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Avosetta Questionnaire 2014: Environmental Law and the Property Guarantee – UK/English Law Perspective

Overall Comments

The focus of the answers will be on English law, which to a large extent reflects UK law generally. However, the environmental law of the UK is increasingly devolved to the different UK administrations (England, Scotland, Wales and Northern Ireland), and so there is no longer a single picture of 'UK' environmental law.

The UK has no written constitution, and there is no explicit 'constitutional' property guarantee in UK law. UK law contains a number of legal principles and doctrines that serve directly or indirectly to protect property interests, ranging from tort and public law doctrines to principles of statutory interpretation and legislative prescriptions for the protection of property in certain regulatory contexts. All these legal avenues are examined below but overall they present a fragmented legal picture. There are no explicit or unifying constitutional principles for the protection of property in UK law, beyond the UK's obligations to implement the property guarantee in Article 1 Protocol 1, which it does through the Human Rights Act 1998 and (increasingly) through associated case law.

1) What are, according to your country's legal system, potential objects of "property" (real things, private law rights, public law rights, a business, a market share etc)? To what extent is it possible to obtain property / ownership on natural resources? Has private property been used in defence of environmental protection?

Objects of 'property' in UK law are wide-ranging. They include real estate (including immovable property, such as buildings and fixtures, attached to the land), rights associated with land (such as mining rights or rights to fish), moveable tangible objects (machines, animals, furniture, and other tangible chattels), and intangible property (intellectual property, private law causes of action, debts, shares in companies, financial instruments, business goodwill). Contested/uncertain forms of property include those in body parts and confidential information. However, whether something can be classified as 'property' essentially depends on the legal protection or implications that might apply.[1] Equivalent legal protections might not attach to different objects that might broadly be considered to be property. For example, while we can say that, at its broadest, property in UK law includes a legitimate expectation of being able to develop land on the basis of existing planning permission (*Pine Valley Investments v Ireland* (1992) 14 EHRR 319), there are no general property law protections that necessarily flow from this classification in UK law (other than protection under the Human Rights Act). In fact, one of the interesting questions in UK property law is, at what point, newly created rights (such as rights to feed-in-tariffs for generating renewable energy, or 'allowances' in the EU emissions trading scheme)

[1] For example, some English law torts that protect property protect 'personal property' only (detinue, conversion, trespass to goods), whilst the UK tax regime considers that business goodwill to be a taxable asset.

turn into 'property' because of the legal consequences or protections that flow from or attach to them.

Objects that are *not* objects of property rights – in that there are no property-type controls or protections that automatically apply to them – include rights to economic opportunity, rights to bring public law cases (which are subject to the permission of the court) and rights to access the market (beyond those that exist in EU law).

2) How does your legal system construe expropriation (definition, preconditions, and legal effects) in particular in matters relating to the environment or of environmental friendly investments (like renewable energy infrastructure)?

There are two main legal protections in UK law in relation to expropriation of property. First, there is a common law principle of statutory construction that requires judges to presume that the legislature does not intend to *take* private property rights without compensation, unless a contrary intention is clear, and further to interpret legislation on the basis of that presumption.[2] Some takings are explicitly compensated under statute, such as when title to land is expropriated for projects in the national or public interest,[3] although there can be arguments about how many properties are 'blighted' by large-scale projects (including those driven partly by environmental imperatives) and thus should be compensated by the government.[4]

Beyond cases of straightforward compulsory purchase or expropriation of property through deprivation of title, there can be more contentious cases in determining whether or not property is 'taken'. As the answer to question 3 indicates, regulatory *restrictions on use* of property do not ordinarily require compensation, but some restrictions, or combinations of restrictions, on use of property can be so detrimental to a property owner's rights as to deprive them of all usefulness. Viscount Simonds held in the leading case of *Belfast v OD Cars* (see further below) that '*a measure which is ex facie regulatory may in substance be confiscatory… [T]he question is one of degree and the dividing line is difficult to draw.*'[5] It would usually be an extreme case where such a line was crossed. Pollution control legislation would not be such an extreme case, even pollution control legislation that required a licence holder to update technology to continue exploiting land (as under the IPPC regime).[6] However, environmental

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[2] See eg *London and North Western Ry Co v Evans* [1893] 1 Ch 16, 28; *Inglewood Pulp and Paper Company v New Brunswick Electric Power Commission* [1928] AC 492, 498–499; *R (Lord Chancellor) v Chief Land Registrar* [2005] EWHC 1706 (Admin) at [35]; [2006] QB 795, 805.

[3] Under the Acquisition of Land Act 1981, with compensation assessed under the Land Compensation Act 1961.

[4] Town and Country Planning Act 1990, Part VI, Chapter 2 and Schedule 13. See e.g. contentious blight compensation for property owners who live in the vicinity of the proposed UK HS2 ('High Speed 2') rail line: http://www.bbc.co.uk/news/uk-england-stoke-staffordshire-26951860 (accessed 29 April 2014). Note also that the TCPA provides for rights of compulsory purchase and compensation for property owners whose land has become 'incapable of reasonably beneficial use in its existing state' due to planning decisions (TCPA, Part VI, Ch 1).

[5] [1960] AC 490 at 520.

[6] Updating conditions attached to an environmental licence could be considered an appropriation of property, but nearly all regulatory regimes give the licence holder in such circumstances the right to appeal the merits of the decision, either to a government inspector or a specialist tribunal – in essence allowing a second look at the decision.

controls that go so far as to render a property owner's rights 'useless' could amount to a de facto expropriation of property that requires compensation. *London & North Western Railway Co v Evans* suggested that legislation that effectively deprived an owner of coal reserves of the right to mine them (by requiring the land containing coal to support a canal) required compensation.[7] There are in fact many environmental controls that can have harsh impacts on rights to exploit land.[8] The key issue seems to be whether they render the property useless. Overall, determining the precise point at which regulatory restrictions, or a number of restrictions, add up to an effective taking or expropriation of property is difficult to ascertain from the case law.[9]

Second, there is the Convention right in Article 1 Protocol 1 ECHR that guarantees every natural or legal person the peaceful enjoyment of his possessions, of which he shall not be deprived 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. In UK law, this is implemented by the Human Rights Act 1998 (HRA), which requires: the Government to introduce legislation that is compatible the Convention;[10] judges to interpret legislation in a Convention-compatible manner; and public bodies, including courts, to exercise their powers in a manner consistent with the Convention.[11] Notably, we do not have any UK/English case law examples of A1 P1 being infringed but justified in the public interest on environmental grounds.

3) Concerning regulatory restrictions to use property: does your legal system distinguish between allowable restrictions and allowable restrictions with compensation? What are the criteria of distinction between the two kinds (weight of public interest, proportionality, etc)? Are these criteria sector-specific enriched, such as in nature protection from intensive agriculture, prevention of pollution from industrial installations, removal of water extraction rights, prevention of climate gas emissions etc?

In UK common law, the starting presumption is that regulatory restrictions on rights to use land are lawful and do not require compensation.[12] If it were otherwise, 'the costs of social and economic organisation would become prohibitive'.[13] The leading case on this issue is *Belfast Corporation v OD Cars*.[14] In this case, the House of Lords held that a refusal of planning consent to develop land did not amount to a 'taking' of property that required compensation (under the relevant provisions of general Irish legislation at the time, which required compensation for takings of property). The House of Lords noted that restrictions on the use of property through the planning

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[7] [1893] 1 Ch 16.
[8] The EU emissions trading scheme has caused serious financial difficulties for some UK businesses (arguably as it is intended to do). See e.g. http://news.bbc.co.uk/1/hi/wales/6214332.stm (accessed 29 April 2014). A year later Alphasteel went into receivership.
[9] Kevin Gray, 'Can Environmental Regulation Constitute a Taking of Property at Common Law?' (2007) 24 *Environmental and Planning Law Journal* 161–181.
[10] The Human Rights Act permits the Government to expressly state that proposed primary legislation is contrary to the Convention, and seek Parliamentary endorsement of that measure.
[11] Human Rights Act 1998, ss 3, 6, 19. Only where primary legislation makes it impossible for the body to follow the Convention may they do so.
[12] *Grape Bay Ltd v A-G of Bermuda* [2000] 1 WLR 574 (Privy Council).
[13] Kevin Gray (n 9) 6.
[14] [1960] AC 490.

system were in the public interest and an acceptable, not uncommon incident of ownership. Notably, Viscount Simonds and Lord Radcliffe both accepted that there might be cases where the *administrative implementation* of regulation, such as planning control, might amount to an excessive restriction on use and constitute a 'taking' of property. However, any such situation should be decided by courts on a case-by-case basis and that possibility was no reason to impugn planning legislation as unlawful when in most cases it would operate in a manner that did not 'take' property but merely regulated its use. But note that once planning permission is granted, this is regarded as equivalent to a property right, so that if the planning authorities subsequently change their mind and revoke the permission, they must pay compensation.[15]

This tendency to defer to the administrative sphere to make reasonable 'regulatory' land use determinations that do not require compensation has continued,[16] particularly in the context of Human Rights Act arguments. In *Lough v First Secretary of State*, a proposed residential development near the Tate Modern Gallery in central London was challenged for alleged breaches of Article 8 and A1 P1 ECHR. The claimant resident association was concerned that the development would lead to a loss of privacy, overlooking, loss of light, loss of a view and interference with television reception (breaching Article 8), and general diminution in the value of the claimant's properties (constituting a partial taking of property in breach of A1 P1). Finding that there was no breach of the Human Rights Act, Lord Justice Pill emphasised that Convention rights should 'normally be considered as an *integral part* of the decision maker's approach to material considerations [which are required to be weighed up by the planning authority in deciding a development application] and not… in effect as a footnote'.[17] Since the planning inspector's decision-making process in approving the development was well within the margin of appreciation in this case, taking into account and weighing all relevant considerations (including those raised by the claimants), there was no reason to find any infringement of the Convention, particularly since the 'concept of proportionality is inherent in the approach to decision making in planning law'.[18]

However, there are some exceptional cases where restrictions are considered to require compensation due to their impact on owners' rights to use property, and land in particular. First, legislation may give powers to bodies such as electricity or sewerage undertakers to enter land, to lay pipes etc. Legislation will normally provide

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[15] Obviously if the planning permission was subsequently found to be unlawful following court action there would be no compensation. But sometimes authorities wish to change their planning policy, and revoke a legally valid permission before development starts. Revocation, however, is very rare because of the heavy costs of compensation involved. A 1993 example of planning permission granted for a supermarket, followed by a strong local campaign, led to the permission being revoked after the supermarket chain secured some £2 million in compensation: source House of Commons Library. Note also that withdrawal of consents to use land in nature conservation protected areas in particular ways will also general rights to compensation: *Wildlife and Countryside Act 1981*, s28M.

[16] See Rachael Walsh, 'Belfast Corporation v OD Cars – Setting Parameters for Restricting Use' in *Landmark Cases in Property Law* (Hart Publishing, forthcoming).

[17] [48] (emphasis added).

[18] [49].

for compensation for landowners in such cases.[19] Second, there seems to be a distinction between the impacts of regulatory restrictions on owners whose rights to use land are directly affected and those of neighbours who are affected. Thus, whilst it has been accepted that the state can increasingly restrict landowners' rights to use land without compensation for nature conservation purposes,[20] the impact of planning or environmental permitting decisions on the property rights of *neighbouring landowners* is a different matter. The impact on neighbours' rights in the latter case may give rise to compensation via a private law claim against the owner who is subject to the relevant planning permission or environmental permit, where there is unreasonable interference with neighbours' property rights and thus liability in private nuisance, rather than compensation being owed by the state.[21] This state of affairs indicates a complex interplay between environmental regulation and property rights when more than one set of property rights is affected, and is further discussed in question 9 below.

4) What public interests are considered legitimate to impose obligations (active & passive; to do or not to do something) regarding the use of property in cases:

- *to prevent environmental damage;*
- *to prevent traditional damage;*
- *to improve the appearance of the property (i.e. to remove own waste; or to renovate the building façade in the towns, or to isolate buildings for energy efficiency, etc.);*
- *to limit activities/property due to the special protected area, like Natura 2000*
- *of public health/safety reasons.*

To what extent can private individual invoke these sorts of powers – eg actio popularis)?
In which above cases compensation is foreseen by law?

In the answer to the previous question, a number of examples were given of statutory provisions that give rights to compensation where property owners must allow work to be done on their land in the public interest, mainly in relation to infrastructure works. These cases show there is a fine line between regulations that *restrict use* of property rights and those that *impose obligations* on owners.[22]

In terms of obligations to prevent environmental damage, the Environmental Damage (Prevention and Remediation) Regulations 2009 (SI 2009/153) implement the obligations of the Environmental Liability Directive (Directive 2004/35/EC), imposing obligations on 'operators' of Schedule 2 activities to prevent or remedy various kinds of prescribed environmental damage. In some cases, such operators may also be owners of the land on which they are running a permitted installation, conducting a waste management operation etc. Under the Environmental Protection Act 1990, there are obligations on those who keep, treat, or dispose of waste to prevent the escape of waste (s 34) and not to cause pollution of the environment or

[19] E.g. Electricity Act 1989, sch 4, para 7; Highways Act 1980, s 28. But note that not all such intrusions into land permitted under statute are accompanied by a right to compensation: compare Water Industry Act 1991, s 159, sch 12, para 2, and *Manchester Ship Canal Company Limited v United Utilities* [2013] EWCA Civ 40 (where an implied right to discharge waters from sewerage works onto the claimant's land was found not to require compensation, although this decision is currently subject to appeal in the Supreme Court).
[20] *R (Trailer & Marina (Leven)) v SS for Environment, Food and Rural Affairs* [2004] EWCA Civ 1580.
[21] *Coventry v Lawrence* [2013] UKSC 13; *Barr v Biffa Waste* [2012] EWCA Civ 312.
[22] See Walsh (n 16).

harm to human health (s 33(1)(c)). These obligations impose cost obligations on the relevant operators or holders of waste,[23] and breach of the obligations constitutes a criminal offence. Note that the 1990 contaminated land regime requires property owners to allow other parties to come onto their land for the purposes of remediating contaminated land, but also grants such landowners rights to compensation for interference with their property rights.[24]

In English law, there is a range of restrictions on use of property within areas protected for nature conservation purposes. [25] Much of this land is privately owned, and generally, no compensation is available for owners whose land is subject to nature conservation obligations, except in some cases where owners have given up existing uses of land.[26]

There are no significant examples where private individuals can impose obligations on property owners in the public interest. As indicated in question 3, private individuals may sue in tort law (in private nuisance) in relation to activities of other property owners that are causing 'unreasonable' inference with their individual rights to use land, and such actions may coincide with a wider public interest in environmental protection.[27] However, this legal avenue essentially concerns obligations in respect of neighbouring private property interests, rather than those owed in the broader public interest.[28]

5) Is there a category of (possibly: gradual) dissolution of vested rights without requirement of compensation (example of stepping out of nuclear power)? Can for instance the economic (financial) difficulties of public finances be a reason for dissolution of compensation or vested rights (for instance, lowering or even abandoning wasted financial rights) like subsidizing green electricity)?

In the regular case, rights to run a nuclear power station or a wind farm or similar are contractual (rather than proprietary), often with the government as the other contracting party. Any withdrawal of rights to operate a nuclear facility or similar may amount to a breach of contract, depending on the relevant terms. In some cases, such arrangements may be based on a subsidy set for a period of years. In the UK, there have been contentious cases when subsidies for renewable energy have been withdrawn quickly for reasons of economic affordability of subsidy schemes, which have led economic operators to mount legal challenges in relation to their defeated financial expectations. In *Secretary of State for Energy & Climate Change v Friends of the*

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[23] Note there is provision for compensation of property owners whose rights might be affected by remedial activity under the Environmental Damage Regulations: reg 30.
[24] Environmental Protection Act 1990 ('EPA'), Part IIA, s 78G.
[25] These include Areas of Outstanding Natural Beauty, national parks, national/local nature reserves, sites of special scientific interest (SSSIs), and European protected areas (SACs, SPAs, SCIs). Restrictions on the rights of landowners include controlling all development within the area through dedicated governing authorities (national parks), preventing any potentially 'damaging operations' without consent of the nature conservation regulator (SSSIs), and preventing any development that may adversely affect the integrity of the site (SACs).
[26] See n 20 and *Wildlife and Countryside Act 1981*, s 28M. Note that there was a change in regulatory policy in 2000, when a more limited regime for granting compensation was introduced to bolster the effectiveness of the SSSI regime.
[27] *Attorney-General v Birmingham Corporation* (1858) 70 ER 220.
[28] Cf Ben Pontin, *Nuisance Law and Environmental Protection: A Study of Nuisance Injunctions in Practice* (2013, Lawtext Publishing Ltd).

Earth,[29] the Court of Appeal found that the government had acted unlawfully in altering the guaranteed rate of return on solar energy generation by small-scale suppliers after capital expenditure had been incurred. The Court's reasoning was based on a proper construction of the Energy Act 2008, which allowed the relevant 'feed-in-tariff' scheme for solar energy, rather than any questions of property law. The court found that the government had no power to take away an existing entitlement without statutory authority, interpreting the relevant legislation in line with the presumption against retrospective operation.

Whilst *SS for Energy v FOE* was resolved as a matter of statutory construction, it is worth nothing that another relevant avenue of legal challenge in such cases might be the administrative law ground of challenge based on 'legitimate expectations'. On this basis, individuals might bring a judicial review action against a public body if the body has made a representation/promise, or generated an expectation based on a course of conduct, where the expectation is sufficiently clear and unambiguous and such that the individual can expect the body to be bound by it.[30] Whether a body will be held to a promise or expected course of conduct will depend, amongst other things, on: whether the expectation is procedural or substantive; the unfairness to the claimant individual in departing from the expectation; whether the damage can be made good by financial compensation; and whether there is an overriding public interest in allowing the public body to resile from the promised or expected position.[31] There is no guarantee that a public body will be bound by the representations it makes, or the expectations it generates – substantive expectations are hardest to enforce legally and much will depend on the circumstances of the case.

6) How can a property holder defend his interests (through the ordinary courts/constitutional court)? What principles will the courts use when checking the compatibility with the property guarantee?

Property holders might claim a range of legal protections by different legal avenues in the ordinary courts. They might mount private law challenges in tort law (private nuisance, trespass to land); judicial review challenges to the lawfulness of government action (as in *Secretary of State for Energy & Climate Change v Friends of the Earth* above); or Human Rights Act challenges where Convention rights are at issue. In relation to Human Rights Act claims, and further to question 2 above, property holders can challenge the interpretation or application of legislation, and the legality of administrative decisions. However, there is little scope to invalidate primary legislation through legal challenge – the only possible remedy is a declaration of incompatibility with Convention rights.[32] The principles that would be applied in such challenges are as set out above in questions 2-5 (and take into account the jurisprudence of the Strasbourg court in Human Rights Act claims).

7) Is secondary legal protection (i.e. the right to compensation) dependent on the exhaustion of primary legal protection (i.e. a motion to annul the action)?

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[29] [2012] EWCA Civ 28.
[30] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453.
[31] *R v North and East Devon Health Authority; ex p Coughlan* [2001] QB 213.
[32] HRA, s 4.

In UK law, compensation is simply a remedy that flows from primary legal liability at common law. Otherwise, the right to compensation can be established under statute, as examples in previous questions have shown.

8) Can one be responsible for the environmental damage only (solely) due to the fact of ownership of the property (i.e. for instance, the owner of the land where the waste is illegally deposited by the third (unknown) person)?

Yes. The best example of this is the contaminated land regime in Part IIA Environmental Protection Act 1990 ('EPA'). This regime relates to land that is identified as causing significant harm due to historical pollution (or as generating a significant risk of causing such harm). In such cases, the obligations to remediate the land fall primarily on those who 'caused or knowingly permitted' the contaminating substances to be in, on or under the land. However, if such persons cannot be found, perhaps because they are companies that no longer exist, then liability to remediate the land falls on current owners or occupiers (EPA, s 78F(4)).[33]

In the case where waste is illegally deposited on land by a third party, the owner of the land has an obligation to ensure that it is collected or treated. This might cause considerable expense to an owner of land in the case of 'fly-tipping' of waste onto their land by waste offenders, but there is a provision for such costs to be recovered from the waste offender, assuming they can be found and that they are solvent (EPA, s 33B).

9) Does the state permit (like IPPC permit, operation permit etc) exclude the holder from the liability towards third persons (in case of damage caused by undertakings)?

In short, no. Generally, no 'permit defence' is provided in environmental permitting legislation, and, in dealing with civil claims brought by third parties (such as claims in private nuisance), the courts have traditionally said that at the most compliance or non-compliance with a permit may be evidence of reasonable/unreasonable behaviour but no more. However, in recent years the courts have had to heal with and acknowledge the growing complexity and demands of modern environmental regulation, and have explored the relationship between regulatory and liability systems in more detail. It is a complex and evolving area of law.

In *Barr v Biffa Waste*,[34] the Court of Appeal held that holding and complying with an environmental permit (to operate a landfill site) was no legal protection from a nuisance claim brought by neighbouring residents in relation to unreasonable interference with their property rights due to unpleasant odours coming from the landfill site. According to Lord Justice Carnwath, 'there is no basis, in principle or authority, [short of express or implied statutory authority to commit a nuisance] for using such a statutory scheme to cut down private law rights'. More recently, in *Coventry v Lawrence*,[35] the UK Supreme Court was faced with a similar issue of alleged noise nuisance in relation to a motor sports track that was operating (just) within the

[33] The legislation provides that where the authority considers that placing this responsibility on current owners may cause undue financial hardship (such as in the case of a poor household), the costs of decontamination may be picked up by the public authority.
[34] [2012] EWCA Civ 312.
[35] [2014] UKSC 13.

terms of its planning permission. Again, the Supreme Court found that the motor sports track owners could be liable in private nuisance to neighbouring property owners for unreasonable noise emanating from their property. However, the judgment also acknowledges that the terms of the relevant planning permission (including conditions setting out when the track can be operated for different kinds of motor racing) might be relevant in determining whether there is an 'unreasonable' interference with the neighbouring property rights (and thus an actionable nuisance) in the first place.

10) Are there cases (courts or administrative) that take into account Art. 8 of the ECHR (Right to private life) or Art. 1 of the first protocol of the ECHR? (For instance, where state intervention to limit the property without the compensation would be objected based on above article)?

This is rare in environmental cases but, as indicated above in question 3, both A1 P1 and Art 8 ECHR have been raised in cases affecting property rights. A1 P1 has had very little impact in relation to regulatory restrictions on rights to use property without compensation (see *Trailer & Marina*)[36]. As for Article 8, in *Lough*, the Court of Appeal made the point that 'respect for the home has an environmental dimension in that the law must offer protection to the environment of the home', but that not every loss of amenity involves a breach of Article 8 – a substantial interference is required.[37] Furthermore, Article 8 and A1 P1 'acknowledge the right of a landowner to make beneficial use of his land *subject*, amongst other things, *to* appropriate planning control'.[38] Beyond this, the main UK Article 8 cases have been *Hatton v UK* and *Hardy v UK*,[39] both of which went to the Strasbourg Court. These cases do not involve limitations on property rights per se, but impacts on the enjoyment of property through aircraft noise and risks of serious environmental pollution. Both cases were unsuccessful.

11) How does your national legal system deal with situations where indirect or direct expropriation may be caused by EU legal acts or their implementation?

There are no UK cases (that I have found) in which EU acts have led to 'expropriation' or takings of property. This is likely due to the fact that extensive regulatory restrictions on property are permitted without amounting to de facto expropriation and requiring compensation (see question 2 above). This is not to say it could not happen.

12) Are there cases where national courts have referred questions to the ECJ concerning property issues in environmental law?

It does not seem so.

Two cases:

1) A factory, situated near a town, has been operating for decades. People are slowly realizing that statistically the inhabitants in the city and in the vicinity do not live average age and the cancer is

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[36] n 20.
[37] [43].
[38] [45].
[39] *Hatton v UK* (2003) 37 EHRR 28; *Hardy v UK* (ECHR, 14 February 2012).

more frequently present among them, also the frequent cause of the deaths. They have no direct proof that the factory could be responsible, although it is rather clear that the soil around the factory is poisoned and that the heavy metals found in the vegetable could be linked to the factory. However, credible proofs are missing.

What could be the obligation of the state?
Could the inhabitants rely on the public remedies procedure?
If the state wants to revoke the operation permit, could the factory claim any sort of property guarantee?

The best avenue of legal recourse in this situation is the contaminated land regime in Part IIA EPA (see question 8 above). The implementation of this regime is based firmly on risk assessment procedures where information about contaminants causing harm to health or to the environment cannot be proved conclusively – risk assessment is important in determining whether a 'significant risk' of harm exists in order for the regime to apply. If such a risk is found, there would be an obligation on the state to begin the Part IIA process, and on the factory to remedy the contaminated land as an 'appropriate person' under the regime.

In relation to deaths caused, it is harder to pin liability for this on the factory, without evidence showing a definite causal link between its activities and the deaths. The negligence claim in *Corby Group Litigation* is not dissimilar to this case,[40] and shows that a negligence claim against the factory is probably the best legal avenue for any individual suffering cancer (or surviving relatives) and that causation challenges in such cases can be overcome with sufficient expert evidence.

In any case, there is no case for the factory to claim any loss if its permit is revoked (the English environmental permitting regime allow permits to be reviewed regularly). In the case that the factory's permit is not revoked, citizens could seek judicial review against the relevant Agency on the grounds that they are legally obliged to revoke to relevant permission. However, a court would have to be convinced that the Agency has acted wholly unreasonably in not revoking the permit. If the evidence is not clear, the prospect of such an action being successful is low.

2) How this case would be solved in your legal system: a waste disposal site is located not far away from a place with app. 150 individual houses. Inhabitants assert that they smell bad odour and they would like to sell their property, but, of course, there are no potential buyers. Their property is worth less. The waste disposal site is equipped with the necessary permits.

[40] [2009] EWHC 1944 (TCC). In this case, the local council was decontaminating a former steelworks site and a cluster of birth defects occurred in the vicinity whilst the works were being carried out, or soon after. The court held that the council owed a duty of care to pregnant mothers (and their children) in the area to take reasonable care in the execution of the reclamation works to avoid injury to the mothers and unborn children. To establish a claim in negligence (which requires proof of damage and its causation by the defendant), the court relied on epidemiological and toxicological evidence, as well as evidence of foetal medicine and the relevant state of scientific knowledge at the time, to show that a causal link existed between the breaches of duty by the council (such as transporting toxic material in uncovered trucks through the local neighbourhood) and the kinds of birth defects that formed the basis of the claim.

Are the inhabitants in the surrounding entitled to compensation (perhaps to annual revenue)? Do they have to annul the operation permit first?

This scenario is similar to that dealt with by the Court of Appeal in *Barr v Biffa Waste* (see question 9 above). The residents should thus sue the waste disposal site in private nuisance for compensation that reflects the diminution in the value of their properties. The success of such an action depends on the court finding that there is an 'unreasonable' interference with the amenity of the houses on the facts, and is subject to Carnwath JSC's subsequent comments in *Coventry v Lawrence* that his position on property rights trumping environmental regulation in *Barr* might have been too stark.