DECISION

(1) This appeal is allowed.
(2) The Duchy of Cornwall is not a public authority for the purposes of the Environmental Information Regulations 2004 or of the Environmental Information Directive 2003/4.
(3) The Duke of Cornwall is under no obligation to provide the environmental information sought by the request that is the subject of the decision of the IC and the FTT in this appeal.

OVERVIEW

(1) The Duchy of Cornwall does not have legal personality (unless it is being used as a reference to the Duke of Cornwall) and is not a person, body or entity that has a separate identity of its own.
(2) The Duke of Cornwall, as the harbour and lighthouse authority for the harbour at St Mary's on the Isles of Scilly (the Harbour Authority) is a public authority for the purpose of the above-mentioned Regulations and Directive.
(3) The Duke of Cornwall's obligations to provide environmental information as such a public authority are limited to the environmental information he holds as the Harbour Authority.

REASONS

Introduction

1. This is an appeal from a decision of the First-tier Tribunal (the FTT) who found that the Duchy of Cornwall (the Duchy or the Duchy of Cornwall) was a public authority for the purposes of the Environmental Information Regulations 2004 (the EIR or the Regulations) and directed the Duchy to disclose the requested environmental information to Mr Bruton (the Appellant before the FTT and the second Respondent to this appeal). The EIR is intended to implement the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EEC) (the Directive).

2. Confusingly the EIR has different numbering to the Directive. When I refer to a Regulation I am referring to the EIR and when I refer to an Article I am referring to the Directive.

3. The request was made to the Duchy and refused on the basis that the Duchy was not a public authority. That refusal was upheld by the Information Commissioner (the IC). The information sought does not exist but no point has been taken that this appeal is academic. This is because the underlying legal issues are relevant to another request Mr Bruton has made, other requests that he and others would like to make and more generally. Also the parties to this appeal were given and took the opportunity to make submissions to the Upper Tribunal (of which I was a member) on common underlying legal issues in *Fish Legal and Shirley v Information Commissioner and Ors* [2015] UKUT 0052 (*Fish Legal UK*).

4. In reaching its decision the FTT concluded that the Duchy was a "body or other legal person" (my emphasis). Apart from setting out a summary of the evidence and argument the reasoning it gives for reaching that conclusion is scant. Essentially it is found in paragraph 57 of its Decision which states:

> 57 The UT in **Smartsource** found that:
>
> > *The definition of "public authority" for the purposes of the EIR 2004 may be fixed as a matter of its wording, but the outcome of its application will necessarily change according to the context and over time. To that extent the notion of a "public authority" is both place and time specific [105]*
>
> With this in mind, whatever the basis of the Duchy under the 1337 Charter, we find that the Duchy is now a body or other legal person. Taking into account all the above evidence and other statutory provisions, the practices of the Duchy and the way it has presented itself to the world including Parliament, the differentiation of the Duchy and the Duke in commercial and tax matters as well as under legislation and the contractual behaviour of the Duchy, we are led to the conclusion that the Duchy is a body or other person for the purposes of regs 2(2)(c) and (d) of the EIR.

5. The remainder of the FTT's Decision is directed to whether the Duchy, as such a body or person, is a public authority. It is based on the approach taken in the *Smartsource* case to determining who is a public authority and is not relied on because that approach has been overruled by the CJEU in *Fish Legal v Information Commissioner* [2014] 2 WLR 568 (*Fish Legal EU*).

Brief overview of the issues

6. A great deal of time and paper has been taken up on the issue whether the Duchy is, as the FTT concluded, a "body or other legal person". This has been read (in my view correctly) as a conclusion that the Duchy has legal personality. This part of the conclusion of the FTT does not mirror the language of Regulations 2(2)(c) and (d) because it includes the word "legal". I confess that it is not clear to me how central the finding of legal personality is to the FTT's later conclusion that the Duchy is a body or other person for the purposes of Regulations 2(2)(c) and (d). However, a requirement of legal personality does reflect the argument of the IC and the Attorney General of the Prince of Wales (the A-G) that the "body or person" referred to in Regulation 2(2)(c) must have legal personality.

7. On the legal personality issue the arguments are:

   i) whether the "other body or other person" referred to in Regulation 2(2)(c) has to have legal personality,

   ii) is the Duchy a body or person that has legal personality, and

   iii) if the Duchy does not have legal personality, is the Duchy nonetheless a body or person referred to in the Regulation.

8. Save in respect of:

   i) one of the arguments on whether the Duchy (as a body or other person) carries out functions of public administration namely, Mr Bruton's argument that it does so because, as a separate entity, it has been entrusted with the management of assets and been given special powers to provide funds for the Heir to the Throne, and

   ii) the hybridity issue

   this is an arid argument because it is clear that the Prince of Wales is a natural person who has legal personality if he is so described (or if he is described in any of the following ways, namely as the Duke of Cornwall, or the Duke in right of the Duchy, or the Heir to the Throne, or the Duke in right of or acting as or as a harbour authority). All such descriptions (save for the last) were used by Mr Bruton's counsel in argument. In all such capacities the Prince of Wales is an individual and in none of them has he been made a corporation sole (as for example some Secretaries of State and other officers (e.g. the Treasury Solicitor) have been).

9. The second main issue is whether the Duchy or the Prince of Wales as an individual (by whatever title or name he is so described) carries out functions of public administration or otherwise falls within Regulation 2(2)(c). On this issue it was accepted before me by the A-G and the IC that the Prince of Wales (as the Duke of Cornwall) does carry out functions of public administration as the harbour and lighthouse authority for the harbour at St

Mary's on the Isles of Scilly (the Harbour Authority). On this issue the A-G expressly reserved the right on any appeal to withdraw this stance and to argue that the Upper Tribunal's decision in *Fish Legal UK* was wrong.

10. On the second issue:

    i) Mr Bruton argues that the Duchy is an organic public authority within Article 2(2)(a) of the Directive and from that base that, as it is not mentioned in Regulations 2(2)(a) and (b) of the EIR, it is included within Regulation 2(2)(c),

    ii) Mr Bruton argues that the Duchy as a body or person carries out a number of functions of public administration,

    iii) Mr Bruton argues in the alternative that the Prince of Wales / Duke of Cornwall or the Duke in right of the Duchy carries out a number of functions of public interest, and is a public authority within Regulation 2(2)(c), and

    iv) the IC and the A-G argue that Mr Bruton wrongly elides the Duchy and the Duke, the Duchy has no separate functions and save in respect of the Duke's function as a harbour authority he has no functions of public administration.

11. The next issue is whether the Duchy is a public authority under Regulation 2(2)(d). This was not pursued in oral argument on behalf of Mr Bruton. As I understood it, this was because of the inability of Mr Bruton to identify the environmental responsibilities, functions or services of the Duchy (as a body or person) that he relies on if the Duke is a public authority under Regulation 2(2)(c). That inability shows that Regulation 2(2)(d) does not apply and is instructive because it indicates that there is considerable force in the argument that the Duchy does not have any functions separate and distinct from those of the Duke. As this argument was not pursued I will not deal with it further, save to record that (a) in my view it did not provide a basis for holding that the Duke or the Duchy is a public authority, and (b) as will appear from my analysis of other arguments, I do not accept that (as was asserted in the alternative by Mr Bruton) that the Duchy (or the Duke) are controlled by the Treasury.

12. The other issues were described as the hybridity and the de minimis issues.

The EIR and the Directive

13. The European Union implemented the Aarhus Convention by the Directive.

14. The general approach to the application of the Directive is set out in paragraphs 35 to 39 of *Fish Legal EU*:

> Introductory Observations

> 35 First of all, it should be recalled that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of EU law, a general principle of access to environmental information held by or for public authorities ----------
>
> 36 As recital (5) in the Preamble to the Directive 2003/4 confirms, in adopting the Directive the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention with a view to its conclusion by the Community, by providing for a general scheme to ensure that any natural or legal person in a member state as a right of access to environmental information held by or on behalf of public authorities without that person having to state an interest: ----------.
>
> 37 It follows that, for the purposes of interpreting Directive 20013/4, account is to be taken of the wording and aim of the Aarhus Convention, which that Directive is designed to implement in EU law: ----------
>
> 38 In addition, the court has already held that, while the *Aarhus Convention Guide* may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purposes of interpreting the Convention, the observations in the guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention: ----------
>
> 39 Finally, it should also be noted that the right of access guaranteed by Directive 2003/4 applies only to the extent that the information requested satisfies the requirements for public access laid down by that Directive, which means inter-alia that the information must be "environmental information" within the meaning of article 2(1) of the Directive, a matter which is for the referring tribunal to determine in the main proceedings: ----------

15. This approach to the Directive is relevant to the approach to the interpretation and application of the EIR because of the direct effect of the Directive and the approach to the meaning and application of a regulation that was made to implement a directive (see for example *HP Bulmer v Bollinger* [1974] Ch 401 at 405, *R v S of S for Trade and Industry ep Greenpeace (No 2)* [2000] 2 CMLR 94 at para 38 and *Marleasing SA v La Commercial International de Alimentaction SA* [1990] ECR 1-4135).

16. The definition of "public authority" in Article 2 of the Aarhus Convention is very similar to that in Article 2(2) of the Directive. It is:

> "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…
>
> …This definition does not include bodies or institutions acting in a judicial or legislative capacity."

17. The body responsible for the Aarhus Convention (the United Nations Economic Commission for Europe - UNECE) has published an Implementation Guide, now in its second edition (2014). The guide has no binding force, but is an explanatory document capable of being taken into account for the purpose of interpreting the Convention's provisions: see for example *Solvay v Region Wallonne C-182/10* [2012] 2 CMLR 19 at paragraphs 26 and 27 and *Fish Legal EU* at paragraph 38 cited above). The guide states:

> The definition of public authority is important in defining the scope of the Convention. While clearly not meant to apply to legislative or judicial activities, it is nevertheless intended to apply to a whole range of executive or governmental activities, including activities that are linked to legislative processes. The definition is broken into three parts to provide as broad coverage as possible. Recent developments in privatized solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public information, participation or justice.
> (a) **Government at national, regional and other level;**
> "Public authority" includes "government" – a term which includes agencies, institutions, departments, bodies, etc., of political power – at all geographical or administrative levels. In a typical situation, national ministries and agencies and their regional and local offices, State, regional or provincial ministries and agencies and their regional and local offices, as well as local or municipal government offices, such as those found in cities, towns or villages, would be covered…
> **(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;**
> "Public authority" also includes natural or legal persons that perform any public administrative function, that is, a function normally performed by governmental authorities, as determined according to national law. What is considered a public function under national law may differ from country to country. However, reading this subparagraph together with subparagraph (c) below, it is evident that there needs to be a legal basis for the performance of the functions under this subparagraph, whereas subparagraph (c) covers a broader range of situations…

> A natural person is a human being, while "legal person" refers to an administratively, legislatively or judicially established entity with the capacity to enter into contracts on its own behalf, to sue and be sued, and to make decisions through agents, such as a partnership, corporation or foundation. While a governmental unit may be a legal person, such persons would already be covered under subparagraph (a) of the definition of "public authority". Public corporations established by legislation or legal acts of a public authority under (a) fall under this category. The kinds of bodies that might be covered by this subparagraph include public utilities and quasi-governmental bodies such as water authorities."

18. The definition of "public authority" in Article 2(2) of the Directive is as follows:

> "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 person or body falling within (a) or (b).
>
> Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity…"

19. The recitals to the Directive state:

> (5) On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.
> …
> (11) To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, 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 national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment**.**

20. The definition of public authority in Regulation 2(2) of the EIR is in different terms and is as follows:

> Subject to paragraph (3) [Scottish public authorities], "public authority" means-
> (a) government departments;
> (b) any other public authority as defined in section 3(1) of the Freedom of Information Act 2000, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding-
> i. any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
> ii. any person designated by Order under section 5 of the Act;
> (c) any other body or other person, that carries out functions of public administration; or
> (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and-
> i. has public responsibilities relating to the environment;
> ii. exercises functions of a public nature relating to the environment; or
> iii. provides public services relating to the environment.

21. Regulation 2(1) provides that "environmental information" has the same meaning as in Article 2(1) of the Directive and repeats that definition. And, more generally, Regulation 2(5) provides that:

> Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

22. Regulation 3 provides that:

> (1) Subject to paragraph (3) and (4), these Regulations apply to public authorities.
>
> (2) For the purposes of these Regulations, environmental information is held by a public authority if the information ----------
>
> (3) These Regulations shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity.

Preliminary comment

23. The general approach of the Directive and the EIR is to give a right to request *environmental information* from a defined class of entities (the word used by the CJEU) namely *public authorities*.

24. In my view, the point made in paragraph 39 of *Fish Legal (EU)* concerning the extent of the right given by the Directive applies to the need for the entity to be a public authority as well as to the need for the information to be environmental information.

25. So although, as indicated by the opening paragraph cited from the UNECE guide (cited at paragraph 17 above) and the introductory observations of the CJEU in *Fish Legal EU* (cited at paragraph 14 above) the Directive, and so the EIR, is intended to have a wide reach, they were not intended to give a right to request *environmental information from anyone* simply because they hold it even though there is a strong public interest in the provision of that environmental information to the public.

26. Through Regulations 2(2)(a) and (b), the approach of the EIR to the identification of the entities (the word used by the CJEU) from whom environmental information can be requested is to include government departments and then other entities by reference to s. 3 of FOIA with some alterations.

27. Section 3 of FOIA operates in a different way to Article 2(2) of the Directive. It lists entities rather than functions. It provides that "public authority" means any body which is (i) listed in Schedule 1 to FOIA; or (ii) is designated by Order under s. 5 of FOIA, or (iii) is a publicly-owned company as defined by ss. 6 and 7 of FOIA. The list in Schedule 1 is lengthy and has a number of internal headings. The first such public authority listed in Schedule 1 to FOIA is any government department (so they come in twice). Local government is included by Part II of that Schedule.

28. Sections 4 and 5 of FOIA give the Secretary of State power by order to amend Schedule 1 and to designate further bodies as "public authorities" for the purposes of FOIA. So this gives a route to adding further public authorities to the definition in the EIR but, if it was adopted, those entities would also be added for the purposes of FOIA. The exemption in s. 37 of FOIA would obviously cause difficulties in so adding the Heir to the Throne or one of his officers or employees.

29. Sections 6 and 7 of FOIA cover companies that are either wholly owned by the Crown, or wholly owned by the wider public sector.

Fish Legal

30. *Fish Legal EU* was a decision made by the CJEU on a reference from the Upper Tribunal. The case before the tribunal concerned the application of Regulations 2(2)(c) and (d) of the EIR to the water companies (and so Articles 2(b) and (c) of the Directive). In giving its guidance the CJEU considered the whole of the structure of Article 2 of the Directive.

31. At paragraphs 40 to 52 the CJEU said:

> Questions 1 and 2
>
> 40 By its first two questions, which it is appropriate to deal with together, the referring tribunal seeks in essence to ascertain the criteria for determining whether entities such as the water companies

concerned can be classified as legal persons which perform 'public administrative functions' under national law, within the meaning of Article 2(2)(b) of Directive 2003/4.

41 Under Article 2(2)(b) of Directive 2003/4, a provision essentially identical to Article 2(2)(b) of the Aarhus Convention, the term 'public authority' covers 'any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment'.

42 According to settled case-law, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (see, inter alia, *Flachglas Torgau*, paragraph 37).

43 In the present case, it must, firstly, be determined whether the phrase 'under national law' is to be understood as an express reference to national law – here, to United Kingdom law – for the purpose of interpreting the concept of 'public administrative functions'.

44 In this regard, there is a disparity between the English and French versions of Article 2(2)(b) of Directive 2003/4 corresponding to the divergence between the versions in the same languages of Article 2(2)(b) of the Aarhus Convention, the authentic texts of which include the French and English versions. In the French version of Article 2(2)(b) of Directive 2003/4, the phrase 'under national law' is linked to the verb 'perform', so that, in this version, the provision's terms cannot be understood as making express reference to national law as regards the definition of 'public administrative functions'. In the English version of the same provision, that phrase is, by contrast, placed after the words 'public administrative functions' and is consequently not linked to that verb.

45 Recital 7 in the preamble to Directive 2003/4 sets out the objective of preventing disparities between the laws in force concerning access to environmental information from creating inequality within the European Union as regards access to such information or as regards conditions of competition. This objective requires that determination of the persons obliged to grant access to environmental information to the public be subject to the same conditions throughout the European Union, and therefore the concept of 'public administrative functions', within the meaning of Article 2(2)(b) of Directive 2003/4, cannot vary according to the applicable national law.

46 This interpretation is supported by the Aarhus Convention Implementation Guide, according to which the phrase 'under national law' means 'that there needs to be a legal basis for the performance of the functions under [Article 2(2)(b)]', this subparagraph covering '[a]ny person authorised by law to perform a public function'. That cannot be called into question by the fact that the guide adds that '[w]hat is considered a public function under national law may differ from country to country'.

47 In this context, contrary to what the Information Commissioner and the water companies concerned submitted at the hearing, if that phrase were to be interpreted as referring to the need for a legal basis to exist, it would not be superfluous since it confirms that performance of the public administrative functions must be based on national law.

48 It follows that only entities which, by virtue of a legal basis specifically defined in the national legislation which is applicable to them, are empowered to perform public administrative functions are capable of falling within the category of public authorities that is referred to in Article 2(2)(b) of Directive 2003/4. On the other hand, the question whether the functions vested in such entities under national law constitute 'public administrative functions' within the meaning of that provision must be examined in the light of European Union law and of the relevant interpretative criteria provided by the Aarhus Convention for establishing an autonomous and uniform definition of that concept.

49 Secondly, as regards the criteria that must be taken into account in order to determine whether functions performed under national law by the entity concerned are 'public administrative functions' within the meaning of Article 2(2)(b) of Directive 2003/4, the Court has already stated that it is apparent from both the Aarhus Convention itself and Directive 2003/4 that in referring to 'public authorities' the authors intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the performance of their functions (*Flachglas Torgau*, paragraph 40).

50 In addition, the Aarhus Convention Implementation Guide explains that 'a function normally performed by governmental authorities as determined according to national law' is involved but it does not necessarily have to relate to the environmental field as that field was mentioned only by way of an example of a public administrative function.

51 Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/4. This first category includes all legal

> persons governed by public law which have been set up by the State and which it alone can decide to dissolve.
>
> 52 The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

32. Paragraphs 48 and 52 effectively mirror the approach taken in the citation by the Advocate General (at paragraph 80 of his opinion with his emphasis) from *Foster v British Gas plc* [1991] 1 QB 405 at para 20 namely:

> a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose *special powers beyond those which result from the normal rules applicable in relations between individuals* is included in any event among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon.

33. Later at paragraph 67, when it is dealing with the issue of control (and reflecting what is said earlier at paragraphs 50 and 51) the CJEU said:

> 67 Thus, in defining three categories of public authorities, article 2(2) of the Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, the state itself, an entity empowered by the state to act on its behalf or an entity controlled by the state.

34. These citations show and confirm the hierarchy of, or as it was referred to in argument in this case the pyramid created by, the provisions of the Directive and the Regulations. They also reflect the purposes set out in the quotation from the UNECE guide and recital (11) to the Directive cited above.

35. The CJEU describe the first two stages using the neutral expression “entities” which are organically or functionally *administrative authorities.*

36. The hierarchy or structure of the Directive is an important factor to be taken into account when determining whether entities are administrative authorities within the definition of *public authorities.* It provides a further indication that if, at the functional stage, the functions or services of public interest with which the

relevant entity is entrusted do not have a sufficient link with the public administration or executive of the State at national or local levels it would be surprising if the Directive and the EIR applied to the environmental information held by that entity, even though there was a strong public interest in it being disclosed because, for example, it related to the maintenance of an iconic building or large expanse of moorland or was owned by a public figure who benefitted from public funding.

37. The language relating to the links in the chain of the hierarchy or structure differ between the Directive and the EIR. Articles 2(2)(b) and (c) of the Directive both make reference to the environment whereas Regulation 2(2)(c) of the EIR does not.

38. However, there is no effective difference between an entity "performing public administrative functions" (the language of the Directive) and an entity that "carries out public administration" (the language of the EIR). So this language of the EIR replicates the functional test under Article 2(2)(b) of the Directive at the Regulation 2(2)(c) stage of the hierarchy or structure of the EIR.

39. Paragraph 52 of the judgment of the CJEU describes that functional test. The second part of the paragraph has to be read with and is informed by the overarching description of the entities as *administrative authorities.* Paragraph 52 provides that it is the combination of the following that make an entity a functional administrative authority and so a public authority:

    i) the entity is a legal person governed by public or private law,

    ii) the legal regime applicable to it has entrusted it with the performance of services of public interest, inter alia in the environmental field, and

    iii) it has been vested with special powers.

40. In my view, applying the description or test in paragraph 52 of *Fish Legal EU*:

    i) the special powers also have to be vested in the entity by the legal regime applicable to the entity, and

    ii) it is the vesting of special powers that makes a service of public interest an administrative function that counts or qualifies in determining whether the entity is an administrative authority (and so a public authority under the functional definition).

41. *Rigidity / flexibility.* In my view, the general approach to the interpretation of a Directive and Regulations to implement it carries over to the interpretation and application of the functional test as set or described by the CJEU with the result that the CJEU description should not be applied in place of the tests set by the Directive and the EIR. Rather, it is important and binding guidance on what those tests mean and how they are to be applied, and like the test set by the Directive, the test set by the CJEU (which contains concepts and words that have a range of meaning) should be applied so as to give effect to the

underlying objectives and purposes of the Directive including those relating to its breadth and the public interest in environmental information being made available to the public.

42. If follows that the CJEU test should not be applied rigidly or without reference to, and a cross check with, both the words of the Directive and the EIR and their underlying objectives and purposes. That cross check involves standing back and asking whether in all the circumstances of the case the combination of what are, or are arguably, the factors identified by the CJEU in its test result in the relevant entity being a functional public authority.

43. The key issue on that approach is whether there is a sufficient connection between what is relied on to satisfy the functional test and what entities that are organically part of the administration or the executive of a state do.

44. Moving to the next tier of the hierarchy or structure both Article 2(2)(c) of the Directive and Regulation 2(2)(d) of the EIR provide respectively that the "natural or legal person" or the "other body or other person" must:

    i) have public responsibilities or functions, or provide public services, relating to the environment, and must

    ii) be controlled by respectively "a person or body" or "a person" who is a public authority under the earlier parts of the definitions.

45. The reference to the controller in Regulation 2(2)(d) as a "person" referred to in the earlier parts of the definition shows that there "person" is being used to cover entities that do not have legal personality for example if they are listed in Schedule 1 to FOIA (e.g. a government department).

What did not arise in Fish Legal

46. In *Fish Legal UK* the lack of reference in Regulation 2(2)(c) of the EIR to a legal person or to the environment did not matter because it was common ground that the water companies were legal persons entrusted with services of public interest in the environmental field. Also, it did not matter whether the special powers referred to by the CJEU had to relate to the environmental functions because the relevant powers were so directed.

47. The issue for the Upper Tribunal in applying the guidance of the CJEU on Regulation 2(2)(c) of the EIR was therefore whether the water companies had special powers (see paragraph 55 of the judgment of the CJEU) .

48. Accordingly, *Fish Legal* in the CJEU and the Upper Tribunal:

    i) did not consider whether Regulation 2(2)(c) of the EIR is wider than the Directive because "the other body or other person" referred to in Regulation 2(2)(c) does not have to be a legal person entrusted with environmental functions and/or whether they must have special powers

directed to such environmental functions as are entrusted to them or which they have, and

ii) proceeded on the basis that, in the case of the water companies, no point arose on the different wording and structure of the EIR and the Directive and the guidance given by the CJEU on the application of Article 2(2)(b) applied to the application of Regulation 2(2)(c) to the water companies.

49. Also in *Fish Legal* no point arose on whether Regulations 2(2)(a) and (b) of the EIR are narrower than Article 2(2)(a) of the Directive and so, absent the exercise of the power conferred by FOIA to add to the list of public authorities, how that gap should be filled.

50. In *Cross v IC and the Cabinet Office* GIA/2187/2013; [2016] UKUT 0153 (AAC) (the *Cross* case) it was not argued that:

i) to be a public authority under the functional test the entity had to be entrusted with special powers for the purpose of the performance of services of public interest in the environmental field, or that

ii) the reference in paragraph 52 of the judgment of the CJEU to "this purpose" linked the need for special powers to only the services of public interest in the environmental field.

Rather that case was argued on the common ground that (i) the reference to "this purpose" was to the whole of the description "the performance of services of public interest, inter alia in the environmental field", and (ii) if the Sovereign was not vested with special powers for the performance of services of public interest in the environmental field but was vested with special powers for the performance of other services of public interest she could be a public authority.

51. In this case the same approach was taken to the meaning of "this purpose" and it was accepted by the A-G and the IC that it was possible for an entity to be a public authority under the functional test if it was only vested with special powers in respect of its performance of services of public interest outside the environmental field.

52. I have therefore taken this approach. I recognise that it links a functional administrative authority with an organic one because it is clear that an organic administrative authority does not have to be entrusted with the performance of services of public interest in the environmental field to be a public authority that is subject to the Directive. However, I add that in my view if the only special powers of the entity relate to services outside the environmental field this is a factor that can be taken into account on the hybridity and de minimis issues discussed below.

53. From that base, counsel for the A-G submitted that for a service of public interest entrusted to an entity to count under the functional test set by the CJEU in paragraph 52 of *Fish Legal EU* the entity must have been vested with special

powers to perform it. This submission was not disputed. As appears from paragraph 40(ii) above the explanation given by the CJEU of what amounts to a public administrative function requires both factors to be present. So it supports this submission of the A-G and I accept it.

The Crown and the Heir to the Throne

54. Much of Mr Bruton's argument touches on the role and position of the Heir to the Throne, the functions of the Heir and the need to provide finance for his public / official / ceremonial duties and his private life. This introduces the need to examine the position of the Sovereign. In turn this introduces the need to appreciate the different uses in our constitutional law of references to the Crown that are reflected in sections 6 and 7 of FOIA.

55. This is so notwithstanding the points that:

    i) Community law must be placed in its context and interpreted as a whole having regard to its objectives (see for example *Srl CILFIT v Ministry of Health* [1983] 1 CMLR 472 at para 20), and

    ii) the definition of what are "*public administrative functions*" must be so construed to capture and reflect the EU approach and so the underlying scheme of EU environmental law including, for example, the Habitats Directive (see paragraph 45 of *Fish Legal EU*).

    This is because a starting point to that approach is to identify the functions and roles of the relevant entity and so, in this case, of the Duke and Heir to the Throne as an entity under national law and then to ask on that Community law approach: Are they *public administrative functions*?

56. Also, as is pointed out at paragraph 48 of *Fish Legal* EU, if the relevant functions are *public administrative functions* the relevant entity only falls within Article 2(2)(b) if it is empowered to perform them by virtue of a legal basis specifically defined in the national legislation which is applicable to it.

The Crown in the sense of the government

57. A classic and regularly used explanation of what the Crown is in this sense is given by Lord Diplock in *Town Investments Ltd v Department of the Environment* [1978] AC 359. At 380F to 381D he said:

> To use as a metaphor the symbol of royalty, 'the Crown,' was no doubt a convenient way of denoting and distinguishing the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will. But to continue nowadays to speak of 'the Crown' as doing legislative or executive acts of government, which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself, involves risk of confusion. We very sensibly speak today of legislation

> being made by Act of Parliament - though the preamble to every statute still maintains the fiction that the maker was Her Majesty the participation of the members of the two Houses of Parliament had been restricted to advice and acquiescence. Where, as in the instant case, we are concerned with the legal nature of the exercise of executive powers of government, I believe that some of the more Athanasian-like features of the debate in your Lordships' House could have been eliminated if instead of speaking of 'the Crown' we were to speak of 'the government' - a term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by 'the Crown' in the fictional sense in which that expression is now used in English public law.

(Explanations to the same overall effect can be found in the speech of Lord Simon in the *Town Investments* case at pages 397 to 401 and in the speech of Lord Templeman in *M v Home Office* [1994] 1 AC 377 at 395 B/G.)

58. As explained by that high authority, although the Crown is personified by the Sovereign, as a natural and so legal person the Sovereign (as our constitutional monarch) is not, and does not act as the Crown in the sense of government.

59. Rather the Crown in the sense of government is effectively a concept of our unwritten constitution to describe the public administration and executive of the state or who those involved in it are and are acting for. To use the CJEU classification in *Fish Legal EU* at paragraph 51 which accords with the recital to the Directive and the UNECE guide (cited above) the Crown in that sense:

    i) is a description of the administrative central authorities and so entities which organically form part of the public administration and the executive of the state, and is **not**

    ii) a description of the Sovereign as a natural and so legal person carrying out duties or functions or exercising powers as part of the public administration and executive of the state at a national or a local level.

60. This constitutional classification means that there is a clear distinction to be made between on the one hand:

    i) the public administration and executive of the state at national and local level, on the one hand, and on the other hand

ii) the following which the Duke carries out as a natural and so legal person (and so as the Prince of Wales or the Duke of Cornwall), namely:

(i) the ceremonial and official roles of the Heir to the Throne and the Duke, and

(ii) his personal life and his roles as an owner of, or a person with interests in, the capital or income of property.

61. These distinctions are also relevant to a consideration of the funding arrangements relating to the Heir to the Throne as the Duke of Cornwall (and of the Sovereign when there is no Duke or the Duke is a minor) that have been put in place over the centuries.

62. In short, the distinctions provide the basis for the determination of what the relevant functions, duties, rights and powers are and so whether, on a Community law approach, they are public administrative functions applying the EIR and the Directive with the guidance given by the CJEU in *Fish Legal EU.*

63. Returning to the Crown in the sense of government the civil servants working in the government departments are working for, or as, the Crown and the general position is that the functions and powers are given to the Secretary of State who is the head of a government department and officers and employees of the department make decisions that are treated as decisions of the Secretary of State or of the Crown under the *Carltona* principle (see *Carltona Ltd v Commissioners of Works* [1943] 2 AER 560). Also under the Crown Proceedings Act 1947 (see s. 17) the Crown in the sense of government can be sued in the name of government departments.

64. Transposing that to an individual (X) conducting his own business or private affairs he may do so through others (employees, officers or staff) who are acting with his express and/or ostensible authority. But although, like the civil service or a government department, that group of people could be identified by a collective description, the members of that group when acting for X will not as such have legal personality or be exercising X's functions or powers as a body or entity with its own separate identity.

Post hearing submissions

65. I gave Mr Bruton's counsel the opportunity to respond in writing to arguments based on *Town Investments* that arose or gained prominence during the hearing particularly because Mr Bruton's primary oral argument at the hearing was that by managing the Duchy Estate with a view to obtaining an appropriate income to fund the Duke's performance, as Heir to the Throne, of his official / public / ceremonial duties, and thereby reducing the burden on the taxpayer, the Duchy or the Duke is performing functions of public administration. At my request Counsel for Mr Bruton also took that

opportunity to summarise that primary oral argument. They did so in the terms set out in paragraph 117 below.

66. The written submission (dated 24 February 2016) asserted that *Town Investments* is simply directed to the point that in the modern British constitution there is a distinction between the Sovereign and the executive arm of government, in the form of the various Secretaries of State, which is obviously correct and uncontroversial.

67. It went on to submit that:

    i) *Town Investments* has nothing to do with the issue in the present case namely whether the Sovereign and / or Heir to the Throne constitute part of the government of the United Kingdom in its broader, or more general, sense (i.e. comprising the executive, legislature, head of state and other sub-units of governance at a devolved and/or local level), and

    ii) the most recent and pertinent consideration of the status and role of the Sovereign and Heir is provided by the Upper Tribunal's judgment in *Evans v ICO* [2012] UKUT 313 (AAC) in particular at paragraphs 64 to 112, which support Mr Bruton's case.

68. As appears from paragraphs 54 to 63 above I do not agree with the first of those submissions. The issue is not whether the Sovereign and the Heir to the Throne constitute part of the government in its broader, or more general, sense as described by Mr Bruton by including the head of state, or as otherwise described without reference to the definitions of a public authority in the Directive and the EIR.

69. Rather, the issue is whether the Heir to the Throne (or the Sovereign) are public authorities as so defined. As I have explained, in my view the accepted constitutional distinction described in *Town Investments* is directly relevant to the identification and classification of the relevant functions and roles of the Heir to the Throne (see in particular paragraphs 55 and 62 above) and so to this issue.

70. In my view, the decision of the Upper Tribunal in *Evans* does not support Mr Bruton's case and I note that the submission that it does is not reasoned by reference to the paragraphs referred to in that decision or otherwise. Those paragraphs relate to constitutional conventions and it seems to me that they support rather than undermine my conclusions on the relevance and impact of the accepted constitutional position demonstrated by *Town Investments.* That account of the (a) cardinal convention: the Monarch acts on advice, (b) the tripartite convention: be consulted, encourage, warn and (c) the education convention and its scope support the distinction set out in paragraph 60 above. Also they, and the subject matter of the *Evans* case, support the view that the Heir to the Throne in that case, and more generally, is not a part of

the public administration or executive of the state that he was addressing in his advocacy correspondence.

Does the Duchy have legal personality? Is the Duchy a body or other person that has its own separate identity?

71. In my view the answer to both these questions is "no" unless the description is construed and applied as being a description of the Duke

72. I record that in my view the extract from paragraph 105 of the decision of the Upper Tribunal in the *Smartsource* case cited by the FTT is not a sound starting point for the analysis of these questions because, as is shown by the balance of that paragraph, the possibility of change over time that is referred to is directed to what is regarded, from time to time, as a function normally performed by a government authority and not to whether something is a body or has legal personality. So, in my view, Mr Bruton's counsel correctly did not try to build his argument on this foundation. It does not support an argument that legal personality is acquired in the manner suggested by the FTT.

73. The conclusion of the FTT, and the submissions made on behalf of Mr Bruton that the Duchy rather than the Duke is a harbour authority, are prime examples of the flaws in their approach to the relevant legislation and their misuse of a reference in explanatory notes and other documents to the Duchy or the Duchy of Cornwall. The legislation is the Pier and Harbour Order Confirmation (No 4) Act 1890 and the St Mary's (Isles of Scilly) Harbour Revision Order 2007. The 1890 Act makes "the Personage for the time being entitled to the Duchy of Cornwall" the undertaker, and the 2007 Order makes "HRH Prince of Wales Duke of Cornwall or other the possessor of the Duchy of Cornwall" the harbour authority or other the undertaker for the purposes of the 1890 order or this Order. So the active and effective parts of that legislation appoint the Duke as the harbour authority.

74. The explanatory note to the 2007 Order is an example of references to the Duchy of Cornwall relied on by Mr Bruton and the FTT because it refers to the Duchy of Cornwall as the harbour authority. But, it is apparent from the legislation that unless that reference is construed as a reference to the Duke it is inaccurate. As I understood it, by the end of the hearing this was accepted on behalf of Mr Bruton and the argument that the Duchy and not the Duke is the harbour authority was no longer pursued.

75. This example shows the need to look at the relevant legislation and the starting point for that analysis is the Great Charter of Edward III 1337 (the 1337 Charter).

76. In contrast to the Duchy of Lancaster, which is made a corporation by its charter, the Duchy of Cornwall is not made a corporation by the 1337 Charter which was held in *The Prince's Case* (1606) 8 Co Rep 1; 77 ER 496 to be an Act of Parliament. Rather, by the 1337 Charter the King and his Council in Parliament give to the King's son and heir to the throne the "*Name and Honor*

of Duke of Cornwall" and the charter then provides that should it be hereafter doubted that "*the same Duke or other Dukes of the same place for the time being in the Name of the duchy aforesaid ought to have all things in particular which we will pertain to the same Duchy*". That is the first reference to the duchy in the charter.

77. To avoid the doubt referred to the 1337 Charter includes a command that the King and his Council in Parliament "*have given and Granted for Us and our Heirs and by this present Charter confirmed to our said son under the name and Honor of the Duke of the said place*" a collection of land and other assets "*to have and to hold to the same Duke and the eldest sons of him and his Heirs Kings of England and the Dukes in the same place, hereditary to succeed in the Kingdom of England together with* ----- _". A description of assets is then set out and the charter then provides:

> and all which Castles etc ---------- and all the things abovesaid to the aforesaid Duchy by this our present Charter for Us and our Heirs We do annex and unite to the same for ever to remain so that from the same Duchy at any time they should be in no wise separated nor to any other or others than Dukes of the said place by us or our Heirs be given or in anywise howsoever granted So also that the aforesaid Duke or other Dukes of the same place dying and the Son or Sons to whom the said Duchy by pretext of our grants aforesaid is known to belong then not appearing the same Duchy with the Castles Boroughs Towns and all other things abovesaid to us and our Heirs Kings of England shall revert to be retained in the Hand of us and our same Heirs Kings of England until there appears such son or sons hereditarily to succeed in the said Kingdom of England as abovesaid to whom then successively for us and our Heirs we Grant and will be delivered the same Duchy with the appurtenances to be olden as above is expressed [a description follows] -------
> ---
> Wherefore We Will and firmly Command for us and our Heirs that the said Duke may have and hold to him and the eldest sons of the same Dukes and his Heirs Kings of England and the Dukes of the same place hereditarily to succeed in the Kingdom of England as aforesaid [a summary of the rights and properties is given] And all which Castles etc ---------- and all other the abovesaid to the aforesaid Duchy by this our present Charter for us and our Heirs We annex and unite to the same forever to remain So that from the same Duchy at any time they shall be in no way separated nor to any other or others than Duke of the same place by us or our Heirs be given or in anywise howsoever be granted So also that the aforesaid Duke or other Dukes of the same

> place dying and the son or sons to whom the said Duchy by pretext of our Grants aforesaid is known to belong then not appearing the same Duchy with the Castles Boroughs Towns and all other things abovesaid shall revert to us to be retained in the hands of us and our said Heirs Kings of England until there appears such Son or Sons hereditarily to succeed in the Kingdom of England as is abovesaid to Whom then successively for Us and Our Heirs We Grant and Will the same Duchy to be delivered with the Appurtenances To be holden as is above expressed

78. In *The Prince's Case* (at pages 27a and 513 in the respective reports), the 1337 Charter is described as the instrument by which the Prince was created Duke of Cornwall and the possessions of the dukedom of Cornwall given to him, with special limitations, and the possessions annexed to the said Duchy so as they shall not be severed with, a special clause of revivification if the special limitations at any time should cease. In other words, the Prince, as the Duke, is the owner of those possessions (the estate) as the Duke subject to special limitations and provisons and the Duchy is a descriptive term for either the Duke or the estate he owns by virtue of the 1337 Charter.

79. Returning to the language of the 1337 Charter, to my mind the first two references to the Duchy (cited at paragraph 76 above) can be read as a description of the Name and Honor of Duke of Cornwall and thus to the dukedom of Cornwall (see *The Prince's Case)* and so to the Duke or that title. Other references could be read in the same way. However, the term the Duchy is also used to describe the land, assets and rights etc etc that are the subject of the 1337 Charter and so become the possessions of the dukedom of Cornwall (see *The Prince's Case).*

80. The 1337 Charter creates an hereditary interest in those possessions (and so in what I shall call the Duchy estate) to which each male heir to the Throne (the Duke) becomes entitled which reverts to the Sovereign when there is no such Heir. It therefore creates something that has similarities to a trust, but without trustees. It clearly vested title to the Duchy estate in the Duke as Heir to the Throne (with a reverter to the Sovereign when there is no Duke) rather than vesting title in some other entity or person called or described as the Duchy or the Duchy of Cornwall.

81. So:

    i) the 1337 Charter does not treat the Duchy as an entity, body or person that is different from the Duke or the Sovereign and which owns or holds or has any interest in any assets. Rather the Duchy is used to describe either the possessions of the Duke and therefore a Duchy

estate or the dukedom of Cornwall created by the 1337 Charter and therefore a person or a title, and it follows that

ii) Mr Bruton's primary submission that the Duchy is an entity created by the 1337 Charter (and so an Act of Parliament) is wrong, and he has to look elsewhere for the creation of a separate entity or body called the Duchy of Cornwall or the Duchy.

82. Over the centuries, officers, a Council and other individuals have been involved in the management of the assets, interests, rights etc. defined in the 1337 Charter and the property representing them from time to time (the Duchy estate). They are not civil servants and are not employed by an organic administrative authority. But, as Mr Bruton has pointed out, and is accepted by the evidence put in on behalf of the A-G, there are numerous and diverse examples of the Duchy being referred to as if it was a separate body or organisation charged with management of the Duchy estate. Some of the examples have been endorsed by the Duke and those who manage the Duchy estate e.g. the entry into of contracts in the name of the Duchy, the Duchy being a party to litigation, descriptions used in accounts, registration under the Data Protection Act and references to the Duchy as the owner or manager of property). Another example is contained in a Memorandum of Understanding on Taxation which refers to the Duchy of Cornwall as a Crown body. Others are found in evidence given to Parliament. And, as I have already mentioned in paragraph 74 above, another example is found in the explanatory notes to the St Mary's (Isles of Scilly) Harbour Revision Order 2007.

83. I accept that taken together these examples (and many of them individually) state or imply that there is an entity or body called the Duchy of Cornwall that owns land or other assets and is as such, or otherwise, an entity or body charged with certain functions. However, such examples cannot create such an entity or body and each investigation of the submissions based on them that took place before me showed such statements or implications to be wrong (e.g. that the Duchy owns Highgrove was shown to be wrong by the production of the Land Certificate).

84. In my view correctly, counsel for Mr Bruton did not pursue arguments that of themselves these examples created, or could create, a separate entity or body (with functions and powers of its own or a legal personality) or that such an entity or body had been, or could be, created by custom, representation or usage evidenced by those examples. For example, it was not asserted that all or some of the persons who administer the Duchy estate on a day to day basis, or the Council, comprise that entity or body as an individual or group of individuals, as a partnership or as an unincorporated association, or in any other way. To my mind, they do not. To do so they would have had to have entered into some sort of agreement to this effect amongst themselves. They have not.

85. Further, the fact that the Council is given very limited powers by s. 36 of the Duchy of Cornwall Act 1844 and s. 12 of the Duchy of Cornwall Management Act 1863 points against rather than in favour of an argument that the members of the Council from time to time are, or are also, the Duchy. The same can be said of the powers given to others when the Duke is a minor or there is no Duke (see paragraph 99 below).

86. If no individual or group of individuals constitute such a separate body or entity called the Duchy it can only be one if it is a corporation.

87. The argument was that such a corporation (and perhaps some otherwise unknown entity or body) has been created expressly or by necessary implication by the 1337 Charter read with the Duchy of Cornwall Act 1844 and the Duchy of Cornwall Management Acts 1863 to 1982 ("the later Acts"). My references to a corporation cover any such other entity or body. This is of course possible and I accept that when Parliament passed the later Acts it was aware of many of the examples relied on by Mr Bruton which indicate that there is, or was thought to be, a separate entity or body called the Duchy of Cornwall that has functions and powers of its own and so these examples are part of the background to the later Acts.

88. *Express statutory creation.* As I have said, a corporation called the Duchy of Cornwall or the Duchy was not so created by the 1337 Charter and I was not directed to anything in the later Acts that did this.

89. *Implied statutory creation.* In my view the fact that examples of the Duchy of Cornwall being stated to be, and being treated as, a separate entity or body that has functions and powers of its own do not found the conclusion that a corporation called the Duchy of Cornwall, or the Duchy, has been created by necessary implication by the 1337 Charter or the later Acts. Indeed, in my view when the underlying purposes of the later Acts are taken into account it is clear that Parliament was not intending to create a corporation, body or entity called the Duchy of Cornwall or the Duchy.

90. The underlying purposes of the later Acts relate to and are directed to ameliorating the special limitations on the powers of the Duke (and the Sovereign) as the owner of the Duchy estate that are imposed by the 1337 Charter and so to facilitate better management of the Duchy estate by its owner. In particular, the limitation relating to the disposal of capital assets was causing significant problems in the management and upkeep of the Duchy estate that reduced its income and capital growth. These problems are reflected by the stated purposes at the beginning of the 1844 Act (passed when the Prince was a minor) and 1863 Act, namely:

> An Act to enable the Council of His Royal Highness Albert Edward Prince of Wales to sell and exchange Lands and enfranchised Copyholds, Parcel of the Possessions of the Duchy of Cornwall, to purchase other Lands; and for other Purposes (1844)

> An Act giving Power to sell and dispose of the Lands, Parcel of the Possessions of the Duchy of Cornwall, and to purchase other Lands to be annexed thereto, and to regulate future Grants of Leases of the Possessions of the said Duchy; and for other Purposes (1863)

91. The recital to the 1863 Act provides further confirmation of these underlying problems and purposes. It states:

> Whereas by the original Constitution of the Duchy of Cornwall the Possessions thereof was so settled and limited that they should at no time be in anyway separated or alienated therefrom ---------- And whereas it is expedient with a view to the Consolidation and more advantageous Management of the Possessions of the Duchy of Cornwall that the Possessor for the Time being of the said Duchy should, subject to the Restrictions hereinafter mentioned, have Power to make sale and dispose of the Possessions of the said Duchy, and to grant Leases thereof, ----------

92. The opening part of that recital seeks to say what was done by the 1337 Charter and does not reflect the existence of, or any intention to create, an entity or corporation called the Duchy of Cornwall. The second part refers to the possessor of the Duchy of Cornwall and so to the Duke. This is confirmed by the points that (a) the powers to sell and to purchase lands and to grant leases are given to the Duke by ss. 3 ,7, 21 and 22 of the 1863 Act, and (b) s. 8 provides that the contracts for such redemption referred to in it may be entered into by the Lord Warden or such other person as the Duke may nominate.

93. The requirement of Treasury consent to sales and the expenditure of capital monies on improvements relates back to powers of the Duke. Much later, the further power of the Treasury conferred by s. 7 of the 1982 Act gives wider flexibility by giving the Duke further powers of disposal and management if he applies for and gets Treasury consent.

94. Mr Bruton places reliance on the creation by s. 2 of the 1863 Act of a Seal of the Duchy of Cornwall but this does not indicate that by doing this Parliament is creating a seal for a corporation or entity called the Duchy of Cornwall. Indeed, the provision that the seal is to be held from time to time by the Personage entitled to the Possessions of the Duchy of Cornwall shows that the intention was that it would be his seal or evidence his acts. This fits with the structure and effect of the 1337 Charter. Further, the references to the seal in ss. 5, 19, 21 and 22 show that its use is to complete and evidence transactions of the Duke (and not of any other entity or body).

95. The provisions of ss. 4, 15 and 17 of 1863 Act and s. 6 of the 1982 Act relating to a bank account in the name of the Duchy of Cornwall do not

provide a basis for a conclusion that a separate entity or corporation of that name has been created by necessary implication or otherwise. Rather, they provide for a named account that is to hold monies derived from the Duchy estate for the owner of those monies or assets (i.e. the Duke) subject to the special limitations and provisions of the 1337 Charter.

96. Standing back from the later Acts their purpose and language is to facilitate and improve the management of the Duchy estate by and on behalf of the Duke (and the Sovereign) and so increase its income and capital value. They proceed on the basis that the Duke has the relevant powers as the hereditary Duke and that he is the legal owner of the assets etc comprising the Duchy estate. This is reflected, for example, in the definitions of "the Duchy" and "Duchy property" in the 1982 Act which echo what was said in *The Prince's Case* because "Duchy property" is defined as the possessions of the Duchy of Cornwall (and so what I have been referring to as the Duchy estate) and "the Duchy" is defined as the Duchy of Cornwall in the sense of the dukedom of Cornwall.

97. None of the later Acts proceed on the basis that the Duchy or Duchy of Cornwall owned any part of the Duchy estate and as such owner, or in any other capacity, that it is a corporation that owns assets or has functions or powers.

98. Rather, the later Acts reflect the position explained in the evidence sworn on behalf of the A-G that the Council and the officers and persons appointed or employed to manage the Duchy estate do so for and ultimately at the direction (subject to Treasury consents where applicable) of the Duke.

99. An examination of the position when the Duke is a minor or there is no Duke supports this because if, as Mr Bruton asserts, the Duchy was an entity or corporation with free standing powers and functions to manage the Duchy estate (or which owns all or parts of it) such an entity or corporation would continue to exist during such periods and one would expect this to be reflected in the later Acts relating to the management of the Duchy estate. It is not. Rather, by s. 1 of the 1844 Act, passed when the Duke was 2 years old, powers were given to the Council of the Duke over the land and possessions of the Duchy of Cornwall. Later, by ss. 38 and 39 of the 1863 Act the Sovereign is made the Duke's guardian during his minority and as such the Sovereign (or someone appointed by the Sovereign) is authorised to exercise the powers of the Duke. And, by s. 39, when there is no Duke, the Sovereign may authorise regular officers of the Duchy (or other persons) to exercise the rights and powers etc. of the Sovereign in relation to the Duchy. During such a period the Sovereign takes the place of the Duke as the owner.

100. I acknowledge that in isolation reference in those sections to the Duchy could be read as referring to an entity or corporation that has its own officers but, in context, it is an example of it being used as a description of the persons acting for the Duke or the dukedom of Cornwall (and so the Dukes of Cornwall from time to time) or the Duchy estate (and so the possessions,

property etc. subject to the 1337 Charter and later Acts). Further, in my view those sections recognise the ownership of the Dukes and the Sovereign subject to the limitations of the 1337 Charter, and that the relevant officers and employees work for the Duke, or the Duke's guardian when he is a minor, or the Sovereign when there is no Duke, and not for an entity or corporation called the Duchy.

101. *Conclusion.* For the reasons given above in my view the Duchy of Cornwall or the Duchy is no more than a name that has been used correctly to describe the possessions of the Duke of Cornwall (the Duchy estate), or to the Duke (or his title), or collectively and conveniently to describe the officers and persons who from time to time act for and on behalf of the Duke as the owner of the Duchy estate.

102. Save to the extent that it is a reference to the Duke as a natural person the Duchy of Cornwall has no legal personality and is not a person, body or entity that has its own functions and powers or a separate identity of its own.

The application of Regulation 2(2)(c) to the Duchy

103. My conclusion that save when it is describing the Duke, the Duchy is no more than a name or a description of property or of a group of people that does not have a separate identity of its own, renders the argument on whether a body or other person has to have legal personality to fall within Regulation 2(2)(c) academic. As this was argued, and in case it becomes relevant, I express my views on the point.

104. It is clear from the wording of Article 2(2)(b) of the Directive that it only applies to natural or legal persons and so to entities with legal personality. This reflects both the structure of the Directive at the functional stage, and the need, at that stage:

    i) for there to be a legal basis for the performance of the functions, and so a need

    ii) for them to be given to a person or entity with legal personality who can, as such, exercise the relevant functions, perform the relevant duties, exercise the relevant power and take responsibility at law for their acts and omissions.

105. In my view, the reference to a partnership in UNECE guide (cited above) does not undermine this because some partnerships have legal personality and others do not. Equally, when they do not have legal personality natural persons are the legal persons who take responsibility for things done for, or in the name of, the partnership in a way that is equivalent to the personal responsibility of an individual for acts done by him using a trading name.

106. In such situations, and so when an individual acts through officers and employees, there is no need to look to those officers or employees to engage Regulation 2(2)(c), or Article 2(2)(b), because the relevant natural or legal

person is the individual. This reflects what became common ground in the *Cross* case and provides the basis for the alternative argument in this case that the Duke is a public authority.

107. The wording of Regulation 2(2)(c) does not require the person or body to have legal personality, and Regulation 2(2)(d) uses the word person to cover organic public authorities listed within the definitions in Regulations 2(2)(a) and (b) that do not have legal personality. Also, Schedule 1 to the Interpretation Act 1978 and s. 6 thereof provide that absent a contrary intention "person" includes a body or person corporate or unincorporate and that the singular includes the plural. Also, s. 84 of FOIA provides that "body" includes an unincorporated association. As such this inclusion of unincorporated bodies does not help Mr Bruton because the Duchy is not an unincorpated association. But these points do support the conclusion that the language of Regulation 2(2)(c) includes a body that has no legal personality.

108. However, in my view the breadth of the language does not warrant a conclusion that the functional test set by Regulation of 2(2)(c) can apply to and so make a group or body of persons who together have no legal personality, a public authority. This is because it would run counter to the language and purposes of the functional test set by the Directive (see for example paragraph 48 of the judgment in *Fish Legal EU*) and any such group or body of persons would be acting for someone else (or possibly for themselves as individual members of the group) and so legal persons.

109. But, I accept that the width of the language in Regulation 2(2)(c) or (d) could be used to enable the Regulations to cover organic public authorities (that do not have to have legal personality) if such a body is omitted from Regulations 2(2)(a) and (b).

Is the Duke and /or the Duchy an organic public authority under Article 2(2)(a)

110. Mr Bruton submits that the second sentence of paragraph 51 of the judgment in *Fish Legal EU* applies because the Duchy and/or the Duke are legal persons set up by the State governed by public law which only the State can dissolve. I do not accept that submission.

111. First, the Duchy is not a legal person or a separate entity or body and the Duke is an individual.

112. I acknowledge that the 1337 Charter is a statute. However, what it created is not governed by public law because the 1337 Charter (a) created a dukedom, (b) vested title in that estate (the Duchy estate) in the Dukes from time to time and the Sovereign (when there is no Duke) and so (c) created an inheritance.

113. Further, the second sentence of paragraph 51 of *Fish Legal EU* cannot be isolated from the first one and the Duke both as an individual and Heir to the Throne, and as the owner of the Duchy estate, and his Council officers and employees engaged on his affairs and the management of the Duchy estate,

are not part of the public administration or executive of the State (see paragraphs 54 to 70 under the heading *the Crown and the Heir to the Throne*).

114. Expropriation by Parliament by primary legislation of the Duchy estate from the Duke and so the Heir to the Throne or the Sovereign, and the termination of the dukedom is theoretical rather than real. But, assuming it to be a possibility, it is not in my view a dissolution by the state contemplated by paragraph 51 of the CJEU judgment in *Fish Legal EU.*

Does the Duke or the Duchy perform public administrative functions?

115. Mr Bruton, through counsel, provided a list of 15 special powers. A number of them did not feature (or feature much) in the written and oral arguments. I shall concentrate on those that were emphasised in oral argument. But I record that I have not identified anything in that list which makes any difference to the outcome. Many repeat the error of seeking to establish the creation of a separate entity (with or without legal personality) on examples of references to, or uses of, the name Duchy of Cornwall. Further, and in any event:

i) applying paragraph 106 of the judgment in *Fish Legal UK*, none of the powers identified by Mr Bruton (with the exception of those of the Duke as a Harbour Authority) are special powers. That test is: "Do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law",

ii) some of the powers relied on (e.g. powers to appoint priests and officers (e.g. the Keeper of the Records and the A-G) and the pricking / appointment of Sheriffs and consultation about legislation) are linked to personal, ceremonial or official functions of the Heir to the Thrown, or the Duke, and so they are not public administrative functions as understood in the UK and on a Community law approach are not functions of an administrative authority as explained by the CJEU in *Fish Legal EU* at paragraph 52 of its judgment,

iii) others are property or estate management rights (e.g. enrolling deeds), and

iv) some are not powers (or functions) at all (e.g. eligibility for a gov.uk domain, the statutory mode of descent created by the 1337 Charter and Crown exemption from some taxes).

The administration of the Duchy estate.

116. On the premise (that I have found to be false) that the Duchy is a body or entity Mr Bruton's primary oral argument was that the Duchy was carrying out functions of public administration by managing the Duchy estate and thereby reducing the burden on the taxpayer in respect of the funding of the performance by the Duke as Heir to the Throne of his official / public /

ceremonial duties. As I have mentioned earlier (see paragraph 65 above), I gave his counsel the opportunity to address in writing how this argument took account of, the points and authorities mentioned under the heading "*The Crown and the Heir the Throne*" (paragraphs 54 to 64 above) concerning the nature of those duties.

117. The argument was formulated as follows in the written submissions put in after the hearing:

> Mr Bruton submits that the main public administrative function carried out by the Duchy is generating and providing funding for the public functions, and to maintain the dignity, of the Monarch and/or Heir from time to time. In those periods where there is no Duke, the Duchy performs this function in respect of the Sovereign and HM Treasury steps in to provide funding for the Heir: s. 9(2) Sovereign Grant Act 2011. In periods where there is a Duke, the Duchy performs this function in respect of the Heir and HM Treasury undertakes this function in respect of the Monarch.

118. A part of the argument advanced was that the Duchy estate was provided by the State and it always has been managed to provide funds for the official/ public / ceremonial duties of the Duke as the Heir to the Throne (or the Sovereign when there is no Duke – with a reduction in the Sovereign grant). And weight was placed on the role of the Treasury, and the control given to it over certain transactions, the statutory requirement to provide annual accounts to the Treasury and the presentation of those accounts to Parliament. As to the last point, I accept the evidence put in on behalf of the A-G that this is to enable Parliament to satisfy itself that the Treasury is fulfilling its duties and does not indicate that the Duke or the Duchy is answerable to Parliament (or the Treasury). Indeed, I was not shown anything in any of the legislation that enables Parliament to query or challenge the accounts relating to the capital and income of the Duchy estate.

119. Leaving on one side the nature of the role and functions of the Sovereign and the Heir to the Throne that are so funded, I consider that this argument is flawed not only because it seeks to treat the Duchy as a separate entity to the Duke but, in any event, because it fails to take account of:

    i) the underlying nature and effect of the 1337 Charter and the later Acts, and so on a Community law approach of

    ii) the effect and impact of the relevant legal regime referred to in paragraph 52 of the judgment of the CJEU in *Fish Legal EU*.

120. As I have mentioned, the nature and effect of that legal regime is to vest assets in the Duke as an individual, and to enable the Duke as the owner of those assets, (but with some limitations of the powers of an owner over his property) to fund himself. The relevant yields of the Duchy estate therefore belong to the Duke as an individual on which he pays tax and it is in his interests to maximise his income from that source (i.e. his property) to fund both his official / ceremonial / public duties and his personal life. When there is no Duke those yields belong to the Sovereign as an individual.

121. Also, the Duchy estate is not being managed by or on behalf of the State and the point that if the Duke, as Heir to the Throne, did not have this income the State might have to fund him does not mean that in providing his own funds from the Duchy estate he is carrying out or performing any function of public administration. The same point applies to the reduction in the Sovereign grant when there is no Duke.

122. In any event, no special powers of the Duchy (or the Duke) were identified to enable the Duchy (or the Duke) to perform this role. The relevant powers are those of the Duke (or the Sovereign when there is no Duke) which, with the limitations imposed by the 1337 Charter and ameliorated by the later Acts, are those of any other owner of the same types of land, property and rights. I do not consider that such limitation and amelioration is or creates a special power or powers and I do not recall it being submitted that they do. Certainly they do not confer any practical advantage on the Duke (or the Duchy) relative to the position of other owners under the rules of private law.

123. Further and in any event, I do not accept Mr Bruton's submission that my conclusions under the heading "*The Crown and the Heir to the Throne"* are irrelevant (see paragraphs 65 to 70 above). In my view, on a Community law approach to the application of *Fish Legal EU* those conclusions mean that funding provided by the Duchy estate to the Duke (and the Sovereign when there is no Duke) is not funding for an organic or a functional public authority.

Bona Vacantia

124. The relevant legislation provides that the property belongs to the Duke of Cornwall (see s. 46 of the Administration of Estates Act 1925 (the AEA) and s. 1012(1) of the Companies Act 2006). This function of the Duke has a longer history but it is these statutes that now apply.

125. I agree with Mr Bruton that the administration of property that ends up without an owner can be and often is carried out as part of the public administration of a State and that the quote he relied on from Blackstone is apposite. It is:

> ---------- 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 occupancies is apt to create and continue, and to provide full 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 --------

126. The Duke of Cornwall is not an organic public authority and so the question is whether his role and function in respect of bona vacantia satisfies the functional test set by the Directive and the Regulations and as explained by the CJEU in *Fish Legal EU* (see in particular paragraph 52). I agree with the A-G and the IC that they do not.

127. Applying the approach set out in paragraphs 34 to 40 and 55 and 56 above the crucial question is whether the Duke has been entrusted by the relevant legal regime (now the AEA and the Companies Act) with the performance of a service of public interest and for that purpose has been vested with special powers.

128. I agree that it is in the public interest to make the Duke of Cornwall (or someone else) the owner of the property for the reasons set out in Blackstone and in Halsbury's Laws of England 5th edition at paragraph 146. But I am not persuaded that by doing so the statutes have entrusted him with a service of public interest because any administration relating to, or checking of, his entitlement is to ensure that he has title and so what is his. Mr Bruton did not identify any special power vested in the Duke of Cornwall for any purpose relating to that acquisition of ownership, or the collection of the property, or as to what the Duke of Cornwall can do with the property. I too have not identified any such special power.

129. It was argued that there was no need for a special power to be vested in the Duke of Cornwall because the bona vacantia function including investigating title, collecting the property and deciding what to do with it was so obviously one of public administration and in particular the last stage was obviously governed by public law and so *Padfield* principles.

130. Firstly, as appears from paragraphs 40(ii) and 53 above in my view on a free standing application of the CJEU's description of the functional test there is a need to identify such a special power to enable the role or function of the Duke of Cornwall in respect bona vacantia to be taken into account in determining whether he is a functional public authority. Accordingly, in my view on that approach the absence of such a special power is fatal to Mr Bruton's argument based on bona vacantia.

131. But, as appears from paragraphs 41 to 43 above, I consider that the CJEU description of the functional test should not be applied rigidly and thus that this argument is open to Mr Bruton even though the absence of a special power is a factor to be taken into account on the flexible approach I describe and so in considering whether the Duke's bona vacantia function has a

sufficiently close connection with what entities that are organically part of the administration or the executive do.

132. But on that wider or standing back approach I do not accept there is such a connection because:

i) I do not accept mr Bruton's submissions that the Duke's bona vacantia role or function is governed by public law and that challenges to his decisions in respect of it are governed by *Padfield* and so administrative law principles. No authority was given for either proposition,

ii) in my view, the point that the administration of bona vacantia can be and often is performed by an organic or a functional public authority as a public administrative function does not mean that any person or entity who performs that function is doing so as a public authority, and

iii) as set out below, in my view his bona vacantia role and function is based on and governed by his ownership of the relevant property and why he acquired that ownership.

133. I do not have to investigate whether property that vests in the Duke as bona vacantia becomes his own property or part of the Duchy estate because on either basis it seems to me that what he can do with it is governed by his ownership of the property, and I repeat that I was not referred by Mr Bruton to any limits on what the Duke could do with the property as its owner that might found the initiation of proceedings against him.

134. I do not accept that someone who has never had any entitlement to the property could challenge the Duke's decisions on the use or transfer of the property (e.g in accordance with his practice of giving it to the Duchy Benevolent Fund). In this context, there is a statutory power to make ex gratia grants on an intestacy but no such power in the case of companies (see Halsbury's Laws of England 5th edition at paragraph 154) and that statutory power does not give anyone a right to, or in my view an expectation to, receive an ex gratia grant. Rather the grants are, as they are described, ex gratia (see *Ing on Bona Vacantia* 1971 edition at page 105).

135. The position of a person who could have established a claim to the property (e.g. on intestacy or a company that was the owner before it was struck off the register) is different but it seems to me that their claims would be based on (a) their private law / beneficial entitlement claim, and (b) the reason why the Duke acquired title to bona vacantia property and so the nature of that title, rather than a public law claim (see *Ing on Bona Vacantia* 1971 edition at pages 157 to 159).

Wreck and Treasure trove

136. This was not relied on in oral argument before me. The present legislation relating to treasure is the Treasure Act 1996 and the right to wreck is

something which was covered by the 1337 Charter. The Duke of Cornwall does not administer either and in practice he disclaims any treasure (which generally ends up in museum) and the rights in respect of wrecks carry obligations (clearing up) which are covered by insurance. Again no special powers were identified.

Harbour authority

137. As I have already mentioned it was accepted before me by the A-G and the IC that the Prince of Wales (as the Duke of Cornwall) does carry out functions of public administration as the harbour and lighthouse authority for the harbour at St Mary's on the Isles of Scilly.

138. The points made by Mr Bruton that the function of the Duchy (or the Duke) as a harbour authority is relevant in the context of the EU Environmental law regime add nothing .

Hybridity

139. This was addressed by the CJEU in *Fish Legal EU* in the following terms:

> 74 By its fifth question, the referring tribunal asks in essence whether Article 2(2)(b) and (c) of Directive 2003/4 must be interpreted as meaning that, where a person falls within that provision in respect of some of its functions, responsibilities or services, that person constitutes a public authority only in respect of the environmental information which it holds in the context of those functions, responsibilities and services.
>
> 75 The possibility of such a hybrid interpretation of the concept of a public authority was advanced in particular in the national proceedings that led to the decision in *Smartsource*. In that context, it was submitted in particular that if the water companies were to fall within Article 2(2)(b) of Directive 2003/4 because they performed certain public administrative functions, that provision could be interpreted as meaning that those companies would be obliged to disclose only environmental information held by them in the performance of those functions.
>
> 76 It must be held that, apart from the fact that a hybrid interpretation of the concept of a public authority is liable to give rise to significant uncertainty and practical problems in the effective implementation of Directive 2003/4, that approach does not, as such, find support in the wording or the scheme of that directive or of the Aarhus Convention.
>
> 77 On the contrary, such an approach conflicts with the foundations of both Directive 2003/4 and the Aarhus Convention as regards the way in which the scope of the access regime laid down by them is set out, a regime which is designed to achieve the widest possible systematic

availability and dissemination to the public of environmental information held by or for public authorities.

78 As is clear from Article 3(1) of Directive 2003/4, the directive's central provision which is essentially identical to Article 4(1) of the Aarhus Convention, if an entity is classified as a public authority for the purposes of one of the three categories referred to in Article 2(2) of that directive, it is obliged to disclose to any applicant all the environmental information falling within one of the six categories of information set out in Article 2(1) of the directive that is held by or for it, except where the application is covered by one of the exceptions provided for in Article 4 of the directive.

79 Thus, persons covered by Article 2(2)(b) of Directive 2003/4 must, as the Advocate General has stated in points 116 and 118 of his Opinion, be regarded, for the purposes of the directive, as public authorities in respect of all the environmental information which they hold.

80 Also, as follows from paragraph 73 of the present judgment, in the specific context of Article 2(2)(c) of Directive 2003/4 commercial companies such as the water companies concerned are capable of being a public authority by virtue of that provision only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4.

81 It follows that such companies are required to disclose only environmental information which they hold in the context of the supply of those public services.

82 On the other hand, as the Advocate General has essentially stated in point 121 of his Opinion, those companies are not required to provide environmental information if it is not disputed that the information does not relate to the provision of those public services. If it remains uncertain that that is the case, the information in question must be provided.

83 Accordingly, the answer to the fifth question referred is that Article 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, such as the water companies concerned, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services.

140. Mr Bruton argues that this conclusion and reasoning applies equally to the Duke and the Duchy if either is a public authority under Article 2(2)(b) and so Regulation 2(2)(c).

141. I do not agree.

142. As in my view the Duchy is not an entity with or without legal personality I do not have to address the hybridity issue in respect of it and it was only argued before me by reference to the Duke. However, I record my preliminary view that if the Duchy is an entity / corporation (a) its unique nature and its close relationship with the Duke as an individual and Heir to the Throne, and so (b) its completely different nature to that of the water companies, found the same or analogous arguments in respect to the Duchy to those advanced by the A-G and the IC on the application of the principle of hybridity to a natural person.

143. As can be seen from paragraph 74 of the CJEU judgment, the hybridity principle is that any obligations under the Directive and the Regulations only attach to environmental information that the person holds in the context of the performance by that person of the public administrative functions that bring that person within the functional test. So, in this case it was argued by the A-G and the IC that the obligations of the Duke as a harbour authority under the Directive and the Regulations relate only to information held by him in that capacity.

144. On a factual issue this hybrid interpretation of the Directive and the EIR would not give rise to the uncertainties and problems referred to by the CJEU in paragraph 76 and would be unlikely to do so in the case of individuals. Further, if it did the solution in paragraph 82 could be adopted in cases of uncertainty to further the aim of giving wide access to environmental information.

145. The approach taken by the CJEU to Article 2(2)(c) provides confirmation that the width of that access is not unchecked by either the aim or the wording of the Directive as it limits access to information held as a result of carrying out functions relating to the environment. In my view, this and:

    i) the staged or pyramid structure of the Directive (and the Regulations), and

    ii) the requirement under Article 2(2)(b) of the Directive for the public administrative functions to include functions in the environmental field

    enables a hybrid interpretation to be applied to the Directive and the EIR that allows a flexible and purposive approach to be taken to the application of a hybridity principle to different types of persons who satisfy the functional test. So, in my view, it would not be correct to transplant the purposive reasoning applied to the water companies by the CJEU without recognising the breadth

of persons who could satisfy the functional test and the stark differences between the water companies and a natural person.

146. This view is fortified by the point that the Directive and the Regulations have to be construed and applied having regard to the rights of individuals (natural persons) under the European Convention on Human Rights and the EU Charter of Fundamental Rights. I agree with the A-G and the IC that if the hybridity principle did not apply to an individual this would involve an unjustified interference with the rights of that individual to respect for his private life under Article 8 of the Convention and Article 7 of the Charter.

147. I also agree that the impact of the rights conferred by those Articles means that reasoning and conclusions on hybridity relating to the water companies in *Fish Legal EU* cannot simply be carried over to individuals.

148. So, in my view neither a purposive approach that recognises that the Directive (and the Regulations) are intended to have a wide application, nor the conclusion of the CJEU on hybridity, preclude the result I favour that:

i) the hybridity principle applies to individuals who, on an application of the functional test, are public authorities to give effect to their rights under Article 8 of the Convention and Article 7 of the Charter, and so

ii) on the concession before me that the Duke is a harbour authority, his obligations under the Regulations (and the Directive) attach only to the environmental information he holds as a harbour authority.

149. There is an additional argument in favour of that result in respect of the Duke based on the legal regime that has given him the relevant functions. It is that that regime gives him Crown Immunity in his private capacity (see ss. 40 and 38(3) of the Crown Proceedings Act 1947).

150. I do need to address the extent to which the hybridity principle would apply to other functions that I have concluded do not satisfy the functional test.

De minimis

151. In my view the application of any de minimis principle has to be applied in the circumstances of each case, including whether, and if so how, the hybridity principle applies in that case to ring fence environmental information to which the obligations apply in that case.

152. If I am right and the hybridity principle limits the obligations of the Duke to those as a harbour authority there is considerable force in the argument of the IC that the harbour is important to the Isles of Scilly and the Duke cannot avoid the obligations imposed by the Regulations or the Directive in respect of environmental information held as the harbour authority for that harbour however small that part of his functions may be on a comparative approach. Indeed, I did not understand the A-G to argue that he could.

153. But, if the hybridity principle does not apply to limit the obligations of the Duke, it seems to me that there is room for a de minimis principle and that an in all the circumstances approach to its application should be taken. So factors to be taken into account on its application would include a comparison between:

    i) the obligations imposed on the person or body who satisfies the functional test if they are limited to the environmental information held as a result of the exercise of those functions, and

    ii) the obligations that would be imposed if they extended to all environmental information held by that person or body.

154. This exercise would also take account of the points that the obligations apply to all environmental information held by organic public organic public authorities and the intention was that the Directive should have wide application.

155. The issues have analogies with those in *R v MMC (ep SYT)* [1993] 1 WLR 23 and the cases referred to in it. That case was mentioned but not cited in argument.

156. This exercise was not the subject of much argument and is only relevant if my view on hybridity is wrong.

157. The obligations that would be imposed on the Duke if they covered environmental information relating to either (a) all of the Duchy estate, or to (b) all of the Duchy estate and other property of the Duke, extend to keeping records of as well as to providing environmental information (the wider obligations) and they would be onerous.

158. If my view on the application of the hybridity principle to the Duke is wrong, I have concluded that applying a de minimis test the combination of the following factors:

    i) the balance between on the one hand (a) the extent and onerous nature of the wider obligations and the invasion of private information they would trigger, and on the other (b) the importance of environmental information being made available and the wide ambit of the Directive that was intended, and

    ii) the comparatively very small amount of environmental information that the Duke would hold as a harbour authority when compared with all other environmental information he holds as a private landowner

    excludes the Duke from being a public authority under the functional test.

159. I do not need to address the extent to which the de minimis principle would apply to other functions that I have concluded do not satisfy the functional test.

Signed on the original on 22 March 2016

Mr Justice Charles

President of UT(AAC)