC & 19 Others [2011] 1 Info LR 1498

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 5 October 2010.

SUBSTITUTED DECISION NOTICE

Dated 3 November 2011

Public authority: Duchy of Cornwall

Address of Public authority: 10 Buckingham Gate
London
SW1E 6LA

Name of Complainant: Michael Bruton

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 5 October 2010.

The Tribunal finds that the Duchy of Cornwall is a public authority under the Environmental Information Regulations 2004.

Action Required

The Duchy of Cornwall to disclose the requested information to Mr Bruton or if it considers that the information or some of the information is subject to exceptions under the EIR then to issue a refusal notice in respect of that information and serve it on all the parties and Tribunal within 28 days of the date of this Decision Notice.

Dated this 3rd day of November 2011

John Angel
Principal Judge

REASONS FOR DECISION

Introduction

1. Michael Bruton ("**Mr Bruton**") requested environmental information from the Duchy of Cornwall ("**the Duchy**"). This was refused on the basis that the Duchy did not regard itself as a public authority under the Environmental Information Regulations 2004 ("**EIR**") and therefore was not subject to the Regulations. The Information Commissioner ("**IC**") upheld that position and Mr Bruton challenged the IC's decision and appealed to the First-tier Tribunal ("**FTT**").
2. The Duchy has a historical context which is complicated and possibly unique. It has provided an income to the Prince of Wales ("**PoW**") when Duke of Cornwall ("**the Duke**") for many centuries.

The request for information

3. Mr Bruton is a resident of "Shearwater", Port Navas, a river user and a co-founder and member of the "Port Navas Quay Preservation Committee".
4. The background to the information request concerns the conservation of the Lower Fal and Helford Special Area of Conservation ("**SAC**"), designated under the Habitats Directive 92/43/EEC ("**the Habitats Directive**"). SACs come into being after having been designated by Member States. They are also Sites of Community Importance (SCI) adopted in accordance with Article 4(2) of the Habitats Directive.
5. This SAC lies within the Duchy and has been designated for a number of reasons but principally for the preservation of its large inlets and bays, Atlantic salt meadows, mudflats and sandflats, and sandbanks (the latter supporting eelgrass beds and maerl). We understand that the SAC is also the subject of several Biodiversity Action Plans for its many species and habitats, including an action plan for native oysters which aims to maintain and increase the abundance and geographical distribution of native oysters in inshore waters. It is also one of the few areas in the UK where the rare fan mussel survives.
6. Mr Bruton became concerned about the activities of the Fishery in the SAC in 2008. He wrote on 29 September 2008 to the Duchy asking for:
 - a. *"Details of any permissions given to the tenant Mr B Wright and/or to the Duchy Oyster Farm at Port Navas, Cornwall TR11 5RJ – relating to the lease since Mr Wright took up the tenancy.*
 - b. *Details of any appropriate Environmental Assessments required in respect of the activities of the Oyster Farm and whether those Environmental Assessments have been carried out.*

Request for Copy of Ministerial Orders

I request also copies of the Ministerial Orders made in 1960 and provided to the Duchy when they bought Port Navas Quay – related to the banning of car parking and commercial/industrial activity on the Quay.”

(“the Request”).

7. The reason behind Mr Bruton’s request was twofold. First, to ascertain whether consents or permissions had been given to the Fishery in the SAC. Second, to ascertain whether an environmental assessment had taken place before consents or permissions were given so as to ensure that there would be no detrimental environmental effects on the SAC. Mr Bruton feared that the Fishery was cultivating and harvesting predominantly non-native Pacific oysters of both the fertile diploid and triploid variety and he was concerned that it might have already introduced stocks to the SAC. Mr Bruton also believes that the oyster fishery involves dredging activities which may harm the site’s nature conservation objectives.
8. The general provisions of the Conservation (Natural Habitats, &c.) Regulations 1994 (“**the 1994 Habitats Regulations**”) apply to any activity which is likely to have a significant effect on the SAC and require the competent authority to abide by the provisions of the Habitats Directive. Consent for an operation may be given only after having ascertained that the plan or project will not adversely affect the integrity of the site. A competent authority under the Habitats Regulations exercises the public function of ensuring that no activity which might damage a SAC is permitted.
9. Only the competent authority may give consent to the Fishery.
10. The Duchy responded to the Request on 7 October 2008 indicating that it did not consider itself to be a public authority for the purposes of the EIR or FOIA.

The relevant statutory framework

11. The EIR permit public access to environmental information which is held by *public authorities*. They implement Directive 2003/4/EC of 23 January 2003 on public access to environmental information (“**the Directive**”), which in turn implements the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“**the Convention**”) which came into force in October 2001. ‘Public authority’ is defined at reg 2 EIR as follows:

(2) Subject to paragraph (3), “public authority” means -

- (a) government departments;*
- (b) any other public authority as defined in section 3(1) of the Act [Freedom of Information Act 2000], disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding -*

- (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or*
- (ii) any person designated by Order under section 5 of the Act;*

(c) any other body or other person, that carries out functions of public administration; or
(d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and -

(i) has public responsibilities relating to the environment;
(ii) exercises functions of a public nature relating to the environment; or
(iii) provides public services relating to the environment.

12. A number of provisions of the Freedom of Information Act 2000 (“**FOIA**”) are relevant to this definition. By section 84 of FOIA, ‘government department’ includes any “body or authority exercising statutory functions on behalf of the Crown”.

13. Section 3(1) of FOIA refers to “publicly-owned companies”, defined at section 6 as follows:

(1) A company is a “publicly-owned company” for the purposes of section 3(1)(b) if

(a) it is wholly owned by the Crown, or
(b) it is wholly owned by any public authority listed in Schedule 1 other than—

(i) a government department, or
(ii) any authority which is listed only in relation to particular information.

(2) For the purposes of this section—

(a) a company is wholly owned by the Crown if it has no members except—

(i) Ministers of the Crown, government departments or companies wholly owned by the Crown, or
(ii) persons acting on behalf of Ministers of the Crown, government departments or companies wholly owned by the Crown, and

(b) a company is wholly owned by a public authority other than a government department if it has no members except—

(i) that public authority or companies wholly owned by that public authority, or
(ii) persons acting on behalf of that public authority or of companies wholly owned by that public authority.

(3) In this section—

“company” includes any body corporate;

“Minister of the Crown” includes a Northern Ireland Minister.

14. The EIR implement the Directive. Paragraph 5 of the preamble to the Directive provides that EC law must “be consistent” with the Convention. Article 2(2) of the Directive defines ‘public authority’ as follows:

2. ‘Public authority’ shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

15. We note that reg 2(2)(c) EIR corresponds with Article 2(b) of the Directive. Although there is no definition of 'public administrative functions' in either instrument Article 2(b) does include "*specific duties, activities or services in relation to the environment*" as such functions. As will be seen below this corresponds with the Convention's meaning.
16. The Convention provides:

Article 1

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 2

DEFINITIONS

For the purposes of this Convention,

...

2. "Public authority" means:

- (a) Government at national, regional and other level;
- (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above.

(emphasis added)

17. The Aarhus Guide says in respect of the definition of "public authority":

The definition of public authority is important in defining the scope of the Convention. While clearly not meant to apply to legislative or judicial activities, it is nevertheless intended to apply to a whole range of executive or governmental activities, including activities that are linked to legislative processes. The definition is broken in to three parts to provide as broad a coverage as possible. Recent developments in “privatized” solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public involvement, information and participation.

EU Interpretative Principles

18. Reg 2(2) EIR is the domestic analogue of Article 2(2) of both the Aarhus Convention and the Directive. The EIR is secondary legislation made pursuant to s.2(2) of the European Communities Act 1972 to implement the Directive. Accordingly:
- (1) when interpreting the Directive and the EIR, the domestic court does not deploy English law principles of statutory construction but rather applies the principles of teleological construction established by the jurisprudence of the ECJ;¹
 - (2) as the Directive gives effect to the Convention, in the case of any latent ambiguity it should be construed in a manner consistent with the terms of that international law instrument;² and
 - (3) if the terms of the EIR fail to give effect to the manner in which the Court of Justice of the European Union (“**CJEU**”) would interpret the Directive, the EIR must be read down accordingly.³
19. It is well established that “Community law must be placed in its context and interpreted in light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”.⁴
20. Ms Steyn contends that the concept of public authority that pertains in relation to the public’s right of access to environmental information as deployed in the Directive must be construed having regard to the wider scheme of EU environmental law, in particular the Habitats Directive.⁵ If the EU legislative scheme concerning environmental law imposes public law duties on a relevant body or person then it would be entirely anomalous, she contends, and contrary to principle, for that body to fall outwith the access to information regime that the Directive establishes. Mr Crow accepts the interpretative principles and that the EIR should be interpreted purposively and in the wider legal context in which it

¹ *HP Bulmer v Bollinger* [1974] Ch 401 at p425-426 and *Marks & Spencer v Customs and Excise Case C62/00* [2002] ECR I-06325 at §24.

² *R v Secretary of State for Trade and Industry ex p Greenpeace (No.2)* [2000] 2 C.M.L.R. 94 at §38 per Maurice Kay J (construing the Habitats Directive in a manner consistent with the relevant international agreements on marine conservation).

³ *Marleasing SA v La Comercial Internacional de Alimentacion SA* C-106/89 [1990] ECR I-4135

⁴ *CLIFIT Sr v Ministry of Health* Case C-283/81 [1983] 1 CMLR 472 at §20.

⁵ The Habitats Directive is described by the European Commission as “the cornerstone of Europe’s nature conservation policy” [283].

appears. However he considers neither should be an excuse for ignoring the words of the legislation and that we should not be beguiled into reading across from one regime to another.

21. We have been mindful of these interpretative principles and Mr Crow's words of caution when considering this appeal.

The complaint to the Information Commissioner and his decision

22. Mr Bruton requested a review of the Duchy's decision by letter to the IC on 14 July 2009. The IC was willing to consider the request despite the time elapsed and after conducting an enquiry into the matter issued what he described as a Decision Letter dated 5 October 2010 ("**the DL**"). Following correspondence with the Duchy and Mr Bruton he found that the requested information was covered by the EIR but that the Duchy was not a public authority for the purposes of the EIR under any of the four limbs of regulation 2 (2)(a)-(d).
23. As to regulation 2(2)(a), the IC found that the Duchy is not a government department:
 - a) It does not appear in the list of government departments on the Cabinet Office's website, nor is it listed as a public authority under section 3(1) and Schedule 1 of FOIA. Its use of a '@duchyofcornwall.gov.org.uk' email address is not determinative.
 - b) The IC accepted that the Duchy is a "body" for the purposes of section 84 FOIA, but found that it does not exercise statutory functions, which he interpreted as meaning the discharge of public law powers in relation to members of the public.
 - c) Nor does the Duchy exercise any powers on behalf of the Crown, in the common-law sense of that term, i.e. a metaphor for the executive branch of central government.
24. As to regulation 2(2)(b), the IC found that the Duchy is not a publicly owned company for the purposes of sections 3(1)(b) and 6(1) FOIA:
 - a) The Duchy is not an incorporated body, a company, or indeed a separate legal person at all.
 - b) It is owned by an individual (the PoW) in his own right and not on behalf of the Crown in its common-law sense.
25. As to regulation 2(2)(c), the IC found that the Duchy is not a body that carries out functions which are both "public" and "administrative" in nature:
 - a) The Commissioner guided himself by case law and adopted a multi-factor test,⁶

⁶ The House of Lords' decision in *Parochial Church Council for the Parish of Aston Cantlow and Wilmcote with Billesley v Wallbank and Another* [2003] UKHL 37, [2004] 1 AC 546 ("*Aston Cantlow*"), and by the Information Tribunal's

- b) By application of the factors set out in previous cases, the Duchy did not fall within regulation 2(2)(c).
26. As to regulation 2(2)(d), the IC found that the Duchy is not “controlled” by anyone within regulations 2(2)(a)-(c) and is therefore not within this subsection.
27. The IC also found, for reasons similar to those summarised above, that the Duchy is not a public authority within the more restrictive definition under FOIA.
28. The IC concluded that he had no jurisdiction to consider complaints against the Duchy.

The appeal to the Tribunal

29. Mr Bruton lodged a Notice of Appeal with the FTT dated 4 November 2010. The Tribunal accepted the appeal because it regarded the DL as the IC making a decision under s.50(2) FOIA applying the Upper Tribunal (“**UT**”) decision in *Smartsources v IC & 19 others* [2011] 1 Info LR 1498 (“**Smartsources**”) [15-19]. In his response to the appeal the IC accepted the Tribunal’s jurisdiction.
30. The Tribunal joined the Duchy to the appeal. Mr Crow for the Duchy accepted that the FTT has jurisdiction in the case.
31. Directions were issued staying the proceedings until the decision of the FTT in *Cross v IC EA/2010/0101* (“**Cross**”) was promulgated. This case involved a similar issue relating to the Duchy of Lancaster. Although this Tribunal is not bound by the decisions of another FTT this appeal was stayed so as to allow the parties to consider the implications of the decision in **Cross**. Following the decision, the stay was lifted and the appeal proceeded.

The questions for the Tribunal

32. The Tribunal has to decide whether the Duchy is a public authority for the purposes of the EIR and subject to its provisions. All parties agree that the only provisions of the EIR that the Tribunal has to consider are regs 2(2)(c) and (d). In order to do this the Tribunal principally needs to decide:
- a) Whether the Duchy is a *body or other person*, and
- b) If so, whether it *carries out functions of public administration*, or
- c) Whether the Duchy is *under the control of the Duke* who carries out functions of public administration and has public responsibilities relating to the environment, exercises functions of a public nature relating to the environment, or provides public services relating to the environment.

“*Network Rail*” and “*Port of London*” decisions (*Network Rail Limited v IC* (EA/2006/0061 and EA/2006/0062); *Port of London Authority v IC* (EA/2006/0083)).

Background to the Duchy

33. The Charter of Edward III dated 1337 ("**1337 Charter**") provided that the eldest son of the Monarch being heir apparent succeeds to the title Duke of Cornwall immediately he is born by right of inheritance.⁷ With the title comes rights and responsibilities with respect to the Duchy. If there is a living male son of the Monarch who is also heir apparent then the Duchy is managed by the Duke. When there is no Duke then the Duchy is managed by the Crown, but it does not belong to the Crown or to the Monarch.
34. The Duchy was established to provide an income for the eldest living son of the Monarch, being heir to the throne. The Charter provides that the Duke is entitled to the income, net of all expenses, but not to the capital, thereby preserving the estate for his successors. When there is no Duke (even if there is a Prince of Wales), the Duchy estate reverts to the Monarch under the 1337 Charter. The annual Civil List will then be reduced by the amount of the income generated from the Duchy (by s.2 of the Civil List Act 1952). Similarly, when the Duke is a minor, eight-ninths of the net revenues from the Duchy estate are placed at the disposal of the Monarch and are used to reduce her income from the Civil List (again, by s.2).
35. Walter Ross CVO ("**Mr Ross**") the Secretary and Keeper of the Records of the Duchy, who was the only witness before the Tribunal, explained that the estate currently comprises some 53,628 hectares of land and around 2,100 hectares of woodlands, mostly in the south west of England, together with around 258 km (160 miles) of coastline, the Isles of Scilly, the navigable riverbed of the Tamar, most Cornish rivers and some rivers in Devon. The properties comprised within the estate include over 3,500 individual lettings, including 700 agricultural agreements, 700 residential agreements, and 1,000 commercial agreements, as well as Highgrove House in Gloucestershire (which is the family home of the Duke and Duchess of Cornwall). In addition, the estate includes a small urban residential property portfolio, a commercial property portfolio and a financial investment portfolio, including both quoted investments and authorised unit trusts. The assets of the estate used to include a retail property portfolio, but this has been sold in recent years and assets have instead been invested in a variety of financial and other property investments.
36. Mr Ross explained that the principal activity of the Duchy is the sustainable and commercial management of estate land and properties. The current core 'mission statement', set out in the 2010/2011 Annual Report and Accounts is:

"To maintain and develop a landed estate which fully reflects His Royal Highness's views and wishes, which will continue to provide an adequate income for His Royal Highness and which he will be able to pass proudly on to his son, from the viewpoints of its environmental integrity, its physical and social fabric and its ability to continue to provide an ongoing level of income sufficient to meet the requirements of the heir to the Throne."

⁷ See Halsbury's Laws of England vol. 12 (1) paras. 318 – 353.

37. Mr Ross further explained that the Duchy is managed by the Duke. He is supported by The Prince's Council ("**the Council**") which meets twice a year, acting effectively as an advisory board. The Council has a number of minor administrative functions under the various Duchy of Cornwall Management Acts.⁸ More generally, the Council provides advice to the Duke with regard to the management of the Duchy estate.
38. In addition to the Duke, the Council comprises a number of Officers appointed by the Duke, and other persons who have the confidence of the Duke.
39. As to the Officers:
- a) The offices of Secretary and Keeper of the Records are technically separate, but they have by convention been held by the same person for some considerable time. Mr Ross currently holds both offices, and is in practice the full-time 'chief executive officer', with specific responsibilities under the Duchy of Cornwall, Management Act 1863, in particular, under s. 31 of that Act, he is obliged to enrol documents in the records of the Duchy.
 - b) The Lord Warden of the Stannaries in Cornwall and Devon is a 'non-executive' position: he acts as deputy chairman of the Council, and as chairman when there is no Duke of full age. The current Lord Warden of the Stannaries is Sir Nicholas Bacon, Bt., OBE, DL.
 - c) The Attorney General to the Prince of Wales is the Duke's principal legal officer. (When there is no Prince, he is the Attorney General to the Duchy of Cornwall.) The current Attorney General is Jonathan Crow QC who acts for the Duchy in this appeal.
 - d) The Receiver General has oversight of the estate's financial affairs. The current Receiver General is the Hon. James Leigh-Pemberton.
40. Only the Keeper of the Records is employed and paid a salary. Other Officers of the estate (such as the Attorney-General to the Prince of Wales) may receive fees for services they provide.
41. Mr Ross explained that the Secretary and Keeper of the Records, Receiver General and Lord Warden of the Stannaries in Cornwall and Devon are the "Proper Officers" for the purposes of the Duchy's accounting procedures and the application of the relevant aspects of company law to the Duchy's Accounts.

Is the Duchy a body or other person?

42. In **Cross** it was not necessary for the Tribunal to decide whether the Duchy of Lancaster was a body because it clearly stated so in its establishing Charter. However the 1337 Charter does not establish the Duchy in that way.

⁸ E.g. the power to fix fees for inspection of enrolments, under s.36 of the Duchy of Cornwall Act 1844 and the power to authorise payments from the capital account, under s.12 of the Duchy of Cornwall, Management Act 1863.

43. Mr Ross in evidence says it is not a body or other person. However Mr Ross also explains that “at least in recent years” it is “the general practice for all contracts other than leases” to have been entered into in the name of “the Duchy of Cornwall” although he says “this is not strictly permissible, because the Duchy estate is not itself a legal person; it is a shorthand that has developed over time.” He also informed us that there had been transactions between the Duchy and Duke, for example the Duke pays rent to the Duchy for his occupancy of Highgrove House and the Duchy has purchased quantities of timber from the Duke.
44. We note that contracts with employees, presumably including Mr Ross himself, are entered into with the Duchy, not the Duke or PoW. The Staff Handbook headed “Duchy of Cornwall” refers to “*employment by the Duchy*”. The Duchy appears to pay PAYE. The Duchy takes out permanent health insurance on behalf of the employees. The Duchy operates a non-contributory pension scheme providing benefits based on final pensionable pay.⁹ The Duchy reimburses travel and other expenses. Employees give their consent to the Duchy processing their personal data. The Duchy is notified as the Data Controller under the Data Protection Act 1998.
45. Mr Crow says that using “the Duchy” in this way distinguishes between the income generating organisation centred at Buckingham Gate where the Duchy’s staff are mainly located and the income spending staff of the PoW based at Clarence House. He contends this does not mean the Duchy is a body or other legal person. However, although we found Mr Ross’s evidence at times confusing and unclear, we were given to understand that the Duchy contracts in its own name and has sued and been sued in its name (although the convention is to join the Attorney General as the relevant party). In fact in this case the Duchy was joined as the Second Respondent and it was only just before the hearing that Mr Crow asked for the Attorney General to be substituted as the party. It was eventually agreed that the Attorney General would be joined as the Third Respondent.
46. Mr Ross explained that Duchy lands were currently going through a voluntary registration process with the Land Registry. We were shown in evidence the land registry entries of land in Windsor Hill Lane, Windsor Hill, Shepton Mallet which showed that the Proprietorship Register recorded the land in the name of *His Royal Highness Charles Philip Arthur George Prince of Wales, Duke of Cornwall and Rothesay, Earl of Chester and Carrick, Baron of Renfrew, Lord of the Isles and Great Steward of Scotland in right of his Duchy of Cornwall*. In the Charges Register any disputes relating to an easement were referred to as being “settled by the Surveyor General of the said Duchy of Cornwall or his deputy” who are presumably employees of the Duchy, not the Duke. Also we note that in Mr Ross’ evidence to the House of Commons Committee of Public Accounts¹⁰ he referred to Highgrove House being owned by the Duchy of Cornwall and that certain properties which are owned by the Duchy are let to Duchy staff and the PoW. As we understand it as Keeper of the Records Mr Ross will hold information, deeds

⁹ The Duchy of Cornwall Staff Pension Scheme 1978 is a funded defined benefit scheme.

¹⁰ Nineteenth Report of Session 2004 – 05.

etc on unregistered land and their dealings “enrolled in the Office of the Duchy of Cornwall”.¹¹

47. Whatever the constitutional or other implications of registering Duchy lands in the name of the PoW/Duke, bearing in mind that he is only entitled to the income from the estates and needs the consent of the government (through HM Treasury) for the sale of land and other assets, we do not regard the fact of registration in his name as determinative of whether the Duchy is a body or legal person. It is one factor we need to take into account.
48. The Duchy holds bank accounts in its name. This is a consequence of ss.4 and 17 Duchy of Cornwall Management Act 1863 and s.6 of the Duchy of Cornwall Management Act 1982. Mr Ross says this is a matter of convenience to enable the deposit of capital sums which form an inalienable part of the possessions of each successive Duke. In any event Mr Crow says the title of a particular bank account cannot convey legal personality on land and assets. We are not sure the Bank of England who holds the accounts would agree that the Duchy has no legal personality in relation to its deposits or its obligations to the Bank. In any case in evidence Mr Ross was unclear as to the way the revenue and capital accounts held by the Duchy operated.
49. We note that the 1997 financial statements presented to Parliament were in the name of the “Duchy of Cornwall” and that the notes on the Duchy stated:

The Duchy of Cornwall is a body created by charter in 1337..... The assets of the Duchy comprise agriculture, residential and commercial properties and a portfolio of quoted investments and authorised unit trusts.

The Duchy is subject to the Duchy of Cornwall Management Acts 1863 to 1982, which effectively govern the use of the Duchy’s assets. The property and other assets of the Duchy, and the proceeds of any sales of assets, belong to the Duchy. His Royal Highness The Prince of Wales in right of his Duchy of Cornwall is only entitled to the net income of the Duchy.

We further note that the introduction to the 2005 Financial Statement is in similar terms.

50. We see that under the 1863 Act the Duke “shall not be personally liable to any Action, Suit or other Proceeding in consequence thereof, or touching any other Matter or Thing done or purporting to be done under the Authority of this Act” [or 1982 Act] ...” and the Keeper of the Records of the said Duchy shall be indemnified out of the Revenues of the said Duchy against Costs, Expenses, and losses of and attending or incurred by any Suit against him aforesaid”. There are other references in these statutes such as in s.7 of 1982 Act “where a transaction affects land belonging to the Duchy” which suggest it is more than just a possessor of assets. Mr Ross himself as the Keeper of Records of the Duchy has specific duties under the 1863 Act in relation to, as his name suggests, the keeping of deeds and charging fees for their inspection. These provisions in our view tend towards the Duchy being a body or other legal person.

¹¹ S.30 Duchy of Cornwall Management Act 1863.

51. Mr Ross as the Secretary and Keeper of the Records of the Duchy of Cornwall describes himself as “in effect, the Chief Executive Officer”. From the evidence before us he can only be the CEO of the Duchy.
52. The IC accepts that the Duchy is a body under reg 2(2)(c) but not a separate legal person. Instead he says it is a portfolio of assets that are placed within a private individual’s possession. The IC does not go on to consider what the position is when there is no Duke.
53. Both the IC and Duchy rely on the statement in the current edition of Halsbury’s Laws to the effect that the Duchy is not a separate legal entity.¹² Ms Steyn says that such a statement was never made in previous editions of Halsbury’s Law, so questions the correctness of the latest statement.
54. We note the Law Officer’s opinion dated 15 August 1913 given in relation to the tax position of the Duchy and Duke. The opinion provided a basis on which it could be claimed that the Duchy was entitled to “Crown Immunity” and as a consequence has a privileged tax position which has direct consequences for the tax treatment of the present Duke and Duchy. Clearly in this context the Duchy is considered separate from the Duke.
55. Ms Steyn maintains that the Duchy is a distinct *sui generis* legal person and, in addition to some of the matters dealt with in previous paragraphs, says:
 - a) The Duchy is an entity that was created by an Act of Parliament. In the Prince’s Case of 1606¹³ it was decided that the Monarch could not by prerogative power create such a mode of descent and that it is authority for the proposition that the 1337 Charter was, in fact, an Act of Parliament and that the Duchy is a creation of Act of Parliament.
 - b) The Duchy exists independently of the persons who, from time to time, are Dukes of Cornwall. There may not be a Duke, but there is always a Duchy. Whilst there is always an heir to the throne, it has often been the case over the centuries that the heir has not been the eldest surviving son of the Monarch, and so there has been no Duke. The Duchy has continued to own its property, be party to contracts and incur liability throughout those periods.¹⁴
 - c) The Duchy is managed and controlled by the Council (which consists of statutory officers and other appointees) and the Treasury because of its powers in relation to the capital of Duchy assets and role in relation to the Duchy’s accounts.¹⁵

¹² Halsbury’s Laws of England, Volume 12(1), paragraph 320.

¹³ 2 8 Rep 1

¹⁴ Most recently there was no Duke from 1936-1952 because Edward VIII’s heir was his brother, George, and then following his abdication George VI’s heir, was his daughter Elizabeth. Prince Charles became Duke, in accordance with the terms of the Act, upon his mother’s accession to the throne. But he did not become entitled to the full income until he reached the age of 21 on 14 November 1969. So for the 33 years from 1936-1969 the entire income, save for one-ninth from 1952 onwards, was used to reduce the burden that the Civil List imposes on the public purse.

¹⁵ See s.7 Duchy of Cornwall Management Act 1982.

- d) The Duchy is managed and administered by officers and employees who are appointed under statutory authority.¹⁶
- e) It is extensively referred to in legislation and a distinction is drawn between the legal entity that is the Duchy and the property of the Duchy.¹⁷

56. Mr Crow says it is not such a person or body for a number of reasons including the following:

- a) There are no words of incorporation in the 1337 Charter. The Duchy is a gift of property by the then King. The Charter created something similar to a strict settlement under the Land Settlement Acts.
- b) Land is being registered in the name of the Duke and tenancies are granted in his name;
- c) Legal provision was necessary for the Duchy to open bank accounts because it was not a legal entity;
- d) Litigation in relation to the Duchy is undertaken in the title of the Attorney General to the Prince of Wales;
- e) Where the Parliamentary draughtsman in legislation refer to the Duchy it is a shorthand for the Duke as possessor of the Duchy;
- f) The Duchy accounts are not a legal document and only a label is being used.

57. The UT in **Smartsources** found that:

The definition of 'public authority' for the purposes of the EIR 2004 may be fixed as a matter of its wording, but the outcome of its application will necessarily change according to the context and over time. To that extent the notion of a 'public authority' is both place- and time-specific. [105]

With this finding in mind, whatever the basis of the Duchy under the 1337 Charter, we find that the Duchy is now a body or other legal person. Taking into account all the above evidence and other statutory provisions, the practices of the Duchy and the way it has presented itself to the world including Parliament, the differentiation of the Duchy and Duke in commercial and tax matters as well as under legislation and the contractual behaviour of the Duchy, we are led to the conclusion that the Duchy is a body or other person for the purposes of regs 2(2)(c) and (d) of the EIR.

¹⁶ See s.8 of the Duchy of Cornwall Management Act 1868 (receiver general); s.4 and 31-33 and 34 of the Duchy of Cornwall Management Act 1863 (Keeper of the Records) and s.2 of the Duchy of Lancaster and Cornwall (Accounts) Act 1838.

¹⁷ See eg s.10 of the Duchy of Cornwall Management Act 1982; s.227 of the Planning Act 2008 and s.67 of the Wildlife and Countryside Act 1981.

Does the Duchy carry out functions of public administration?

58. The UT decision in **Smartsource** is very relevant to helping us decide whether the Duchy carries out ‘functions of public administration’. In any case the FTT is bound by the decisions of the UT. In **Smartsource** the UT had to consider whether the water and water and sewerage companies in England and Wales were public authorities under EIR. The UT, sitting following the discretionary transfer of the appeal from the FTT:¹⁸
- a) Decided that a body will not be a public authority simply because it carries out public functions; they must be “functions of public administration” [35];
 - b) Agreed with and approved of the multi-factor approach taken by the Information Tribunal in *Network Rail v Information Commissioner* EA/2006/0061 (“**Network Rail**”) and *Port of London v Information Commissioner* EA/2006/0083 (“**Port of London**”) namely that whether a body was a “public authority” within reg 2(2)(c) EIR depended on a range of factors [64] and that is a matter of fact and law [65];
 - c) Decided the onus lies on the appellant to demonstrate that the body falls within the statutory definition [65];
 - d) Paid due regard to Lord Neuberger of Abbotsbury’s observations in *YL v Birmingham City Council* that the mere fact of the existence of an intensive regulatory regime “cannot mean that the provision of a service, as opposed to its regulation and supervision, is a function of a public nature” [64] rather the very fact an intensive regulatory framework exists may itself demonstrate that the body operates at arm’s length from government otherwise the regulatory regime would not be needed [71];
 - e) Decided that where any administration undertaken by the body is ancillary to its primary commercial purpose then it does not become a function of public administration simply because there is an obvious and significant public interest [76];
 - f) Decided it is not open to the FTT to find that a body is a public authority for some purposes but not for others [104];
 - g) Decided that in relation to reg 2(2)(d) the focus of both the Aarhus Convention and the Directive is on “capturing governmental and executive functions in their various guises”, rather than on functions at “arm’s length from the machinery of the state” [94].
59. We would observe that the finding that a body cannot be a hybrid public authority under the EIR is surprising bearing in mind that hybrid authorities are part of the FOIA regime – see s.7. Also we note that under the Directive and Convention a Member State may decide that the implementing regulations do not apply to public authorities when they are acting in a judicial or legislative capacity. It would appear that such public authorities are still public authorities to the extent that they carry

¹⁸ Under rule 19 of the Tribunal Procedure(First-tier Tribunal)(General Regulatory Chamber) Rules 2009 as amended.

out other functions of public administration. However we are bound by the UT's decision.

60. In **Cross** the Tribunal considered whether the Duchy of Lancaster was a public authority for the purposes of EIR. The two Duchies are similar bodies in that the Duchy provides an income for the PoW when Duke whereas the Duchy of Lancaster provides an income for the Monarch. The Tribunal in **Cross** considered that the starting point in a determination as to whether a body undertakes functions of public administration is the statement of Lord Nicholls in *Aston Cantlow & Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 ("**Aston Cantlow**") at 555 [12]

"12 What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of government functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

61. The UT in **Smartsources** approved of the factors taken into account in **Port of London** and **Network Rail**. We set these out:
- a) Whether there are types of functions that are typically governmental in nature?
 - b) Do the functions of the body in question form part of a statutory scheme of regulation?
 - c) Are those functions such that if the body did not exist some Governmental provision would need to be made for the exercise of those functions?
 - d) Whether the organisation has a statutory basis, or whether it exists purely as a matter of contract?
 - e) Whether the organisation is accountable to members or shareholders, or alternatively whether it has some formal accountability to government (e.g. a requirement to make reports to Parliament)?
 - f) The extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.¹⁹
 - g) The extent to which the body is performing a regulatory function and the degree of government control.²⁰
62. In relation to paragraph 58.e. above the appellant in **Smartsources** had argued that some of the water companies functions were of a regulatory, rule-making or law enforcement nature, for example their power to impose hose-pipe bans in times of

¹⁹ Lord Nicholls of Birkenhead's analysis in *Aston Cantlow* at [13] adopted by the Tribunal in *Network Rail*.

²⁰ *Network Rail* at [38].

actual or anticipated water shortage and to decide whether to grant consent to trade effluent being discharged into public sewers. The water companies conceded that they were not ordinary companies but argued that the examples given by the appellant, which were described as “special features”, were “*ancillary to the water companies’ primary commercial purposes and are there to enable them to protect their assets. The core regulatory functions or “functions of public administration” were vested in the Secretary of State and OFWAT during the 1989 process of privatisation. The bottom line is that the water companies are commercial enterprises in the business of supplying water and providing sewerage services; any administration that they undertake is ancillary to the central activity. It does not become a function of public administration simply because there is an obvious and indeed a significant public interest in securing a clean water supply and safe sewerage system.*” [76] The UT agreed with the argument.

63. What does this mean? We consider it means that a body which carries out functions of public administration will not be a public authority for the purpose of the EIR if those functions are on the whole secondary functions which are related to and flow from primary functions which are not functions of public administration. But where the functions of public administration are separate self-standing functions which do not flow from or depend on the main activity of the body, they are not “ancillary” in **Smartsource** terms and the body may be a public authority for the purpose of the EIR.
64. The Duchy’s primary function according to its 2010/11 Annual Report is to provide an income for present and future Dukes. The Duchy’s principal activity to generate this income is the commercial management of its lands and properties.
65. But in evidence we were informed of a number of other activities undertaken by the Duchy. We start by considering that of a Statutory Harbour Authority.

Statutory Harbour Authority in respect of the Isles of Scilly

66. The Duchy of Cornwall St Mary’s Harbour web site states that

“We are a Private Harbour run by the Duchy of Cornwall. We have around 2000 visiting Yachts a year and Harbour users also include fishing boats, local boat owners, inter island passenger launches and the Ships used for the Island’s Mainland connections. As a Competent Harbour Authority we provide Pilotage for the islands currently having around 25 visiting cruise ships per year, along with sail training vessels, large yachts and special cargo deliveries. We are classed as a Local Lighthouse Authority under Trinity House enabling us to establish maintain certain navigational aids around the islands. St Mary’s harbour is owned and managed by the Duchy of Cornwall as part of the archipelago of the Isles of Scilly.”
67. The web site refers to the harbour bye-laws and rates which by implication have been established by the Duchy.
68. We have been shown the Isles of Scilly Pilotage Service Operating Procedures which were prepared by MARICO Marine for the Duchy as the Isles of Scilly

Competent Harbour Authority. In the introduction it says “The Duchy of Cornwall was appointed as the Competent Harbour Authority for the Isles of Scilly in 1987”.

69. Mr Ross in evidence told us that the Duchy employs a number of people to undertake the statutory harbour and lighthouse duties.
70. Ms Steyn set out for us in some detail the position of the Duchy in relation to the harbour. Under the Pier and Harbour Order Confirmation (No.4) Act 1890 (“**the 1890 Act**”) and the St Mary’s (Isles of Scilly) Harbour Revision Order 2007 (the “**the 2007 Order**”), which incorporates most of the provisions of the Harbours Docks and Piers Causes Act 1847 (“**the 1847 Act**”), she says the Duchy is the statutory harbour authority (“**the Statutory HA**”) for the Isles of Scilly citing the Explanatory Note to the Order – although the application was in the name of the Duke.
71. Mr Crow argues that it is the Duke of Cornwall not the Duchy who is a harbour and lighthouse authority for St Mary’s as “possessor of the Duchy of Cornwall” under these statutes and that any public references by the Duchy that it is the harbour and lighthouse authority are not accurate and are no more than shorthand.
72. On the basis that the Duchy is the harbour and lighthouse authority Ms Steyn contends that it undertakes functions of public administration. She says the Duchy is a Statutory HA under s.67 of the Harbours Act 1964 (“**the 1964 Act**”), which defines harbour authority for the purposes of that Act as:

“any person in whom are vested under this Act, by another Act or by an order or other instrument (except a provisional order) made under another Act or by a provisional order powers or duties of improving, maintaining or managing a harbour”. (emphasis added)
73. The power and duty of improving, maintaining and managing the harbour of the Isles of Scilly is imposed ‘on the possessor of the Duchy of Cornwall’ by the 1890 Act, as amended and expanded by the 2007 Order. The explanatory note to the statutory instrument states that the reference to the ‘possessor of the Duchy’ (from time to time) is co-terminous with the Duchy itself. Ms Steyn maintains that there can be no dispute that it is the resources (and crucially the assets, including the capital) of the Duchy which are subject to the duties of public administration which the 2007 Order imposes.
74. The Duchy, if the Statutory HA, is also the relevant Statutory HA for the purposes of, *inter alia*, the Merchant Shipping Act 1995, Merchant Shipping and Fishing Vessels (Port Waste Reception Facilities) Regulations 2003, the Dangerous Vessels Act 1985, the Dangerous Substances in Harbour Areas Regulations 1987, various regulations regarding the reception of wastes under the Merchant Shipping and Maritime Security Act 1997 and (importantly) the Pilotage Act 1987.
75. As such, Ms Steyn argues, the Duchy is the statutory body responsible for the management of the Isles of Scilly’s principal harbour. She quotes from *Douglas & Green on the Law of Harbours, Coasts and Pilotage*²¹ (“**Douglas & Green**”), the

²¹ GK Green, Richard Douglas, Peter Low and Monica Peto, 5th edition, 1997, LLP Professional Publishing.

leading treatise on the law relating to harbours, which helpfully summarises the functions which Statutory Harbours perform as:

- “(a) the provision and maintenance of harbour facilities, i.e., quays, wharves, etc;
- (b) navigational safety functions, including lighting and buoying the harbour, the removal of wrecks and other obstructions and maintenance dredging;
- (c) regulating the activities of other persons at the harbour including, in particular, regulating the movement and berthing of ships in the harbour by means of directions and bye-laws and licensing dredging and the construction of works in the harbour by other persons;
- (d) carrying out harbour operations including, in particular, cargo-handling activities;
- (e) the provision of pilotage services; and
- (f) of increasing importance, the prevention of pollution and nature conservation...”

76. Douglas & Green also state: “[t]he powers granted to a harbour authority by Parliament are in virtually all cases conferred for the purpose of providing a public service”.
77. Ms Steyn also points out that while the statutory provisions conferring the functions of managing and maintaining harbours are commonly framed in permissive terms, the relevant provisions are properly interpreted as imposing a duty on the Duchy to establish and maintain the relevant public services and to continue to perform the relevant public administrative functions.²²
78. The nature and extent of the Duchy’s statutory duty is illustrated by s.33 of the 1974 Act and, by analogy, *Re Salisbury Railway*. S. 33 provides: “Upon payment of the rates payable by this and the special Act (i.e. the Act which incorporates section 33), and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers”. In *Re Salisbury Railway* the court considered that the railway was subject to an implied obligation to continue to operate, for the public benefit, the railway and Market House and not, without statutory sanction, to abandon any of its functions:36-C-E and 362C. By analogy, and having regard to the terms of the provision, s.33 of the 1847 Act must be interpreted as imposing an implied obligation to continue to maintain the harbour for the benefit of the public until such time as the Statutory HA is released from their functions by an Act of Parliament.
79. Douglas & Green observe the public duty which is imposed on Statutory HAs by s.33 and similar provisions means that Statutory HAs cannot lawfully close even a significant part of their harbour without Parliamentary authority.²³ Ms Steyn says

²² Gardner v London, Chatham and Dover Railway Co (1867) LR 2 Ch App 201 and Re Salisbury Railway and Market House Co [1967] 3 WLR 651 (see also the Department for Transport’s Port Marine Code [529]).

²³ Green & Douglas, p21, paragraph 3.11.

that the Duchy's relevant local legislation makes no provision for any derogation from this obligation.

80. Ms Steyn then provides us with a number of examples of what she describes as functions of public administration which the Duchy, as a Statutory HA, has a duty to perform such as navigational safety with power to deepen, dredge, scour and improve the bed and foreshore of the harbour,²⁴ to mark and light the harbour area,²⁵ to remove wrecks from the harbour²⁶ and so on. These powers she considers are directed at safeguarding the life and property of all members of the public using the harbour.
81. The Statutory HA has power to regulate the activities of all users of its harbour area. The Statutory HA appoints the harbour's 'harbour master'. S. 52 of the 1847 Act confers wide powers for the Duchy's harbour master to issue binding directions regulating the activity of all ships using the harbour. All vessels using the harbour are compelled by law to comply with such directions, and are subject to criminal penalty for non-compliance - s.53 of the 1847 Act.
82. Ms Steyn provided us with further examples of the powers or functions of a Statutory HA from excluding ships to enacting bye laws for the management and operation of the harbours area to various environmental obligations in relation to for example oil and pollution.²⁷

²⁴ S.193(2)(a) Part VIII Merchant Shipping Act 1995

²⁵ S.201 *ibid*

²⁶ S.252 *ibid*

²⁷ As stated by Widgery CJ in Pearn v Sargent [1973] Lloyd's Reports 141 It 144: "The function of the harbour master under section 52 is to regulate the traffic; after all it is a public harbour where the public have a right to be, and it is not the harbour master's function, as such, to keep them out. His function is to control and regulate them rather like a traffic policeman regulating traffic"

The Duchy's harbour master wields further powers to exclude ships from the harbour on the basis that they constitute a danger to public safety: s.1, Dangerous Vessels Act 1985. Failure to comply with such a direction is a criminal offence: s.5 Dangerous Vessels Act 1985. The Duchy also enjoys the power to regulate the movement of vessels carrying dangerous substances under the Dangerous Substances in Harbour Areas Regulations 1987.

Regulation 35 of the Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 requires the Duchy to notify the Secretary of State if it has reason to believe that a ship entering the harbour does not comply with the requirements of those regulations.

A Statutory HA has power to enact bye-laws for the management and operation of its harbour area: s.83 of the 1847 Act. Further *vires* to make binding bye-laws are conferred by regulation 43 of the Dangerous Substances in Harbour Areas Regulations 1987. Under s.57 of the Criminal Justice Act 1988, breach of harbour bye-laws is punishable by a fine of up to level 4 on the standard scale.

Parliament has specifically legislated to render Statutory HA's subject to a global duty, in formulating or considering any proposals relating to their functions under any enactment, to have regard to various environmental matters including conservation, freedom of public access to places of natural beauty and the availability of facilities for visiting buildings, etc. of archaeological, architectural or historic interest: s.48A of the 1964 Act.

Under the Dangerous Substances in Harbour Areas Regulations 1987, the Duchy is subject to a range of environmental and public safety obligations, primarily by regulating access to its harbour area of ships carrying dangerous cargoes and the obligation to prepare emergency plans and arrangements: regulations 6 and 7 (powers of prohibition and exclusion) and 26 (emergency plans). Under Regulation 44, the Duchy is given the responsibility for enforcing the operative provisions of the Regulations: e.g. Parts II and III and regulations 19, 20, 32(2) and 38.

As to the Duchy's functions which are directed specifically to the prevention of pollution, Schedule 1, paragraph 1 of the Maritime Safety Act 2003 authorises the Duchy to detain any ship where the harbour master has reason to believe that the master or owner has committed an offence by discharging oil (or a mixture containing oil) into the harbour. S. 131 criminalises such discharges.

83. An important function of a Statutory HA is its statutory duties and powers to protect public safety and the environment in its capacity as a marine pilotage authority under s.1 of the Pilotage Act 1987.
84. S. 2 of the 1987 Act obliges each marine pilotage authority to keep under consideration whether any, and if so what, pilotage services need to be provided to secure the safety of ships navigating in or in the approaches to their harbours and whether, in the interests of safety, pilotage should be compulsory in any part of that harbour or its approaches. If so, the marine pilotage authority must consider for what ships and in which circumstances pilotage is necessary, and what services should be provided. S. 2(2) expressly requires that the Statutory HA has particular regard to the hazards involved in the carriage of dangerous goods or hazardous substances when performing this function. Some pilotage functions cannot be delegated to another competent harbour authority - s.11(2) of the 1987 Act.²⁸

S.135 of the 1995 Act requires notice to the Duchy before oil is transferred to or from any ship in the harbour area. S. 136 also obliges the owner or master of any ship that discharges or leaks oil (or a mixture containing it) to notify the Duchy.

S. 259(6) confers the power upon the Duchy to board any ship in the harbour in order to ascertain the circumstances relating to any alleged discharge or leak. In this connection the Duchy may also conduct such investigations as it sees fit and require the production and copying of relevant documents.

The Duchy's functions in respect of the Isles of Scilly harbour extend to clearing any oil spills which occur within the harbour area: Douglas & Green, p90, paragraph 9.22. Further, s.137 of the Merchant Shipping Act 1995 specifically contemplates that the Secretary of State may issue directions to Statutory HAs in order to deal with any oil spill affecting the harbour area.

Ss 153 and 154 of the 1995 Act provide that the Duchy is entitled to recover any costs incurred in the process of remedying any oil spill within the harbour area from the owner of the ship concerned, even in the absence of negligence. In the event that the full cost cannot be recovered from the owner then the Duchy will usually be entitled to claim under s.175 of the 1995 Act against a statutory fund.

Under s.19 of the Prevention of Oil Pollution Act 1971, where a site on land commits a criminal offence under s.2 of that Act by discharging oil (or a mixture containing it) into a harbour area, the responsible Statutory HA is the only authority empowered to bring criminal proceedings against the malefactor. S. 11 of that Act also imposes a notification obligation upon the owner of the relevant site to inform the Statutory HA of any such leak.

The Statutory regime has important environmental functions concerning the reception and processing of ships' waste under the Merchant Shipping and Fishing Vessels (Port Waste Reception Facilities) Regulations 2003 which gives effect to the UK's international obligations under MARPOL. These measures require all Statutory HAs to ensure that adequate reception facilities are provided in order to comply with the UK's international legal obligations.

²⁸ Under s.3 of the 1987 Act it is the Duchy which determines which pilots shall be authorised to operate within its harbour area and the Duchy which prescribes which qualifications (age, fitness, experience and skill etc.) shall be required in order to be eligible for authorisation. Under s.5 of the 1987 Act it is the Duchy which has the statutory responsibility for determining whether any pilot's authorisation should be suspended or revoked within its jurisdiction on grounds of incompetence, misconduct, cessation of eligibility etc. S. 3(7) renders it a criminal offence for any party not authorised by the Duchy to hold him or herself out as an authorised pilot within the relevant area.

Sections 7, 8 and 15 of the 1987 Act establish the Duchy's important functions concerning compulsory pilotage: see e.g. The Isles of Scilly (Pilotage) Harbour Revision Order 1988 (SI 2156/1988). Under s.7 of the 1987 Act, if the Duchy considers it necessary in the interests of safety then it has the duty to direct that pilotage shall be compulsory

85. Mr Ross in evidence and Mr Crow in submissions advance a number of contentions as to why the Duchy's functions, if a Statutory HA, are not functions of public administration for the purposes of the EIR. In brief, it is asserted that:

- (1) the Duchy's functions arise 'purely as result of [its] possession of the land and foreshore on the Isles of Scilly'. They were carried out by a private individual until the turn of the twentieth century and, in common with other ports, there is no reason why St Mary's could not be operated by a private, commercial operation. Commercial companies can own and manage ports as Statutory HA in England and Wales;²⁹
- (2) the Duchy's functions as Statutory HA 'are not public functions';
- (3) the Duchy's public administrative functions as Statutory HA 'are only a very small part of the operations of the Duchy'. Levies are raised for the benefit of the Duchy estate. Any administration undertaken by a private commercial entity which is designated a Statutory HA is ancillary to this central commercial activity;
- (4) the detailed statutory scheme governing the activities of harbour authorities in the Harbours Act 1964, Pilotage Act 1987 and otherwise simply serves to demonstrate that harbour undertakers operate in an arm's length relationship vis a vis government: c.f. **Smartsources** [71], in relation to water companies; and
- (5) in any event, those public functions which arise in respect of ports and harbours in England and Wales are vested in the Secretary of State, not in the harbour authority.³⁰

86. Ms Steyn disagrees. She argues that:

- a) It is erroneous to assert that the Duchy's public administrative functions as Statutory HA arise because of its land ownership in the Isles of Scilly. Its functions arise because they have been conferred under statute. Another public body, such as the Isles of Scilly Council, could have been appointed as Statutory HA but the decision has been taken to vest the relevant statutory powers and duties in the Duchy;
- b) The nature of the public administrative functions that the Duchy carries out as Statutory HA in respect of the Isles of Scilly is a matter of legal analysis. Applying well-established principle it is clear that Statutory HAs duties and powers, being conferred under statute and principally directed to ensuring public and environmental safety, must be characterised as functions of public administration;
- c) It is correct to note that public limited companies can be designated as Statutory HAs e.g. Associated British Ports. However, it is an elementary

for ships navigating in, or in any part, of its harbour or the approaches thereto. The power to issue such compulsory pilotage directions is flexible, in that directions may specify the class of ship, area, circumstances etc. in which the obligation to submit to the compulsory pilotage shall be imposed. S. 15 establishes that the failure to comply with compulsory pilotage directions is a criminal offence.

²⁹ Halsbury's Laws Vol 36(1) (2007 Reissue), 'Ports and Harbours'. Para 620.

³⁰ See variously, for example, the Harbours Act 1964 (esp. ss.14-17, 31, 44 and Schedule 3), the Marine Strategy Regulations 2010 (SI 2010/1627), the Aviation and Maritime Security Act 1990, s.19 and the Transport Act 1982, s.66.

error (and *non-sequitur*) to suggest that it in any way assists in the analysis of *the nature of the functions* which the Duchy exercises as Statutory HA for the purposes of the EIRs, the Directive and Aarhus. In short, if a public limited company exercised the statutory powers and duties of the Duchy under an analogous legislative scheme then it too would be engaged in carrying out functions of public administration and would be subject to the EU's environmental information regime. It must be noted that a stated aim of the Aarhus Convention, as recorded in the Implementation Guide, was that bodies engaged in functions of public administration could not be inoculated against public scrutiny and accountability by privatisation: Implementation Guide, p33.

- d) Neither the EIRs, the Directive nor the Aarhus Convention comprehend any *de minimis* exemption. Further, the suggestion that the Duchy's scale in absolute terms can affect the analysis of its functions as Statutory HA in respect of the Isle of Scilly is flawed in principle. Moreover, as the Duchy is the only Statutory HA for the entire population and territory of the Isles of Scilly any attempt to minimise the importance of its role is misconceived.
87. Having considered all the evidence and arguments including the Tribunal's decision in **Port of London**, which is almost certainly another Statutory HA, we find that the Duchy is a Statutory HA and do not find it surprising that the Duchy publicly says exactly that.³¹ We consider that Ms Steyn's arguments are to be preferred and that, in any case, there appears to be a reluctant acceptance by Mr Crow that this is the case. What he really argues is that a Statutory HA does not carry out functions of public administration. If we are wrong we note that Mr Crow considers that the Duke is the Statutory HA.
88. We now need to undertake a multi factor approach as approved in **Smartsources** to determine whether the Duchy carries out functions of public administration as a Statutory HA. Before doing this however we need to consider some contextual European law.

The Duchy's functions of public administration under the EU Environmental law regime

89. A Statutory HA (and a lighthouse authority) is a 'relevant authority' within the meaning of regulation 6 of the Conservation of Habitats and Species Regulations 2010 ("**the 2010 Conservation Regulations**") and regulation 5 of **the 1994 Habitats Regulations**.
90. Ms Steyn submits that the Duchy is also a 'competent authority' for the purposes of regulation 7 of the 2010 Conservation Regulations and regulation 6 of the 1994 Conservation Regulations. Regulation 7 of the 2010 Conservation Regulations provides that a competent authority includes "any government department, statutory undertaker, public body of any description or person holding a public office". The Duchy falls within this definition, Ms Steyn submits, as a statutory undertaker, a public body and a relevant authority in relation to marine areas and European marine sites.

³¹ Also see Duchy of Cornwall 2005 Report and Financial Statements page 4.

91. Mr Crow asserts, without seeming to provide reference to supporting evidence or explanation, that it is not a 'competent authority', but had difficulty in asserting that it was not a 'relevant authority'. Ms Steyn argues that being a 'relevant authority' is more than sufficient to establish that the Duchy is a public authority for the purposes of the EIR, the Directive and the Aarhus Convention.
92. Ms Steyn contends that it would be entirely contrary to the aims of the Aarhus Convention, the Directive and the EIR if a body which is a 'relevant authority' for the purposes of what the European Commission has stated is "the cornerstone of Europe's nature conservation policy" (alongside the Birds Directive) was not subject to the European access to environmental information regime. As noted in CILFIT(at §20)³² above at paragraph 19: "Community law must be placed in its context and interpreted in light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".
93. Ms Steyn puts two propositions to us based on this guidance:
 - a) the duties imposed upon the Duchy as Statutory HA under the EU Habitats Directive must themselves be regarded as public administrative functions in order to ensure the coherent and harmonious application of EU law; and
 - b) the fact that these additional duties, being expressly directed to environmental protection, are incumbent upon the Duchy in exercising its domestic statutory obligations confirms that those responsibilities are functions of public administration for the purposes of EU law.
94. Ms Steyn drew our attention to the case of R (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin); [2010] Env. L.R. 33.
95. The claimant in R (Akester) sought judicial review of a decision by Wightlink Ltd ("**Wightlink**"), a private company and Statutory HA for Lymington Pier, to introduce more powerful ferries on a route which terminated at its harbour. Wightlink's functions as statutory HA were expressly limited in geographical scope by its empowering local legislation to Lymington Pier and a small adjacent area of water. Beyond Wightlink's harbour area, the ferries would pass through an EU SAC. The Claimant sought to establish that Wightlink was a competent authority under the Habitats Directive and so was required to conduct an 'appropriate assessment' of the proposed new ferries' potential impact on the EU SAC.
96. Owen J held that despite the fact that Wightlink was a private company and was acting in a commercial capacity it was nevertheless a competent authority for the purpose of the EU regime and consequently subject to the public law duties which the directive imposed. The judge held that neither the Habitats Directive nor the Habitats Regulations specifically preclude a non-governmental body from being a competent authority. He stated (at §§85-86):

³² CILFIT Sr CILFIT (Srl) v Ministry of Health C-283/81 [1983] 1 CMLR 472

“The fact that [Wightlink] is a private company does not in my judgment disqualify it from discharging its public duties as a statutory harbour authority. The discharge of its public duties must override commercial considerations.”

and

“[Wightlink's] decision to introduce and operate the new ferries was a decision made in discharge of its functions as a harbour authority, and had therefore to be made in compliance with its obligations under the Habitats Directive and Habitats Regulations.”

(emphasis added)

97. The judgment, Ms Steyn maintains, demonstrates that the Duchy is a competent authority in carrying out its functions as a Statutory HA and that it is subject to the duties imposed under the EU environmental law regime when engaged in activities which are primarily of a private/commercial character. We agree.

Multi-factor approach

98. We have referred above to the factors approved by **Smartsources** and those also applied in **Cross**. We also remind ourselves that functions of public administration include “specific duties, activities or services in relation to the environment” – paragraph 15 above. Taking each in turn:
- a) Whether there are types of functions that are typically governmental in nature? We find there are. The power to create by-laws, to licence operators and to undertake and/or regulate pilotage are examples.
 - b) Do the functions of the body in question form part of a statutory scheme of regulation? We find there are such functions. There is a statutory scheme to regulate merchant shipping, pollution, dangerous substances, to board vessels etc.
 - c) Are those functions such that if the body did not exist some Governmental provision would need to be made for the exercise of those functions? We consider some government intervention would be needed even if it was to appoint a private body or person to undertake the functions. Such appointments seem to be made by statutory order. St Mary’s seems to be open to the public. Provision would need to be made for the safety of individuals and private boats as well as oil pollution and other environmental matters.
 - d) Whether the organisation has a statutory basis, or whether it exists purely as a matter of contract? The Duchy is, at the very least, a creature of statute. As a Statutory HA there are many other statutory provisions, outlined in previous paragraphs, which lead us to find that it does have a statutory basis.
 - e) Whether the organisation is accountable to members or shareholders, or alternatively whether it has some formal accountability to government (e.g. a

requirement to make reports to Parliament)? We find that the Duchy is accountable to the Treasury and Parliament for annual financial reports. Also it requires the consent of the Treasury to certain transactions. Mr Ross in his evidence to the House of Commons Committee of Public Accounts in relation to “The accounts of the Duchies of Cornwall and Lancaster”³³, which he largely confirmed in evidence before us, said “The governance of the Duchy of Cornwall is very much controlled by the Treasury and in the process of this hearing we will seek to point out the very considerable control that we think the Treasury has over the affairs of the Duchy of Cornwall.”

- f) The extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service. We consider that a Statutory HA provides a number of public services in relation to the environment for example dealing with oil spillages and other forms of pollution.
- g) The extent to which the body is performing a regulatory function and the degree of government control. We consider that a number of the functions of a Statutory HA are regulatory functions from issuing bye laws to responsibility for navigation. These are largely controlled through legislation. There appear to be no regulators like OFWAT in the water industry as described in **Smartsouce**.

99. We conclude from this analysis that the preponderance of factors point to the Duchy carrying out functions of public administration. This conclusion does not mean that we consider all Statutory HAs will necessarily be public authorities under the EIR. It depends on the facts in each case.
100. If we are wrong then the Duke must be the Statutory HA. Somebody has to be performing these functions under the law and there is no other body or person it can be. In any case Mr Crow maintains that the Duke is the Statutory HA for St Marys. At the very least the Duchy undertakes the Statutory HA functions of public administration on behalf of the Duke as he clearly does not do this himself. Messrs Ross and Crow both say that the Duke manages the Duchy and, in effect, controls it with the support of the Advisory Council. They say the only aspect of the Duchy which is not under his control is capital dispositions which require the approval of the Treasury. We take that to mean that even if the Duchy is not a public authority under reg 2(2)(c), it is under reg 2(2)(d).
101. However is this an ‘ancillary’ function in **Smartsouce** terms so as to take it outside the EIR? We think not. The Duchy’s primary business is not that of a port authority. It manages properties and investments to provide an income for the Duke. The Statutory HA role is not one which directly flows from the primary business. It is different, independent and unrelated, and contributes only a small amount of income.

³³ Nineteenth Report of Session 2004-05.

Is the Duchy subject to the EIR?

102. So far we have found that:

- i) The Duchy is a body or other person;
- ii) The Duchy is a Statutory HA;
- iii) Statutory HAs are 'relevant authorities' and likely 'competent authorities' under the UK regulations implementing the Habitat Directive;
- iv) The Aarhus Convention requires the Directive to be read purposively so as to cover information requests relating to the EU environmental regime as a whole;
- v) Statutory HAs carry out functions of public administration;
- vi) Therefore the Duchy is a public authority under reg 2(2)(c);
- vii) Even if the Duchy is not the Statutory HA, the Duke is;
- viii) The present Duke manages and controls the Duchy;
- ix) Then the Duchy is a public authority under reg 2(2)(d).

103. To determine whether the Duchy is a public authority under the EIR, is it sufficient that the Duchy is a public authority in its capacity as a Statutory HA? **Smartsources** does not seem to allow us to consider whether the Duchy may be a hybrid public authority for limited purposes under the EIR. And since we have found that the functions of public administration performed by the Duchy as Statutory HA are not ancillary in the **Smartsources** sense, those functions are sufficient to make it a public authority subject to the EIR.

104. Having determined that the Duchy is a public authority by virtue of its functions as a Statutory HA we do not consider we are required to engage in further analysis but we would observe that, in addition to those functions, there are additional factors indicating that the Duchy is also a public authority for other (some non-ancillary) purposes. For example, the Duchy provides an income for the PoW in his constitutional capacity to undertake public services and enjoys a statutory right to bona vacantia. We make the following brief comments on these two points.

Income to support the Heir to the Throne's public services

105. The Duchy's evidence is that the 1337 Charter provided a private inheritance for the Duke of Cornwall and that it is an entirely private operation. Today it provides an income for the Duke. From Mr Ross' evidence it would appear that most of that income is used to fund the public services the Duke carries out and his charitable activities. This is largely confirmed by the fact he pays income tax on only a small part of his income.

106. The Duke as PoW has an important constitutional role as Heir to the Throne. Under what is sometimes called the "Apprenticeship Convention" he is required to be educated in the business of government in order to prepare him for the time when he becomes King. Also he often stands in or represents the Monarch or UK government at public and international functions or events. Clearly in modern times the government has a public responsibility to ensure he is funded to carry out such roles. He does receive some small grants but the bulk of his income comes from the Duchy. If the Duchy did not provide this income then the government would need to make provision.

107. This relationship is clearly understood by the way the Civil List operates. When there is no Duke or the Duke is a minor and too young to undertake any public duties then the amount paid to the Monarch is reduced as she/he has the benefit of the Duchy's income. Similarly the relationship is seen through the way the Duchy and Duke are taxed. The income is only taxed in the hands of the Duke but not for the income supporting public services and charitable work which is the bulk of the income. These are forms of indirect public funding.
108. Parliament wishes to ensure that the Duchy is managed properly so as to provide the necessary income for the Duke by not only requiring the approval of the Treasury to capital dispositions but also having oversight to ensure the Duchy is being managed well. Mr Ross in his evidence to the House of Commons Committee on Public Accounts explains this oversight through monthly meetings and the Treasury giving advice often in the form of Accounts Directions. The Treasury then has to present these accounts to Parliament annually. These activities are subject to Parliamentary scrutiny through select committees. The 19th report of session 2004-05 made a number of recommendations which seem to us to be about protecting the Duchy's income and the transparency of its accounts.
109. Therefore in a modern day context the Duchy is carrying out the public function or service of providing an income for the undertaking of an extremely important constitutional role for the UK. The Aarhus Guide set out above states "*the Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public involvement, information and participation.*" Here it was referring to recent privatisation but in our view the innovation may equally be a historical one which was appropriate at the time. It has remained as a convenient way of funding a public role but subject to Parliamentary scrutiny. It follows that if the Duchy is not properly funding the Duke the government could step in to ensure it is carrying out this public function, as it has done over many centuries in relation to the Duchy through various Acts of Parliament.
110. From this it is not difficult to understand Ms Steyn's argument that the Duchy is also a public authority in performing its primary function and that the provision of an income for the Duke is a function of public administration.

Bona vacantia

111. In the UK the government through the Treasury administers the estates of persons who die intestate without known kin and collect and administer the assets of dissolved companies. In exercising this function the State performs a public law duty, as Blackstone states to prevent 'strife and contention' and the danger to good public order and administration that would arise from the existence of 'unowned' property.³⁴ Blackstone also states that this right of *bona vacantia* is part of the modern constitutions of most governments in Europe.
112. There are two exceptions in the UK – the Duchies of Cornwall and Lancaster. The Duke has the right to bona vacantia for the County of Cornwall (which is not the same geographical area as that covered by the Duchy). We were not provided with

³⁴ 1 BI. Comm. 299 (14th Edition, 1803).

evidence of how this originally arose but it is clearly reflected in legislation over many centuries.

113. Mr Crow argues this a private right and that he is supported by the Tribunal's decision in **Cross**. The income from bona vacantia in Cornwall forms part of the Duchy's income and is reflected as such in the accounts. In the Duchy's 2010/11 Annual Report the Duke received bona vacantia of £75,000. Surplus receipts were paid to The Duke of Cornwall's Benevolent Fund.
114. Ms Steyn argues that this is a public administrative function, as bona vacantia is for largely the rest of the UK and that it is administered by the Duchy even when there is no Duke.
115. As we have explained, in view of our finding in respect of the Duchy's functions as Statutory HA we do not need to decide whether these additional functions are also functions of public administration and where relevant are not ancillary in the **Smartsource** sense. However it seems to us to be reasonably arguable that they are.
116. At the end of the hearing we asked Mr Crow to provide us with the conferring charter or statute on bona vacantia of Duke/Duchy as this was not provided in any of the bundles. He provided a note which went further than our request and in any case did not seem to provide what we asked for. The Appellant objected to the Tribunal having regard to the note before he had an opportunity to respond. As we are not relying on this function we have not needed to decide whether to take the note and the response into account.

Conclusion and next steps

117. We find that the Duchy of Cornwall is a public authority under the EIR and that the Duchy must deal with Mr Bruton's request under these Regulations. We substitute a decision notice to this effect and require the Duchy to disclose the information or issue a refusal notice in respect of the whole or part of the requested information within 28 days of the date of this decision. In this regard, we would remind the parties that as we understood the Duchy's evidence, no Environmental Assessment of the Oyster Farm had been carried out.
118. Our decision is unanimous.

John Angel
Principal Judge

Date: 3 November 2011