

IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)

BETWEEN

MICHAEL BRUTON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE DUCHY OF CORNWALL

Additional Party

APPELLANT'S SKELETON ARGUMENT
for hearing 20-21 September 2011

References

Numbers in square brackets refer to page numbers in the Open Bundle. (There is no closed bundle.)

Essential Reading

- *This skeleton argument*
- *Skeleton arguments on behalf of the Commissioner and the Duchy*
- *The Commissioner's Decision [1]*
- *EIR request [125]*
- *Duchy's response to EIR request [129]*
- *Mr Bruton's complaint to the Commissioner [139; 149]*
- *Oral Evidence taken by the House of Commons Committee of Public Accounts [421-446]*

A Introduction and Summary

1. The Appellant, Mr Bruton, is interested in protecting the environment.¹ With this aim in mind, he sought environmental information from the Duchy of Cornwall ("**the Duchy**") in relation to the Duchy Oyster Farm at Port Navas, which is within the Fal and Helford Special Area of Conservation ("**SAC**") and an Area of Outstanding Natural Beauty ("**AONB**").² The Duchy refused to provide the Appellant with the

¹ [140].

² [125].

environmental information he sought, claiming that it is not a public authority for the purposes of the Environmental Information Regulations 2004 (“**the EIRs**”).³ This is an appeal against the decision of the Information Commissioner (“**the Commissioner**”), dated 5 October 2010, by which he accepted the Duchy’s claim.⁴

2. The Commissioner’s decision means that a creature of statute, which exists for the benefit of the State, and which carries out a plethora of functions of public administration – including, importantly, under the principal instrument of the EU’s own environmental law regime: the Habitats Directive – is rendered immune from public scrutiny and accountability under the access to environmental information regime which the EIRs, the Directive and the Aarhus Convention establish (as defined below). Without more this would be a startling proposition, but when one considers that the Duchy owns and manages over 53,628 hectares⁵ of land, predominantly in Devon and Cornwall, including most of the Isles of Scilly; 2,135 hectares⁶ of woodland; about one third⁷ of Dartmoor National Park; around 258 km⁸ of coastline; the navigable riverbed of the Tamar; most other Cornish rivers and some rivers in Devon,⁹ it can only be regarded as troubling. Such an outcome would be manifestly inconsistent with the Directive and the Aarhus Convention.
3. The issue in this appeal is whether the Duchy constitutes a public authority under regulations 2(2)(c) and/or 2(2)(d) of the EIRs, the Directive and the Aarhus Convention. For the reasons detailed below the Appellant submits that the answer to this question is plainly yes.
4. The Commissioner erred in concluding that the Duchy is not a public authority under the EIRs. In short:

³ [129].

⁴ [1].

⁵ [379]. This is equivalent to 132,518 acres.

⁶ [344]. This is equivalent to 5,275 acres.

⁷ About 70,000 acres [275], which is equivalent to 28,328 hectares.

⁸ About 160 miles.

⁹ Ross WS §12.

- (1) He failed to apply the correct interpretative principles when construing regulation 2(2) of the EIRs, as required by EU law and the UK's international law obligations under the Aarhus Convention. In particular, he erred in:
 - a) placing undue emphasis on domestic law material in interpreting what is an autonomous EU and international law concept;
 - b) failing to adopt a teleological interpretation having regard to the object and purpose of the Directive and the Aarhus Convention;
 - c) not recognising that the Directive must be interpreted with regard to, and harmoniously with, the other relevant provisions of EU law e.g. the Habitats Directive etc.
- (2) Consequently, the Commissioner erred in his approach to determining whether a body performs functions of public administration for the purpose of the EIRs, the Directive and the Aarhus Convention.
- (3) The Commissioner's decision was based on the mistaken premise that "where a body, such as the Duchy of Cornwall, has multiple functions only some of which may constitute public administration functions, then ... the body is only a public authority under Regulation 2(2)(c) in respect of information relating to any such public administration functions".¹⁰ The analysis adopted by the Commissioner has since been rejected by the Upper Tribunal in Smartsource Drainage & Water Reports Limited v Information Commissioner [2011] 1 Info LR 1498, which is binding on this Tribunal. The Commissioner and the Duchy now accept that this was an error of law.¹¹
- (4) The Commissioner failed to conduct any proper analysis of the nature of various functions of public administration which the Duchy carries out.
- (5) Further the Commissioner failed to give any proper consideration to the status of the Duke of Cornwall and the Duchy for the purpose of regulations 2(2)(c) and (d) of the EIRs.

¹⁰ [15].

¹¹ Even applying this analysis, the Commissioner's decision was wrong on the facts: see the Appellant's original outline Grounds of Appeal [27-32] and the analysis below.

5. The Appellant's case, in outline, is that the Duchy must be regarded as a public authority subject to the EIRs, the Directive and the Aarhus Convention because:
- (1) It is a pure creature of statute which enjoys perpetual legal succession.
 - (2) All of its functions (powers and duties) are entirely predicated upon, and defined, by a comprehensive and bespoke statutory scheme.
 - (3) It is entirely funded by the State, both as regards the initial transfer of capital which was vested within it by Parliament at its inception and on an on-going basis via its exemptions from capital gains tax and corporation tax.
 - (4) It is subject to detailed control and oversight by Central Government in the form of HM Treasury, and is also accountable to Parliament.
 - (5) It carries out multiple functions of public administration and exercises, and is subject to, a plethora of statutory duties and powers for this purpose. In particular, it carries out the following paradigmatic functions of public administration:
 - a) the principal function for which the Duchy was established, and which it continues to carry out, is managing property and investments to generate and provide funding for the official functions and public duties of the prospective and current Heads of State of the UK;
 - b) the Duchy exercises the statutory power and duty of collecting and administering *bona vacantia* within its territorial boundaries; and
 - c) the Duchy is a statutory harbour authority, in which capacity it exercises a wide variety of regulatory and public and environmental safety functions.
 - (6) Further, and in the alternative, if it is the 'Duke of Cornwall' rather than the Duchy *per se* who carries out those functions, then the Duke of Cornwall is a public authority for the purposes of regulation 2(2)(c) of the EIRs. The Appellant does not need to go further than this for his appeal to be allowed. But in fact if the Duke of Cornwall falls within regulation 2(2)(c), then the Duchy which is subject to the control of the 'Duke of Cornwall' from time to time, and which has

environmental responsibilities, falls within the ambit of regulation 2(2)(d) of the EIRs.

6. The Duchy and the Commissioner's various contentions that the Duchy is not subject to the EIRs, the Directive and the Aarhus Convention are vitiated by the following, recurring, fallacies:

- (1) the assertion, whether explicit or by implication, that the peculiar constitutional nature and history of the Duchy (and in particular its connection to the Monarchy) can be relied upon to exempt it from public scrutiny under the EU access to environmental information regime;
- (2) a focus on form, specifically the novel *sui generis* legal status of the Duchy; rather than the substance of the functions of public administration which it carries out and the specific provisions of the legislative scheme to which it is subject;
- (3) the attempt to elide the Duchy *qua* legal entity and the party who from time to time is entitled to: (i) receive its revenue; and (ii) exercise control over its functions (either the Heir as prospective Head of State or the Monarch as actual Head of State, depending on the situation at any particular time); and
- (4) an over-reliance on the highly partial opinions of the Duchy's employees, office holders and paid retainers; as opposed to a rigorous and objective scrutiny of the relevant legislative instruments and the documentary evidence of the practice of the Duchy.

B Legal Framework

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 ("the Aarhus Convention")

7. The Aarhus Convention provides (in relevant part):

"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...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;"

8. The Aarhus Convention is an international agreement concluded by the European Council. It is binding upon EU member states¹² and directly effective on the same basis as Directives¹³.
9. *The Aarhus Convention: an implementation guide*¹⁴ ("**the Implementation Guide**") is jointly published by the Economic Commission for Europe and the United Nations. It is not legislation but is an authoritative guide to the interpretation of Aarhus¹⁵.

Directive 2003/4/EC

10. Directive 2003/4/EC ("**the Directive**") implements the European Union's obligations under the Aarhus Convention.
11. Recital (11) of the Directive states (so far as relevant):

"...the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under

¹² Case C-162/96 Racke GmbH & Co v Hauptzollamt Mainz [1998] ECR 3655 at §41, citing Case 12/86 Demirel v Stadt Schwäbisch Gmünd [1987] ECR 3719 at §14

¹³ Case C-416/96 Nour Eddline El-Yassini v Secretary of State for the Home Department [1999] ECR I-1209.

¹⁴ *The Aarhus Convention: an implementation guide*, ECE/CEP/72, 2000.

¹⁵ See Smartsources at §§30-31.

national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment” (emphasis added).

12. Art. 2 of the Directive provides:

“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).” (emphasis added)

The Environmental Information Regulations 2004

13. Regulation 2(2) of the EIRs provides (so far as relevant):

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

(a) government departments;

(b) any other public authority as defined in section 3(1) of the Act, 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.

EU Interpretive Principles

14. Regulation 2(2) of the EIRs is the domestic analogue of Article 2(2) of both the Aarhus Convention and the Directive. The EIRs are 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 EIRs, 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: HP Bulmer v Bollinger [1974] Ch 401 at p405 and Marks & Spencer v Customs and Excise Case C62/00 [2002] ECR I-06325 at §24;

- (2) as the Directive gives effect to the Aarhus Convention, in the case of any latent ambiguity it should be construed in a manner consistent with the terms of that international law instrument: 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); and
 - (3) if the terms of the EIRs fail to give effect to the manner in which the Court of Justice of the European Union (“CJEU”) would interpret the Directive, the EIRs must be read down accordingly¹⁶.
15. Importantly in the present case, 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”: CLIFIT Sr CILFIT (Srl) v Ministry of Health Case C-283/81 [1983] 1 CMLR 472 at §20.
 16. 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 accordingly be construed having regard to the wider scheme of EU environmental law, in particular the Habitats Directive.¹⁷ If the EU legislative scheme concerning Environmental law imposes public law duties on a relevant body or person then it would be entirely anomalous, and contrary to principle, for that body to fall outwith the access to information regime that the Directive establishes. The prospect of the CJEU adopting such a construction must be regarded as non-existent.

Current domestic principles

17. For the purposes of the present appeal Smartsource establishes the following principles:
 - (1) A body will be a public authority under regulation 2(2)(c) whenever it carries out a function of public administration: §35.

¹⁶ Marleasing SA v La Comercial Internacional de Alimentacion SA C-106/89 [1990] ECR I-4135

¹⁷ The Habitats Directive is described by the European Commission as “the cornerstone of Europe’s nature conservation policy” [283].

- (2) The Tribunal must adopt a ‘multi-factorial’ approach in determining whether a body is a public authority under the EIRs. The UT specifically endorsed the FTT’s conclusion that the Port of London was properly characterised as such a body: §66.
- (3) If a body carries out a function of public administration then it falls within regulation 2(2) for all purposes; there is no scope for hybridity: §104.

C The nature of the Duchy

(a) The Duchy is a creature of Statute

18. The Commissioner contends that “the Duchy is not a creature of statute”.¹⁸ This claim is quite simply untenable.
19. The Duchy was created by the Charter of Edward III,¹⁹ which was endorsed by Parliament. In The Prince’s Case (1606) 8 Co Rep 1 at 13b, 16a the Court of Common Pleas (Lord Ellesmere CJ, Coke CJ, Fleming CB and Williams J) held that the Charter of Edward III constituted an Act of Parliament.²⁰ If it were not so, it could not have been created at all. As the reasoning in The Prince’s Case demonstrates, the mode of descent that applies to the Duchy was unknown at common law and therefore only capable of being created by primary legislation endorsed by Parliament.
20. The effect of The Prince’s Case was reaffirmed by the Divisional Court, Cleasby B giving the judgment of the Court, in Mayor of Penryn v Holm (1876-77) L.R. 2 Ex.D. 328 observing at 331
“the charter, or Act of Edward III, is set out at length in the Prince’s Case 8 Co Rep 1, in which it was decided that this charter had all the effect of an Act of Parliament.” (emphasis added)
21. The Charter, or Act, of Edward III remains in force, thus enabling the Duchy to continue to exist in its present form. The Commissioner’s assertion that the instrument establishing the Duchy can be treated merely as a Royal Charter is indefensible.

¹⁸ [91], §49.

¹⁹ [687].

²⁰ As the Duchy had been duly created by statute, the grant by Elizabeth I of estates that belonged to the Duchy was held to be ineffective and so the estates reverted to the Duchy, to the benefit of James I’s son Henry, Duke of Cornwall.

22. The conclusion that the Duchy is a pure creature of statute, governed by public law principles, is inescapable.

(b) The Duchy is a legal entity

23. While the Commissioner concedes that the Duchy is a 'body' he erroneously contends that it is "not a separate legal person, instead it is a portfolio of assets that are placed within a private individual's possession"²¹.

24. To similar effect, the Duchy asserts that the *sui generis* nature of the Act of Parliament establishing the Duchy and its unique legal structure means that it is not to be regarded as a legal person for the purposes of the EIRs, Directive and Aarhus Convention²². This contention is, with respect, hopeless.

25. Interestingly, the documentary evidence suggests that the Duchy's current, novel, thesis as to its legal status has only recently been developed as a response to the introduction of legislation, such as the Human Rights Act 1998, which has established important new obligations on public authorities.

26. The Implementation Guide states (at p32 and 33):

"...innovations cannot take public services or activities out of the realm of public involvement, information and participation..."

'legal person' refers to an administratively, legislatively or judicially established entity with the capacity to enter into contracts on its own behalf, sue and be sued, and make decisions through agents..."

27. Accordingly, it follows that: (i) 'legal person' in the context of the EIRs, the Directive and the Aarhus Convention is to be given an expansive and generous interpretation; and (ii) the novel history and legally innovative character of the Duchy cannot exclude it from the relevant category.

28. Analysing the Duchy, it is plain that it is a distinct *sui generis* legal person:

²¹ The IC's concession is explicit in respect of s.84 of FOIA and must be taken as implicit as regards regulation 2(2) of the EIRs: see §20(ii) of the IC's Amended Response.

²² Duchy's Response, §12(a) [99] but cf. the Duchy's concession in its letter of 27 May 2010 that the Duchy is a body for the purpose of s.84 of FOIA [157].

- (1) The Duchy is an entity that was created by an Act of Parliament (see above);
- (2) 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. Indeed, 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;²³
- (3) The Duchy is managed and controlled by the Prince's Council (which consists of statutory officers and other appointees) and HM Treasury (see analysis of the control and supervision of HM Treasury below);
- (4) The Duchy is managed and administered by officers and employees who are appointed under statutory authority: see s.8 of the Duchy of Cornwall Management Act 186 (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;
- (5) The Duchy owns property and enters into contracts on its own accounts e.g. employment contracts, insurance contracts and leases: see s.34 of the Duchy of Cornwall Management Act 1863 and Halsbury's Laws, volume 12(1), §329;
- (6) Statute specifically empowers the Duchy *qua* legal entity to enter into banker-customer agreements and to open and maintain bank accounts: s.6 of the Duchy of Cornwall Act 1982;
- (7) The Duchy is party to litigation on its own account, where it is represented by one of its appointed officers and is distinct from the party who is entitled to its

²³ 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.

revenue: see s.34 of the Duchy of Cornwall Management Act 1863 and Halsbury's Laws, volume 12(1) at §329; and

- (8) 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: 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.
29. The Commissioner and the Duchy both rely on the statement in the current edition of Halsbury's Laws to the effect that the Duchy is not a separate legal entity.²⁴ However, it should be noted that the current author of the relevant section of Halsbury's Laws is a Solicitor at Farrer's, the retained solicitors of the Duchy and the Heir in his distinct capacity as Prince of Wales. This assertion is unsupported by authority and it is striking that neither of the previous learned authors of the relevant section in Halsbury's Laws saw fit to include any such statement of opinion: see Halsbury's Laws of England, Third Edition, Volume 7, Butterworths, London, 1954 and Halsbury's Laws of England, First Edition, Part VII, Section 4, Butterworths, London 1909. The Tribunal should disregard this statement. More generally, given that: (i) the author of the current edition is not an independent, objective commentator, and (ii) a number of statements pertaining to the Duchy are advanced without reference to authority, the commentary on the Duchy in the current edition of Halsbury's must be treated with great caution.
30. Similarly, the Tribunal should attach no weight at all to the Duchy's recent practice of sprinkling the term 'private estate' liberally throughout its published documents: see e.g. the 2011 accounts. In common with the most recent iteration of Halsbury's, these statements are inevitably highly partial and moreover appear to form part of a concerted and considered legal strategy to influence (not to say distort) third parties' (particularly Government and the Courts) understanding of the Duchy's true legal status.

²⁴ Halsbury's Laws of England, Volume 12(1), paragraph 320.

31. The Appellant submits that a more candid, and accurate, account of the Duchy's true legal nature and status is provided by the Duchy's Accounts for 1997.²⁵ It is of some interest that these accounts were produced and published shortly before the introduction of the Human Rights Act 1998 and the Freedom of Information Act 2001. The 1997 Accounts state ([568]):

"The Duchy of Cornwall is a body created by charter in 1337...

The assets of the Duchy comprise agricultural, 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 sale 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...

The Duchy's primary function is to provide an income for the present and future Dukes of Cornwall..."²⁶ (emphasis added)

32. The witness statement provided by Mr Ross on behalf of the Duchy attempts to provide support for the Duchy's assertion that it is not a legal person.²⁷ Mr Ross's contentions cannot bear even cursory scrutiny. Taking each point in turn:

- (1) The property, including the real estate, of the Duchy is said to be owned by the 'Duke of Cornwall' (that is the Heir, currently Prince Charles) rather than the Duchy. This assertion is demonstrably inaccurate. It is plain that under the Act of Parliament which established the Duchy the possessor of the Duchy (e.g. the current Duke) has no right of any sort to the capital, including the capital assets (such as real property). There is simply no tenable legal basis upon which the Duchy can seek to contend that the real property of the Duchy is in fact owned by the Duchy's current possessor, whose only legal entitlement is to its revenue. The weakness of the Duchy's reasoning on this point becomes apparent when it is compelled to attempt to explain the Duchy's interest in its real property in a manner that does not draw attention to its unreality: see Halsbury's Law,

²⁵ [568].

²⁶ The evolution in the Duchy's presentation of its legal status can be appreciated by comparing the 1997 Accounts with those issued in 2005 (see [589]) and the 2011 version.

²⁷ [669].

Volume 12(1), §320 “Lands and other property are described as ‘possessions of the [Duchy]’, which may be understood as an institution without separate legal personality” (emphasis added).

- (2) Mr Ross’s argument in regard to the Duchy’s offices are flawed for the same reason. It follows that, as stated by the Appellant, the Duchy does indeed own offices through which its functions are administered.
- (3) Mr Ross’s comments regarding leases are flawed for precisely the same reason. The possessor of the Duchy has no legal title to the freehold of the relevant estate that would allow him to grant a valid lease to any third party. Parliament has given him a right, subject to HM Treasury approval, to sell land that was originally inalienable from the Duchy. But the proceeds of any such sale must be paid “to the Account of the said Duchy” and form part of the “Revenues of the Duchy of Cornwall”: s.4 Duchy of Cornwall Management Act 1863. In other words, the capital realised by any such sale does not belong to the Duke of Cornwall, but must be paid into the capital account which is held in the name of the Duchy itself.
- (4) The Duchy concedes, as it must, that statute expressly provides that the Duchy shall have the power to establish a banker-customer relationship and maintain accounts as a distinct entity. Mr Ross opines that this should be disregarded as ‘simply a matter of convenience’. With respect, the statutory purpose is a matter for the Tribunal and Mr Ross’s views on the topic are irrelevant and of no assistance. In fact, s.4 and 17 of the Duchy of Cornwall Management Act 1863 and s.6 of the Duchy of Cornwall Management Act 1982 are highly significant, in that they entirely undermine the Duchy’s assertions regarding alleged lack of separate legal personality. In enacting these provisions Parliament, in unequivocal language, has recognised that the Duchy has distinct legal personality and confers a particular legal power on that entity.
- (5) As to litigation, Mr Ross’s description is equally partial and misconceived. It is plain that when the Duchy is party to litigation it is the Duchy, in the form of its Keeper of the Records, which is implicated: s.34 of the Duchy of Cornwall

Management Act 1863. It is plain that the possessor of the Duchy at any particular time is not liable in such proceedings. The fact that the administrative practice is that the proceedings are listed in the title of the Attorney General to the Duchy is nothing to the point. A party who brings such proceedings has a right of recourse against both the revenue and capital of the Duchy.

- (6) Mr Ross is compelled to concede that the practice of the Duchy is to contract as a distinct legal entity. He faintly claims that this can be regarded as a form of shorthand and that the true analysis is that the contracting party is 'the Duke'. The Duchy's practice, rather than Mr Ross's revisionist account, reflects the reality of the situation. This is perhaps best illustrated by the Duchy's contracts with its employees. As Mr Ross frankly admitted before the PAC (defined below), a significant proportion of the costs of the Duchy's employees are charged to the capital account of the Duchy. Self-evidently it is therefore the Duchy itself, rather than its current possessor, who is meeting the contractual liability to which the Duchy is subject. To similar effect, the Duchy's pension fund would have recourse against the capital assets of the Duchy.
- (7) Finally, Mr Ross conceded that the Duchy is registered as an entity with the Information Commissioner under the Data Protection Act 1998. This is also sought to be explained away as inadvertence. In fact, it is further evidence of the Duchy's distinct legal personality
33. For all of the foregoing reasons, it is submitted that it very clear that the Duchy is a distinct legal person as defined in EIRs, the Directive and the Aarhus Convention. All of the available objective evidence supports this conclusion and only bare, and misconceived, assertion is advanced to the contrary on behalf of the Duchy. With respect, it is submitted that the terms of the relevant legislation and the documentary evidence are objective facts that simply cannot be explained away. It follows that the only further question for the Tribunal is whether the Duchy exercises functions of public administration under regulation 2(2)(c).

D The Duchy carries out functions of public administration: Regulation 2(2)(c)

34. Pursuant to the Directive and the Aarhus Convention the proper approach to determining whether the EIRs apply is to ask, first, whether the body in question is one which carries out functions of public administration. That is to be determined by applying a test of substance rather than form and by objectively assessing the nature of the statutory powers and duties to which the Duchy is subject.
35. The Tribunal's analysis and judgment in Port of London (at §§33–40) is of considerable assistance in determining whether the Duchy is to be regarded as carrying out functions of public administration.
36. In concluding that the Port of London (“**the PLA**”) did exercise such public administrative functions and so was subject to the EIRs, the Tribunal relied upon the following factors: (i) the PLA was a creature of statute: §29; (ii) the PLA was under a statutory duty to provide harbour services and if the PLA did not exist the Government would have to assign its function to another organisation: §§30–31; (iii) the PLA's autonomous status, the fact that it was self-financed and not owned, controlled, funded or specifically regulated by Government did not prevent it being a public authority carrying out functions of public administration. In support of that conclusion the Tribunal took into account that (§§ 33–38): (a) appointment of the Board was heavily influenced by the Secretary of State; (b) it had to report annually to the Minister; (c) it had to provide the Minister with such information about the exercise of its powers as he might require; (d) in certain circumstances it was required to obtain ministerial approval for temporary loans; (e) the Act provided for appeals to the Board of Trade on licensing matters; (f) its functions permitted it to act in a way akin to a local or governmental authority, including the power to make charging regulations and the power to require others to provide information in connection with the assessment and collection of a charge; (g) it regulated others in excess of the powers permitted to the general public or private organisations.
37. Applying this analytical framework, as endorsed in Smartsources, it is impossible to escape the conclusion that the Duchy is a public authority carrying out functions of public administration under the EIRs, the Directive and the Aarhus Convention. Indeed, following a close examination of the Duchy's legal status and functions of public administration its case is plainly *a fortiori* that of the PLA.

The Duchy's public administrative functions

(a) *Financing the public activities and official functions of the prospective Head of State*

38. It is common ground between all of the parties to this litigation that the principal purpose for which the Duchy was established was to manage and administer property for the purpose of producing and maintaining financial resources in order to support the Heir to the Throne (from time to time, including future Heirs) in his capacity as prospective Head of State of the UK.²⁸ This funding is primarily required to enable the Heir to undertake official duties, on behalf of the Head of State.²⁹ To a lesser extent it is also directed towards supporting the Heir 'in a manner that befits his status'. In generating and providing these financial resources, the Duchy is plainly engaged in one of the core functions of the UK *qua* State/Government and thus performs a function of public administration. As the Government acknowledges, the Crown in the sense of The Queen and members of the Royal Family undertaking official duties on her behalf "has a governmental character".³⁰
39. The validity of this proposition is demonstrated by considering the position which would obtain if, *ex hypothesi*, the UK had an elected or otherwise appointed Head of State (rather than a system of hereditary entitlement). It could not sensibly be disputed that a body:
- (1) created by statute;
 - (2) governed by a comprehensive and bespoke legislative scheme which places a pre-emptory legal duty upon its office holders to preserve the capital value of the assets vested within it for the public and official duties of prospective incumbents of the office that it was created to fund; and
 - (3) which is subject to detailed control and oversight by HM Treasury, and is ultimately accountable to Parliament,
- performs a function of public administration.

²⁸ [329].

²⁹ [471].

³⁰ [526].

40. As detailed above, the Duchy is a pure creature of Statute. Not only was it created by the Charter of Edward III, which indisputably constitutes an Act of Parliament, but all of its powers to manage the property and possessions vested within it emanate from (and are defined by) its comprehensive and bespoke legislative scheme: see the Duchy of Cornwall Management Acts 1863 to 1982.
41. The Duchy's property management powers exist to enable it to fulfil the statutory object of funding the Heir to the throne (from time to time) and, applying elementary principles of public law, must only be deployed for that purpose: Padfield v Minister of Agriculture, Fisheries & Food [1968] AC 997 at 1030B-D per Lord Reid and R v Braintree DC ex p Halls (2000) 32 HLR 770 at 779. It follows that all of the decisions of the Duke of Cornwall and the various 'proper officers' of the Duchy appointed under the governing legislation are subject to, and ultimately controlled by, the comprehensive and bespoke statutory scheme to which the Duchy is subject. In this sense, all of the Duchy's powers and duties are facets of its central, defining, function of public administration.
42. Further, during the currency of any period in which: (i) the Heir is a minor; or (ii) there is no Heir eligible to 'possess' the Duchy; statute (in the form of s.2 of the Civil List Act 1952, as amended) provides for the deployment of the revenues of the Duchy. Thus:
- (1) during any period in which the Duke is a minor, up to eight ninths of the net revenues of the Duchy is placed at the disposal of the Monarch and the sum payable by Parliament under the Queen's Civil List allocation is reduced by the same amount; and
 - (2) when there is no Duke, the entire net revenues of the Duchy are at the disposal of the Monarch *qua* Head of State and Parliament reduces the sum payable for the Queen's Civil List under the Civil List Act 1972 by an amount equal to the net revenues of the Duchy for the year.

43. This mechanism gives the lie to the Duchy's bare assertion that it is a 'private estate'. It cannot be disputed that during periods when there is no Heir entitled to 'possess' the Duchy (and who requires State financial support in his public activities), the revenue which is generated is deployed for the sole purpose of funding the public functions of the Head of State.
44. It is illuminating to consider how this role, generating and administering investments in order to fund the public activities of the Monarch in her capacity as Head of State, should be characterised on its own terms. In carrying out this function during periods when the revenue of the Duchy is not diverted to the Monarch, Central Government (in providing for Her Majesty *qua* Head of State under the Civil List Act 1972) is unquestionably carrying out a function of public administration: see §9 of the Memorandum of Understanding on Royal Taxation (which confirms that the Monarch's civil list payments are solely on account of her public expenses as Head of State, and so exempt from taxation).³¹
45. This analysis does not change simply because, during a period when there is no Heir who requires funding from the Duchy, it is the Duchy rather than Central Government that is performing the role of funding the Head of State's public activities. The function of public administration which is being carried out remains the same. All that has changed is the unit of public administration with responsibility for the relevant task – with the public administrative function shifting between Central Government and the Duchy.
46. A further analogy may assist: it could not be contended that in generating and providing financial support for the public activities of its Head of State an EU member state with an elected Head of State is not engaged in a function of public administration. The EIRs implement the Directive and the Aarhus Convention and must accordingly be interpreted in a manner which results in consistent application of the environmental information regime across the EU.
47. The contention that the Duchy is not publicly funded is untenable. As demonstrated above, the Duchy's revenues are public money which Parliament has provided should

³¹ [466].

be at the disposal of the Heir or Monarch for the purpose of funding their public activities as prospective, or actual, Head of State. As Lord Tenterden CJ recognised in Rowe v Brenton (1828) 8 Barnewell and Cresswell 737 at p.744:

The Crown representing the public, has an interest in everything relating to the Duchy of Cornwall and its revenues; and it is immaterial whether any act affecting them is done by the King when there is no Duke of Cornwall, or by the Duke of Cornwall when there is one. [Emphasis added.]

The reference to the “Crown” in this passage denotes the executive arm of central government.

48. That the principal function of the Duchy is one of public administration is further attested by the nature of the mechanisms that Parliament has put in place to ensure the good management of the Duchy from time to time, consistent with its statutory object:
- (1) under the Duchies of Lancaster and Cornwall (Accounts) Act 1838, the Duchy is required to submit its accounts annually to HM Treasury and the Treasury lays those accounts to Parliament. This is accountability, both to the executive arm of government and the legislature, both of which have a constitutional role in the administration of financial provision for the Head of State;
 - (2) also under the 1838 Act, HM Treasury has the power to direct the form of the Duchy’s accounts;
 - (3) the statutory powers to sell or dispose of Duchy land and possessions, and to use Duchy capital for purchases, are subject to the prior sanction and approval of HM Treasury: s.11 of the Duchy of Cornwall Management Act 1863. In determining whether such transactions should be approved HM Treasury applies three statutory criteria: (i) whether it is in the interests of present and future possessors of the Duchy; (ii) the interests of the inhabitants of the Duchy; and (iii) whether the proposal is conducive to the good management of the Duchy: House of Commons Committee of Public Accounts Report: The Accounts of the Duchies of Cornwall and Lancaster, Nineteenth Report of Session 2004-2005 (“**the PAC Report**”);³²

³² [438] and see s.7(3) and 8 of the Duchy of Cornwall Management Act 1863.

- (4) HM Treasury operates as a mechanism to regulate potential conflict between the interests of present and future actual or prospective Heads of State by determining whether, and if so on what terms, the Duchy's revenue account may borrow from capital reserves;³³ and
- (5) the Duchy is exempt from corporation tax and capital gains tax in the course of its commercial activities (principally property investment and trading). This means that no charge to capital gains tax is levied on capital asset disposals or trading profits despite the Duchy enjoying the benefit of perpetual legal personality. The significance of the grant of this favourable tax status to the Duchy can hardly be over-stated.

49. The significance of the control exercised by HM Treasury over the Duchy's affairs was emphasised by the Mr Ross, the Secretary and Keeper of the Records of the Duchy, in the oral evidence he gave to the House of Commons Committee on Public Accounts on 7 February 2005. Mr Ross said that:³⁴

"the governance of the Duchy is very much controlled by the Treasury and I think that in this process of the hearing we will seek to point out the very considerable control that we think the Treasury has over the affairs of the Duchy"

...

As far as our accounts are concerned, they are dealt with by direction with [HM] Treasury. We are very positive in our attitude about this. We meet them on a basis of every month...

...

...the control of [HM] Treasury is very significant, it has complete power of veto over capital transactions if it feels they are not being done either for good commercial interests or in the best interest of the management of the estate

...

...we operate within the strict investment criteria that we have to satisfy in dealing with [HM] Treasury

³³ [444].

³⁴ see the PAC Report, Oral Evidence, Q's 6, 46, 115, 119 and 125 [422]-[431].

...

Every transaction that we do is submitted to [HM] Treasury. In a recent report which I received it was pointed out that the detail into which we are going has greatly increased...We are very happy to provide that information to [HM] Treasury

[in response to a question by Mr Sion Simon MP querying whether Mr Ross's statutory duties would oblige him to prevent the possessor of the Duchy from damaging the capital reserves]...We would not get very far. The whole procedure would be shut down, I am almost certain, by the Treasury

...

...we have regular meetings with the Treasury and we do co-operate. We do not dogmatically resist everything, we do along with their proposals, As he said, there have not been any areas of total disagreement. In fact, I cannot remember in my time any areas of marginal disagreement...

(emphasis added)

50. Further evidence of the nature of the Duchy's functions is provided by its status and treatment under the tax regime:

- (1) First, as foreshadowed above, the Duchy is afforded a complete exemption from liability to any corporation tax or capital gains tax despite enjoying the advantage of perpetual legal succession. The Duchy is exempt because it benefits from Crown Immunity. The commercial value of this status, and the contribution which it has made to the 'profitability' of the Duchy can hardly be over-stated. The Duchy has never been willing to opine on the scale of the contribution which its tax treatment can be regarded as making to its profitability. Its reticence in this regard is readily understandable when it is appreciated that on any view this tax treatment constitutes a huge and continuing indirect subsidy to the Duchy from the public purse.³⁵
- (2) Second, the majority of the profit which the Duchy pays to its possessor is used to finance the public duties of either the Heir or Monarch as prospective or

³⁵ Notably, during his evidence to the PAC Mr Ross of the Duchy declined to respond to the suggestion put to him that the value of the Duchy's tax-exempt status equated to a State subsidy of £20-40m per annum. Nor did the Duchy avail itself of the opportunity to submit a written response on these matters following the PAC hearing.

actual Head of State and insofar as it is so used it is entirely exempt from income tax by the MoU on Royal Taxation.³⁶ This demonstrates that the Duchy's revenue (either wholly or predominantly, depending on whether the possessor of the Duchy is the Monarch or the Heir) is public money deployed for a public purpose. It follows that the function of the Duchy in generating and providing these funds is one of public administration.

51. Mr Ross acknowledges that the power to fix fees for inspection of enrolments under s.36 of the Duchy of Cornwall Act 1844 is an "administrative function" [672]. What sections 30-36 of that Act make clear is that the Keeper of the Records is under a statutory duty to enrol deeds etc in the "Office of Duchy of Cornwall", at which point such documents do not need to be enrolled in any other public registry but will be regarded as "good and available" i.e. available to the public. It is precisely because the Office of the Duchy of Cornwall is effectively the public registry in respect of Duchy land that the Duchy is given a power to charge fees for the use of or making copies of records in the Office of the Duchy of Cornwall. Clearly this is not merely an administrative function, as Mr Ross acknowledges, but a *public* administrative function established by statute.
52. In considering the governmental character of the Duchy, it is striking that the Duchy is consulted by the Government on any Bill which affects the interests of the Duchy of Cornwall, and it is a constitutional requirement that the consent of the Monarch *and the Duke of Cornwall* must be obtained in respect of any such Bill.³⁷ This *right* of veto and to be consulted applies to numerous pieces of draft primary legislation, including Bills affecting the environment, such as the Marine and Coastal Access Bill.³⁸

(b) *Bona vacantia*

53. It is plain, both as a matter of English law and under the legal systems of the other EU member states and state parties to the Aarhus Convention, that the collection and administration of *bona vacantia* is a paradigmatic example of the State exercising a function of public administration. In carrying out this function within its relevant territorial boundaries the Duchy performs a function of public administration and is

³⁶ [471].

³⁷ [626].

³⁸ [809].

accordingly a public authority for the purposes of the EIRs, the Directive and the Aarhus Convention.

54. The relevant question for the Tribunal must be formulated thus: would the CJEU regard a statutory body with responsibility for collecting and administering *bona vacantia* within a defined municipality as engaged in a function of public administration? The question obviously admits of only one possible answer: yes.
55. The Commissioner clearly erred in concluding to the contrary. In particular:
 - (1) The Commissioner failed to conduct any analysis of the legal nature and provenance of the Duchy's *bona vacantia* function and erred by accepting (entirely uncritically) and regurgitating (verbatim) the Duchy's bare assertion that its functions can be characterised as a *mere* 'property right'.
 - (2) The Commissioner only considered the Duchy's *bona vacantia* function in connection with the issue as to whether the Duchy constituted a government department under s84 of FOIA. It entirely failed to direct itself to the proper question: whether the Duchy's *bona vacantia* function is a function of public administration.
 - (3) The Information Tribunal in Cross v Information Commissioner EA/2010/0101 considered the issue on the papers and did not have the benefit of submissions from a legally represented appellant. It is perhaps unsurprising in these circumstances that the Tribunal accepted without scrutiny what it described as the 'helpful and scholarly submission' of the Chief Executive of the Duchy of Lancaster to the effect that *bona vacantia* concerns a 'property right rather than a duty of public administration': see Cross, §§29 and 40. However, in doing so the Tribunal erred. That submission, far from being scholarly and helpful, in fact derives no support from - and is indeed flatly inconsistent with - the law of England as it relates to *bona vacantia*.
56. In order to understand properly the State and the Duchy's *bona vacantia* function it is important to grasp that when governmental authorities administer the estates of

persons who die intestate without known kin and collect and administer the assets of dissolved companies, they do not only exercise a right or privilege. On the contrary, in exercising this function the State performs a classic public law *duty*.

57. As stated by Blackstone:

“...in settling the modern constitutions of most of the governments in Europe, it was thought proper (to prevent that strife and contention, which the mere tide of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burdensome to individuals) that these rights [of *bona vacantia*] should be annexed to the supreme power by the positive laws of the state...”³⁹ (emphasis added)

58. Blackstone’s analysis shows that in English law the Crown and the Duchy’s *bona vacantia* functions are carried out pursuant to a public law duty – to prevent ‘strife and contention’ and the danger to good public order and administration that would arise from the existence of ‘unowned’ property, but for the intervention of the State in collecting and administering such property. Further, as Blackstone also notes, it is the uniform practice of the countries of Europe (and in other jurisdictions, see below) that the State should carry out this role in the public interest.

59. To similar effect, in Hensloe’s case⁴⁰ Sir Edward Coke said:

“That of ancient time, as appears by record when a man died intestate, and had made no disposition of his goods, nor committed his trust to any, in such case the King, who is parens patriae, and has the supreme care to provide for all his subjects, that every one should enjoy that which he ought to have, used by his ministers to seize the goods of the intestate, to the intent they should be preserved and disposed for the burial of the deceased, for payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood...” (emphasis added)

60. In the leading monograph on *bona vacantia* in English law, Ing identifies ‘the fundamental basis of *bona vacantia*’ as: “the Crown’s duty to maintain good order in the realm, rather than the support of royal dignity” (emphasis added)⁴¹.

³⁹ I Bl. Comm. 299 (14th Edition, 1803)

⁴⁰ (1600), 9 Co. Rep. 36b at 38b.

⁴¹ Noel D Ing, *Bona Vacantia*, London, Butterworths, 1971, p12.

61. Ing also states that “On one view, wherever there are species of property which have no owner unless the Crown claims them, and this situation creates a possibility of mischief or leaves problems to be solved (even the problem of an asset holder being unable to obtain a good discharge), so it may be the duty of the Crown to remedy the situation by claiming such property as *bona vacantia*”⁴² (emphasis added).
62. Importantly for present purposes, in particular the proper interpretation of the Directive and the Aarhus Convention (and consequently the EIRs), it is clear that collecting and administering *bona vacantia* is a function of public administration that is universally recognised as incumbent upon the State and the organs of government. As stated in the seminal comparative study of the law of succession, Zweigert and Kotz’s International Encyclopaedia of Comparative Law, Volume 5, Chapter 3, ‘The Law of Succession’: “If there are no heirs...nearly always a public authority inherits. Differences exist only in terms of which body of the public sector is entitled. This is generally the state itself without any further specification”⁴³ (emphasis added).
63. Zweigert and Kotz proceed to demonstrate that it is the universal practice of both common law and civilian jurisdictions for governmental organs to exercise the *bona vacantia* function. In some jurisdictions, the collection and administration of *bona vacantia* is the exclusive preserve of central government, while in other states responsibility is devolved to various regional or local units of public administration (typically based upon the deceased’s domicile at the time of their death): Zweigert and Kotz, p57, paragraph 166 (citing the roles of Swiss cantons, German lander and US states).
64. Further, Zweigert and Kotz observe that different legal systems recognise a range of means by which the proceeds of *bona vacantia* may be deployed: Zweigert and Kotz, p57-58, paragraphs 167-169 and p60-61, paragraph 176 (e.g. French law’s provision for certain proceeds to be allocated to public centres for social help; Spanish law’s tripartite division of proceeds between local community institutions of residence and

⁴²Ibid, p11.

⁴³Zweigert and Kotz, Encyclopaedia of Comparative Law, Volume 5 Chapter 3, The Law of Succession, Part VI, Succession Rights of Public Authorities, p57-61.

domicile and the State treasury and Sweden's allocation of proceeds to the promotion of the care and education of children and adolescents).

65. In English law, the Crown's *bona vacantia* function in respect of intestate estates was initially a matter of the Crown prerogative: British General Insurance Co., Ltd v AG [1945] LJ CCR 113 at p121 and 211. However, in line with the foregoing analysis, Parliament subsequently legislated in the form of the Administration of Estates Act 1925 ("**AoE 1925**"), the Companies Act 1985 ("**CA 1985**") and the Companies Act 2006 ("**CA 2006**")⁴⁴ to provide a statutory basis for the Crown's *bona vacantia* function.
66. The Crown's *bona vacantia* function is administered in respect of the majority of England by the Treasury Solicitor under s.2 of the Treasury Solicitor Act 1876 ("**the TSA 1876**") and Royal Warrant. It is important to recall that these provisions are not the source or legal basis of the State's rights and obligations regarding *bona vacantia* (which emanate from statute); rather, these provisions are simply the mechanism by which the Treasury Solicitor *qua* public body is invested with appropriate *vires* to act on the Crown's behalf.
67. The following features of the Treasury Solicitor's principal activities in this context demonstrate that in exercising its public law powers and duties in respect of *bona vacantia* it carries out a public administrative function:
 - (1) under s.4 and 5 of the TSA 1876 the Treasury Solicitor is obliged to submit annual accounts regarding its *bona vacantia* functions before Parliament⁴⁵;
 - (2) s.4 of the TSA 1876 provides that all moneys realised from the disposal of *bona vacantia* are to be carried to an account directed by rules made under that Act. The relevant rules direct that all such funds are transferred to the Crown Nominee Account. By agreement with HM Treasury there is an annual transfer of such monies to the Consolidated Fund equal in amount to 85% of the net

⁴⁴ The Crown's *bona vacantia* function in respect of the assets of dissolved companies were first placed on a statutory footing by the Companies Act 1929.

⁴⁵ Such accounts are prepared under Accounts Direction of 17 April 2009 issued by HM Treasury under s.4 and 5 of the TSA 76 and the Treasury Solicitor (Crown's Nominee) Rules 1997 (S.I. 1997 No.2870).

balance on the account as at the end of January. These monies then fund general governmental public expenditure on the same basis as funds raised by general taxation;

- (3) The Treasury Solicitor describes its own functions in this regard as ‘investigating the jurisdiction and title to assets’, ‘collecting and administering those [assets] that have’, selling [assets] to realise their value’ and ‘making payments to entitled kin’: Accounts for the Crown’s Nominee for the year ended 31 March 2011, Foreword by Sir Paul Jenkins (Treasury Solicitor and Crown Nominee), p2-3.⁴⁶
68. The legal basis and effect of the transfer of the Crown’s *bona vacantia* function to the Duchy is illustrated by the Privy Council’s analysis of the similar transfer of function involving the Duchy of Lancaster in Dyke v Walford (1846) 5 Moo PCC 434 at 495. The Duchy’s *bona vacantia* function is now established and regulated by statute in the form of the relevant provisions of the AoJ 1925, CA 1985 and CA 2006. Notably, the Duchy continues to exercise its *bona vacantia* function throughout any period in which the Duchy is vested in the Monarch.
69. Section 46(1)(vi) of the AoE 1925 establishes the Duchy’s statutory right of *bona vacantia* in respect of intestate personal estates. Further, this provision expressly contemplates the Duchy making provision from the proceeds of the estate for any dependant of the deceased.
70. Sections 1012, 1013, 1025, 1032 and 1034 of the CA 2006 provide for the assets of dissolved companies to vest in the Duchy (where *bona vacantia* arises). The CA 2006 makes detailed provision for the manner in which such assets are to be administered, including rules about disclaimer and the restoration of assets or payment of compensation where the dissolved company is restored to the register.
71. Notably, s.1025 provides for certain conditions to be met before a dissolved company can be restored to the Register. They include:

⁴⁶ [642]-[643].

“(3)... if any property or right previously vested in or held on trust for the company has vested as *bona vacantia*, the Crown representative has signified to the registrar in writing consent to the company's restoration to the register.

(4) It is the applicant's responsibility to obtain that consent and to pay any costs (in Scotland, expenses) of the Crown representative –

(a) in dealing with the property during the period of dissolution, or

(b) in connection with the proceedings on the application, that may be demanded as a condition of giving consent.”

72. The Duchy's power to give or withhold consent to restoration is plainly a public administrative function, which must be exercised in the public interest and is subject to well-established public law principles of reasonableness, proper purpose and abuse of power: see e.g. Padfield.

73. Where the Duchy exercises its *bona vacantia* function in respect of the assets of a dissolved company and the company is subsequently restored to the Register, the Duchy must account to the company for the proceeds of any sale of the assets, subject to deductions for its expenses: s.1034, CA 2006.

74. As stated by Ing⁴⁷, the obligation to make account to the entitled party in such circumstances shows that the *bona vacantia* function is an obligation which is exercised in the public interest; rather than a mere private right or privilege which exists simply for the benefit of the Duchy.

75. The witness statement of the Duchy's Mr Ross offers two faint arguments as to why the Duchy's *bona vacantia* function should not render it a public body for the purposes of the EIRs, the Directive and the Aarhus Convention because:

(1) the number of estates and companies whose property the Duchy collects and administers annually is said to be limited; and

(2) the Duchy can dispose of the proceeds of the *bona vacantia* which it collects and administers as it sees fit.

76. It appears implicit in these arguments that it is conceded that collecting and administering *bona vacantia* is, in principle, a public administrative function. Further and in any event, upon examination both contentions are hopeless.

⁴⁷ See footnote 41, above, p12.

77. First, it is elementary that neither the EIRs, the Directive nor the Aarhus Convention provide for any *de minimis* exemption if a body carries out a public administrative function. Any such approach would be entirely contrary to the object and purpose of the Directive and the Aarhus Convention. Moreover, the Duchy's objection is misconceived in principle. The size or scale of the Duchy as a unit of public administration (and the fact that its *bona vacantia* function is limited to a defined territorial area) is irrelevant to the only issue with which the Tribunal must be concerned, *viz* whether the statutory function of collecting and administering *bona vacantia* is a function of public administration under EU law and for the purpose of Aarhus. If, *ex hypothesi*, Central Government had devolved its *bona vacantia* function to a series of small locality based statutory bodies (with each entity only working within its designated district) then each such body would still constitute a public authority carrying out a public administrative functions in its own right.
78. Second, the fact that the proceeds of any *bona vacantia* realised by the Duchy becomes part of its revenue has no bearing on the analysis of the logically anterior function carried out in *collecting and administering* such property. The end use to which the proceeds of the relevant estate are put is nothing to the point. Different legal systems recognise a variety of different avenues through which the proceeds of *bona vacantia* may be deployed: see Zweigert and Kotz, p57, §166. The fact that this revenue is deployed for charitable purposes, in the public interest, cannot conceivably undermine the argument that it is part of the Duchy's public administrative function to collect and administer such property.

(c) Statutory Harbour Authority in respect of the Isles of Scilly: St Mary's Harbour:

79. 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**"), the Duchy is the statutory harbour authority ("**the Statutory HA**") for the Isles of Scilly.

80. In this capacity, as previously recognised by this Tribunal and multiple decision notices issued by the Commissioner⁴⁸, the Duchy exercises a variety of functions of public administration – many of which are specifically concerned with environmental protection and conservation.
81. With respect to the Commissioner’s position in this appeal, given its reasoning regarding, for example, the significance of Mersey Dock’s public law powers and duties as Statutory HA and competent pilotage authority, it is difficult to comprehend on what basis it feels able to contend that the Duchy does not carry out functions of public administration. The Commissioner’s submissions to date shed no light on this anomaly, though it is interesting to note that the Duchy’s connections with the Monarchy feature prominently in its contentions.
82. 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)
83. 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. As the explanatory note to the statutory instrument states, the reference to the ‘possessor of the Duchy’ (from time to time) is co-terminous with the Duchy itself. 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.
84. The Duchy has faintly suggested that it may wish to contend that it is the Prince of Wales in his personal capacity who is the relevant Statutory HA. This is contrary to the Duchy’s public pronouncements: see eg [189], [211] and [277]. In any event, it would be surprising if, having reflected upon the consequences in terms of the transfer of

⁴⁸ See e.g. the Commissioner’s Decision Notice FER0195081 in respect of the Mersey Docks and Harbour Company (in particular at §§27-40).

liability from the Duchy to the Prince of Wales, the Duchy wishes to maintain this contention.

85. The Duchy's appointment as Statutory HA also makes it the relevant Statutory HA for the purposes of, *inter alia*, the Merchant Shipping Act 1995, the Prevention of Pollution (Reception Facilities) Order 1984, 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.

86. As such, the Duchy is the statutory body responsible for the management of the Isles of Scilly's principal harbour. *Douglas & Green on the Law of Harbours, Coasts and Pilotage*⁴⁹ ("**Douglas & Green**"), the leading treatise on the law relating to harbours, helpfully summarises the functions of public administration which Statutory HAs, such as the Duchy, 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..."
- (emphasis added)

87. As Douglas & Green expressly 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" (emphasis added). As this Tribunal has previously held, and as the Commissioner has repeatedly affirmed, these are functions of public administration.

88. Importantly, while the statutory provisions conferring the public administrative functions of managing and maintaining harbours are commonly framed in permissive

⁴⁹ GK Green, Richard Douglas, Peter Low and Monica Peto, 5th edition, 1997, LLP Professional Publishing.

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: 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]).

89. The nature and extent of the Duchy's statutory duty is perhaps best illustrated by Re Salisbury Railway, in which the Court considered the implied obligations imposed by s.33 of the 1847 Act. Section 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" (emphasis added). While this provision is obviously phrased in permissive terms, the Court held that it must be interpreted as imposing the 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.
90. As 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 authority⁵⁰. It must be noted that the Duchy's relevant local legislation makes no provision for any derogation from this obligation.
91. The Duchy also has important functions of public administration relating to ensuring navigational safety in and around the harbour area for which it is responsible:
 - (1) First, the Duchy has the power to deepen, dredge, scour and improve the bed and foreshore of the harbour in order to render it safe for traffic.
 - (2) Second, under s.193(2)(a) of Part VIII of the Merchant Shipping Act 1995, the Duchy is the local lighthouse authority in respect of the Isles of Scilly. Section 201 of the 1995 Act confers the power upon the Duchy to mark and light the harbour area for which it is responsible.

⁵⁰ Green & Douglas, p21, paragraph 3.11.

- (3) Third, s.252 of the 1995 Act empowers the Duchy to remove wrecks from its harbour area⁵¹. The Duchy also enjoys the power of sale and/or destruction of such wrecks.
92. It is clear that the Duchy's functions in this regard are directed to safeguarding the life and property of all members of the public using the harbour. The public law powers and duties to which the Duchy is subject in this regard are further paradigmatic examples of functions of public administration.
93. Further, the Duchy exercises far-reaching powers (and is subject to correlative duties) in regulating the activities of all users of its harbour area. The Duchy appoints the harbour's 'harbour master'. Section 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.
94. As stated by Lord Widgery CJ in The Guelder Rose⁵²: "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" (emphasis added). As recognised by Lord Widgery CJ's dictum, this is a further function of public administration that is principally concerned with ensuring public safety.
95. 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.

⁵¹ The Duchy also exercises statutory powers for this purpose under s.56 of the 1847 Act, which are framed in wider terms to empower the Duchy to remove other impediments to navigation.

⁵² (1927) 136 LT 226.

96. Moreover, 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. This is an important example of the environmental obligations which the Duchy's functions as Statutory HA impose⁵³.
97. Also of significance is the Duchy's power as Statutory HA 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.
98. Importantly, 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. It follows that Parliament has determined that environmental protection and conservation must be central in the carrying out of all Statutory HA's functions of public administration.
99. 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). The Duchy's bye-law making power has been noted above. Further, 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.

⁵³ See also: (i) Regulation 13 of the Merchant Shipping (Reporting Requirements for Ships Carrying Dangerous or Polluting Goods) Regulations 1995 (implementing EU Directive 93/75/EEC) obliging Statutory HAs to notify the Coastguard Agency of pollution risks; and (ii) Regulation 15(3) of the Merchant Shipping (Port State Control) Regulations 1995 obliging Statutory HAs to notify the Marine Safety Agency of dangers to the marine environment.

100. As to the Duchy's public administrative functions which are directed specifically to the prevention of pollution, s.144 of the Merchant Shipping Act 1995 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. Section 131 criminalises such discharges.
101. Further, s.135 of the 1995 Act requires notice to the Duchy before oil is transferred to or from any ship in the harbour area. Section 136 also obliges the owner or master of any ship that discharges or leaks oil (or a mixture containing it) to notify the Duchy.
102. Section 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.
103. The Duchy's functions of public administration 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 such as the Duchy in order to deal with any oil spill affecting the harbour area.
104. Sections 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.
105. 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 (in this case the Duchy) is the only authority empowered to bring criminal proceedings against the malefactor. Section 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.

106. Further, the Duchy has important environmental public administrative functions concerning the reception and processing of ships' waste under: (i) the Prevention of Pollution (Reception Facilities) Order 1984, which gives effect to the UK's international obligations under Regulation 12 of Annex I and Regulation 7 of Annex II of MARPOL; and (ii) the Merchant Shipping (Reception Facilities for Garbage) Regulations 1988, which gives effect to Regulation 7 of Annex V of MARPOL. These measures require that all Statutory HAs, such as the Duchy, ensure that adequate reception facilities are provided in order to comply with the UK's international legal obligations.
107. Perhaps the most obvious example of the Duchy's public administrative functions as Statutory HA is provided by 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.
108. Section 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 (in this case the Duchy) must consider for what ships and in which circumstances pilotage is necessary, and what services should be provided. Section 2(2) expressly requires that the Duchy have particular regard to the hazards involved in the carriage of dangerous goods or hazardous substances when performing this function. Importantly, the Duchy's fundamental duty to ensure public and environmental safety in this regard cannot be delegated to any agent or corporation: s.11 of the 1987 Act.
109. The corollary of the Duchy's duty to analyse what pilotage services are necessary to ensure public and environmental safety is contained in Section 2(3), which imposes the duty on the Duchy to provide such pilotage services in respect of its harbour area and approaches as are necessary.
110. Further, the Duchy also exercises complementary public administrative functions relating to ensuring public and environmental safety by regulating and administering the licensing of pilots within its harbour area and approaches. As is the case in respect of the Duchy's fundamental responsibility in respect of determining the need for

pilotage services, this public administrative function cannot be delegated to any agent or third party.

111. 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. Moreover, 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. In short, the Duchy performs the public administrative function of regulating all pilotage activity within its territorial jurisdiction. Section 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.

112. The judgments of the High Court in Law Society of England and Wales [2010] EWHC 353 at §68 and 71 per Aikenhead J (legal complaints service held to perform function of public administration) and the House of Lords in Institute of Chartered Accountants [1999] 1 WLR 701 at §1 per Lord Slynn are of particular significance in this connection. It is submitted that these authorities authoritatively and convincingly demonstrate that the type of regulatory activity performed by Statutory HAs must be regarded as a public administrative function under EU law.

113. 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 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. Section 15 establishes that the failure to comply with compulsory pilotage directions is a criminal offence.

114. As foreshadowed above, while marine pilotage authorities such as the Duchy may delegate the execution of certain of their public administrative functions under s.11 of

the 1987 Act, the legislative scheme specifically provides that the most fundamental functions cannot be delegated to any other body: s.11. Thus, the Duchy cannot delegate:

- (1) the s.2 duty to continually review the need for pilotage services within its jurisdiction;
- (2) the authorisation and regulation of pilots under s.3;
- (3) determining the qualifications to be required in order for pilots to gain authorisation under s.3(2);
- (4) the s.4(2) obligation to offer to employ authorised pilots;
- (5) the licensing of pilot boats operated by parties other than the Duchy under s.6(1)(b);
- (6) directions concerning compulsory pilotage under s.7(1);
- (7) granting compulsory pilotage exemptions under s.8(1);
- (8) making charges in connection with pilotage under s.10; and
- (9) making payments, where required, to a pilots' compensation scheme under section 28.

115. The fact that Parliament has specifically decreed that these functions are of such fundamental importance as to be incapable of delegation to the 'private sector' removes any scope for debate that the Duchy's power and duties in this field must be considered functions of public administration.

116. The Duchy's witness statement advances a number of contentions as to why the Duchy's public administrative functions as a Statutory HA should not lead to the conclusion that it is subject to the EIRs. 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';
- (2) the Duchy's functions as Statutory HA 'are not public functions';
- (3) there is 'no reason why [the Duchy's functions] could not be [carried out] by a private, commercial operator'; and
- (4) the Duchy's public administrative functions as Statutory HA 'are only a very small part of the operations of the Duchy'.

117. With respect, each of these assertions is devoid of legal merit and is irrelevant to the only question which is relevant to the Tribunal's determination of the present case, *viz.* whether the Duchy as Statutory HA exercises functions of public administration. Taking each contention in turn:

- (1) It is simply 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.
- (2) The nature of the public administrative functions that the Duchy carries out as Statutory HA in respect of the Isles of Scilly have been comprehensively analysed above. This is a matter of legal analysis. Applying well-established principle (as reflected in both the decisions of this Tribunal and multiple decision notices of the Commissioner) it is clear beyond peradventure 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.
- (3) 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 error (and *non-sequitur*) to suggest that 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 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.

- (4) As noted above, 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.

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

118. Moreover, as a Statutory HA and lighthouse authority, the Duchy 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 Conservation (Natural Habitats etc) Regulations 1994 ("**the 1994 Conservation Regulations**"). The Duchy has (perhaps tellingly) failed to address the question whether it is a 'relevant authority'.

119. Further, the Appellant submits that the Duchy is 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 as a statutory undertaker, a public body and a relevant authority in relation to marine areas and European marine sites. The Duchy has asserted, without reference to supporting evidence or explanation, that it is not a 'competent authority'.

120. But even if the Duchy is right that it is not a 'competent authority', there is no answer to the point that it is a 'relevant authority' in relation to marine areas and European marine sites which is more than sufficient to establish that the Duchy is a public authority for the purposes of the EIRs, the Directive and the Aarhus Convention.

121. It would be entirely contrary to the aims of the Aarhus Convention, the Directive and the EIRs – and starkly anomalous – 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 CLIFIT (at §20): “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”.

122. It is submitted that that in the present context, the significance of this guidance is two-fold in that:
- (1) 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
 - (2) 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.
123. The implications of the European environmental law regime for the Duchy’s public administrative functions is well illustrated by R (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin); [2010] Env. L.R. 33.
124. 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.

125. Owen J unequivocally 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 learned 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):

“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)

126. The judgment accordingly demonstrates that the Duchy is a competent authority in carrying out its functions as 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. It is submitted that this obviates any residual scope for doubt that in exercising its statutory obligations (and exercising its powers as Statutory HA), the Duchy carries out functions of public administration under the EIRs, the Directive and the Aarhus Convention.

(e) Other factors

127. The functions referred to above are more than sufficient to establish that the Duchy is a public authority for the purposes of the EIRs. But the public nature of the Duchy is further evidenced by (i) its right to appoint the High Sheriff of Cornwall; (ii) its right to appoint priests to the Church of England; (iii) its rights of wreck and treasure trove; (iv) the numerous powers it has to determine the applicability of legislation to its land; and (v) its eligibility for a '.gov.uk' domain name.⁵⁴

⁵⁴ See the Appellant's Response [119]-[120].

128. Mr Ross attempts to sweep away the matter of the Duchy's '.gov.uk' e-mail address as a simple error that the Duchy has now remedied by opting to use a '.org' designation. But this misses the point. There are strict eligibility criteria for the grant of such a domain name. Private entities are ineligible. As the Government's Central Office of Information website states:

To preserve the integrity of the .gov.uk namespace, registration/ownership is limited to:

- UK government and devolved administration departments and agencies;
- Executive and advisory non-departmental public bodies (NDPBs); and
- Local and regional government bodies (including town and parish councils).

129. The Commissioner said in his decision simply that this point was not "determinative". Of course, that is true. But he failed to recognise or acknowledge that the Duchy's successful application for a '.gov.uk' domain name (and maintenance of that name, albeit enquiries are now diverted to the '.org' site) provides a further illustration of the public nature of the Duchy.

E The Duke is a public body within regulation 2(2)(c)

130. Further and in the alternative, if the Tribunal were to accept the Duchy's submissions that the functions relied upon above are not those of the Duchy *per se*, but of the Duke of Cornwall, it would follow that the public administrative functions referred to above are undertaken by the Duke. The nature of the functions remains the same and it is obviously unnecessary to repeat the analysis set out above. Accordingly, if the Duchy is correct in its submission, for example, that the Statutory HA is the Duke rather than the Duchy, the consequence is that the Duke is a public body within regulation 2(2)(c).

131. It may be said that the Appellant's EIR request was directed to the Duchy rather than the Duke, but any such suggestion would be disingenuous and of no avail given the authority's duty to provide advice and assistance (reg.9 EIRs).

F The Duchy is a public body within regulation 2(2)(d)

132. The first step in the analysis of whether the Duchy is a public body within regulation 2(2)(d) is to establish that it is under the control of a person falling within regulation 2(2)(c). In this instance, the relevant person is the Duke of Cornwall.
133. As explained above, if the Duchy was to establish, for example, that it is the Duke rather than the Duchy which is a Statutory HA, Lighthouse Authority, Pilotage Authority and relevant/competent authority for the purposes of the Habitats Directive, then the Duke would be a public authority for the purposes of regulation 2(2)(c). In that eventuality, it would be strictly unnecessary for the Appellant to establish that the Duchy is also a public authority: his request for environmental information should be answered by the Duke.
134. Nevertheless, the Appellant does submit that the Duchy has numerous public responsibilities relating to the environment and exercises functions of a public nature relating to the environment. By way merely of example:
- (1) The Duchy owns one third of Dartmoor National Park and states that it works closely with the Dartmoor National Park Authority on environmental projects [275]; and
 - (2) The Duchy of Cornwall is one of the partners involved in implementing the Isles of Scilly AONB Delivery Plan 2010-2014, which involves the Duchy taking the lead in respect of a number of objectives, including woodland management.⁵⁵
135. Accordingly, if the Tribunal finds that the functions referred to above in section D, or some of them, belong to the Duke rather than the Duchy, then the Duchy also (or in the alternative) is a public authority within the meaning of regulation 2(2)(d).

G Conclusion

136. It is submitted that the Duchy is a public authority under regulations 2(2)(c) and/or 2(2)(d) the EIRs, the Directive and the Aarhus Convention. For all of the foregoing reasons, the Tribunal is respectfully invited to allow the appeal.

⁵⁵ <http://www.ios-aonb.info/Library/Management%20Plan/loS%20AONB%20Delivery%20Plan%202010-2014.pdf>.

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