Application to the Aarhus Convention Compliance Committee

ALYSON AUSTIN

Communicant

and

UNITED KINGDOM

Member State

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A INTRODUCTION

1. The non-compliance in this communication is, in one sense, relatively simple. The communicant, Mrs Alyson Austin an individual living in Merthyr Tydfil, South Wales, asked the High Court to direct that a pre-action costs protection application of 1.11.12 in relation to a proposed claim for noise and dust pollution proceed on the basis that each party paid their own costs (or 'no order for costs'). The Court declined to do so and the order of 31.1.13 directed that the pre-action costs hearing proceed on the basis of 'costs in the application' **[4.93]**. This has meant that the communicant, an individual of modest means, could not proceed with the application because the exposure to the costs risk was prohibitive.

2. The policy, jurisprudence and legislative proposals underlying the application give rise to points of general public importance and highlight a systemic and widespread concern about access to justice in the UK. This includes the particularly high costs of bringing and pursuing claims and the exposure to adverse costs risk; conflicting case law as to whether costs protection is in fact available and, in particular, whether it is available in cases starting from a private law rather than public law basis; and emerging legislation found in s. 46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 [**7.560**] which is set to restrict access to insurance mechanisms, which have, until now, been available to help individuals secure access to justice in environmental nuisance claims.

3. Nuisance proceedings form a key element in the UK legal justice system for reviewing the infringement of environmental rights in that they allow citizens to enforce basic amenity rights directly against those who interfere with them. The UK Court of Appeal has recently affirmed the importance and independence of private nuisance in *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312. In Communication ACCC/23/2008 the Aarhus Compliance Committee stated that in the context of odour nuisance:

> "… the law of private nuisance is part of the law relating to the environment of the Party concerned, and therefore within the scope of Article 9 paragraph 3 of the convention." [**7.620**]

4. The UK has suggested that there may be alternative legal options available to the communicant. The communicant submits that the alternatives are either too limited in scope to achieve an appropriate remedy or, in the case of judicial review of a regulator's failure to act, prohibitively expensive in itself and unrealistic in terms of the prospects of acquiring an equivalent remedy to those available in nuisance. In a situation where one owner/occupier wishes to prevent the material interference of their property against the consequences of actions or operations of a neighbour, private nuisance remains the most appropriate cause of action and the only one which will allow the communicant to assert her environmental rights in a comprehensive manner.

5. The communicant has taken all practical steps to bring substantive proceedings but is being prevented from doing so by the prohibitive level of cost involved in private nuisance suits (which stems in large part from the level of evidence that has to be gathered, mostly at the claimant's expense), and the unwillingness of the UK courts to take steps to protect her from the threat posed by a defendant (the operator) which has already shown its willingness to run up punitively high levels of costs.

6. The communicant submits that the current judicial process, as evidenced by the order of 31.1.13, is in breach of Article 9 of the Convention in that it fails to ensure that the communicant has access to judicial procedures to challenge acts and omissions by private persons contravening law relating to the environment that are fair, equitable, timely and not prohibitively expensive. There is also concern that revisions to the Civil Procedure Rules relating to the Convention exclude private nuisance proceedings from what is defined as an 'Aarhus Convention claim'.

B FACTUAL BACKGROUND TO THE COMMUNICATION

1. History behind the non-compliance of 31.1.13

7. An outline chronology is at Annex 2 relating to the Ffos-y-fran opencast coal operations. It is the largest opencast coal mine in the UK[1]. The

[1] In January 2007, the operator's director, James Poyner, explained in evidence to the Member State's Select Committee on Welsh Affairs that the Ffos-y-fran scheme represented the largest authorised coal mining reserve in South Wales.

communicant notes that the operator repeatedly places reliance upon the operations being a 'land reclamation scheme'[2]. There was the removal of a series of hazardous waste tips on the opencast site, however this according to the operator concluded in January 2009. The communicant has raised concerns about the adverse environmental effects of the opencast coal mine since 2004, when she first became aware of the proposal to develop the site. She made submissions to the planning inquiry in September 2004. She was appointed to the operator-run community liaison committee in 2007. Soon after the opencast mining operations commenced in 2007 she contacted the environmental regulator, Merthyr Tydfil County Borough Council (MTCBC) and the operator expressing concerns about noise and dust pollution.

8. The communicant has since 2008, acting by herself and with others raised concerns of continuing and excessive noise and dust deposition emanating from opencast coal mining operations located within 500 metres from her home. Photographs of the site and images of the communicant's home in relation to the opencast coal mine are at Annex 3. Further plans are found at **6.456-620**. The levels of dust and noise along with their frequency, intensity, duration and nature are such that they may reasonably be argued to constitute a nuisance at common law in the UK[3]. The communicant has sought to resolve the nuisance through correspondence and attempted negotiation with the opencast operator, Miller Argent (South Wales) Ltd (the operator). She has also raised concerns the environmental regulator, Merthyr Tydfil County Borough Council who has not itself taken any action against the operator.

[2] [1] The scheme is referred to as land reclamation by the operator. This is a misnomer. Land reclamation has never been urgent or necessary at the site. A Member State decision of January 2001 refused opencast extraction at Ffos-y-fran relying upon an Inspector's finding that the 'risk to public safety at present appears slight …' (see the Outline Chronology) and that '… I see that coal extraction as the operational means chosen to achieve the reclamation and in that context I believe it is excessive and harmful.' [2] Much of the opencast extraction is being carried out on what was greenfield, common land. Further, Merthyr Tydfil County Borough Council (MTCBC) stated in a letter of 8.12.03 that the classification of the potentially contaminated sites at Ffos-y-fran did not imply that 'the tips in their present state or in any future anticipated circumstances pose a significant risk to humans, animals or the environment'. [3] The reference to 'land reclamation' downplays the fact that the operations are opencast coal mining in a highly inappropriate location. Another 'land reclamation scheme by opencast methods' was proposed 2 km from Ffos-y-fran at Merthyr Village. Again it was, in fact, opencast coal extraction.

[3] See the evidence in support of the claim provide in support of the detailed submissions.

9. In 2009, the communicant instructed Richard Buxton Environmental & Public Law solicitors to raise concerns about noise and dust nuisance with Miller Argent (South Wales) Ltd (the operator) and to seek to stop noise and dust pollution from affecting the locality. Although the operator has, on a number of occasions, sought to compensate some local residents in a selective manner by way of car washing vouchers and cash payments, it has consistently denied that either noise or dust is a problem [**5.309**].

10. The communicant has attempted to issue legal proceedings in the High Court to prevent the nuisance. To date, this has not been possible. In June 2010 the communicant and 491 other residents applied to the High Court for a pre-action group litigation order (GLO) in order to manage a large number of proposed claimants in one legal claim. On 11.11.10, the High Court dismissed the GLO application due to uncertainty as to the proposed claimants' funding provisions: *Austin & others v Miller Argent* (11.11.10) (unreported) [**4.71**]. On 2.12.10 the operator sought payment of £257,104 for its legal costs of the pre-action application. The High Court order of 11.11.10 was appealed.

11. On 29.7.11, the Court of Appeal dismissed an appeal against the High Court decision when, on the day of the appeal, the operator gave an undertaking to the court that it would only claim costs on a *pro rata* basis, that it would limit those costs to a total of £553 and that it would not to pursue any proposed claimant for those costs *unless* they recommenced legal proceedings. The Court of Appeal accepted the undertaking and dismissed the appeal (see *Austin & others v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928 [**4.76**]). The consequence of the judgment meant that residents were, in fact, prevented from pursuing a claim by the financial constraint. Meanwhile the noise and dust pollution continued.

12. After the July 2011 appeal, the communicant sought to resolve the problems as an individual, seeking to reach a negotiated solution with the operator: see e.g. [**5.304**]. This proved unsuccessful. As a last resort, the communicant issued a further pre-action application in the High Court on 1.11.12, this time asking for costs protection in order to pursue legal proceedings. Certain directions arose from the application and a subsequent telephone case management hearing was held on 31.1.13.

The pre-action costs application included a detailed statement of case, witness evidence from the communicant, other residents, noise experts, dust experts, and correspondence: see Annex 4.

13. To help ensure that the preliminary pre-action costs protection hearing could proceed without fear of another £0.25 million costs bill, the communicant proposed that it be heard on the basis of either 'no order for costs' or 'each party pay their own costs'. This would mean that she would not be exposed to the operator's costs if the application was unsuccessful. The hearing would not be without cost: the communicant would have expenses and court fees to pay, although her own legal costs could be avoided by the communicant instructing her legal representatives on a conditional fee agreement (CFA)). However, an order that 'each party pays their own costs' would mean that the one day pre-action costs hearing would not be prohibitively expensive. The communicant submitted that in all the circumstances including the financial means of the operator as 'a large company' the proposed order would be fair and equitable.

14. On 31.1.13 the High Court declined to direct that the one day costs hearing should be on an 'each party pays their own costs' and directed that the pre-action costs protection application should be on the basis of 'costs in the application' [**4.93**]. This left the communicant exposed to considerable costs risk because if the application for costs protection was dismissed the operator would be entitled to claim its costs from the communicant. In the light of the operator's previous costs claim the potential costs exposure for the one-day pre-action costs hearing was likely to be significant. And, while the communicant was advised that to comply the Aarhus Convention some form of costs protection was required to be provided by the High Court, this was uncertain.

15. The High Court order of the 31.1.13 and the consequent costs exposure has prevented the communicant from proceeding with the one day costs protection hearing. The communicant has appealed that decision. However, having attempted to progress this matter through an appeal process once beforehand, it is likely that she will face even further prolonged delay as part of that appeal: see e.g. the earlier Court of

Appeal judgment of 29.7.11 [**4.76**].[4] Meanwhile the noise and dust continues.

16. The proposed claimants appealed to the Court of Appeal raising concern that the costs order was prohibitively expensive following the costs claim and further that dismissing the GLO application was unfair in that if there was uncertainty as to the proposed claimants' costs they would apply to the court for costs protection [**4.94-103**].

2. Evidence of pollution

17. In the communicant's view, the circumstances were such that the opencast mine should never have been permitted. The site boundary is situated as close as 36 metres to local homes and at the edge of Merthyr Tydfil town, in an elevated situation with the densely populated heart of the town arranged in a horseshoe shape around the foot of the mine. The Welsh Government policy on coal extraction recognises that opencast coal operations cause pollution and in 2009 it set a minimum separation or buffer zone of 500 metres between opencast coal operations and sensitive receptors such as homes **[7.566]**. The communicant took part in the consultation of this policy and had fought, in vain, to get the 500 metres protection applied to the Ffos-y-fran opencast. Had a 500 metre buffer zone been provided to Ffos-y-fran most, if not all, of the problems of noise and dust for the communicant and most other residents may well have been significantly reduced. Instead 36 metres separates the opencast mine from the local community.

18. The communicant submits that the frequency, intensity, duration, and offensiveness of the noise and dust deposition highlighted in the communicant's statement at [**5.378-385**] are such that it constitutes a nuisance in common law.

19. Problems of noise are also recorded in the council's summary noise assessment of June 2008 and January 2009 [**5.140-144**]; in the noise report of Hilson Moran of June 2009 [**5.145-169**]; at paragraphs 3-7 of the

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[4] See e.g. the approach of the Court of Appeal in the recent PCO application of *R (Eaton) v Natural England* C1/2012/2323 of 20.2.13.[**7.672-673**]

statement of Robert Griffin of 25 October 2012 [**5.348-349**]; and noted in correspondence from local residents [**5.222-249**] As can be seen from the Communicant's diary entries, noise problems are frequent and experienced, on average, around twice a week [**5.381-382, 384**]. They are intense enough such as to cause unacceptable noise intrusion inside the home. They involve prolonged periods of noise throughout the day. The nature and character of the noise, described as often unrelenting low frequency droning of heavy machinery, is offensive [**5.380**]. Noise interference has been caused since 2008.

20. The dust deposition experienced at the communicant's property, as described in the EPML report of July 2012, is again at such a level as to constitute a nuisance:

> 1.2.1 The frequency of excessive dust deposition at Bradley Gardens, Mount View, and Blaen Dowlais from March 2009 to June 2012 exceeded the threshold at which complaints are justified such that residents living at Bradley Gardens, Mount View, and Blaen Dowlais are likely to have experienced a dust nuisance over the monitoring period. [**5.200**]

21. The EPML report explains that dust deposition is lowest when no opencast activity is being carried on (i.e. over the Christmas period) notwithstanding that the wind direction at that time is blowing from the mine towards residential areas [**5.200**].The impact of dust deposition is that it leaves the communicant's home and garden permanently dirty. Dust complaints have also been raised by other residents in the locality. Problems of dust deposition have been continuing since 2008.

22. The communicant submits that the extent of the noise and dust constitute a nuisance in themselves. That is: if noise did not arise, the dust alone would be a nuisance; if dust deposition was not experienced, noise alone would be a nuisance. The communicant submits that the cumulative effects of noise and dust is such that nuisance from the opencast mine may reasonably be characterised as substantial or serious.

3. Circumstances of the communicant

23. Details of the communicant's personal circumstances including her financial situation are set out in a witness statement before the court

[**5.378**]. In summary, the communicant is 49 years old and works part-time as a self-employed book-keeper. She lives at 10 Llwyn-yr-Eos Grove, Bradley Gardens, Merthyr Tydfil with her husband, Christopher Stanley Austin, and their two children; Thomas, aged 16 years and Emily, aged 13. The family home is situated around 450 metres from the opencast mine [**3.61**]. It is located in a residential area. It is marked on the plan at [**5.394**]. Chris was the main breadwinner of the family up until he was made redundant in 2010. He has been unable to find a permanent job since then and is in receipt of an occupational pension.

24. The communicant was a member of the Ffos-y-fran Community Liaison Committee for some time at which she sought to raise matters about noise and dust with the operator and MTCBC. In November 2010, the operator unsuccessfully sought to prevent the communicant from attending the Liaison Committee. In July 2012 the operator wrote to the communicant and informed her that she was no longer required to attend the Liaison Committee citing 'a conflict of interests' as the reason: see e.g. [**5.399**].

25. The communicant does not have legal expenses insurance cover that will limit the adverse costs risk of the proposed claim. The communicant and other residents applied for after-the-event (ATE) insurance in 2010. ATE insurance was ultimately not offered. This is unsurprising following the Respondent's costs claim for £257,104. Were it to offer cover an ATE provider would immediately face costs liability of over £0.25 million. Moreover, the introduction of s. 46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPOA 2012) which prevents the recovery of an ATE insurance premium from an opposing party in private nuisance (and other proceedings) effectively means that, in practice, ATE insurance cover is no longer available in these types of claim from 1.4.13.

26. The communicant has instructed legal representatives by way of a Conditional Fee Agreement (CFA) and in that way she could afford to be legally represented. However, the communicant could not afford to issue

private nuisance proceedings without a pre-action order providing costs protection.[5]

27. Another practical consequence of the claim for costs following the GLO application is that, although a large number of other local residents are affected by noise and dust, they are simply unable to afford to risk bringing proceedings. Merthyr Tydfil is one of the most deprived areas in Wales according to the 2011 Welsh Index of Multiple Deprivation[6] and with the operator expressly stating that it will pursue any person that takes legal proceedings [**5.290**], local residents, including the communicant, understandably cannot afford to risk taking legal action. In these circumstances, it is reasonable for one person to ask the court for a pre-action order on costs and then, if granted to pursue a claim in nuisance. This is consistent with the approach encouraged by *Barr v Biffa* at §5:

> "The common law is at its best when it is simple."

and at §146:

> "This case is a sad illustration of what can happen when apparently unlimited resources, financial and intellectual, are thrown at an apparently simple dispute such as one about nuisance by escaping smells."

The communicant submits that although the noise and dust pollution experienced is serious and substantial, it remains a relatively simple case of private nuisance.

4. Operator's evidence to the High Court

28. The communicant has sought to be open and frank about the nuisance activities and provided considerable documentation in support of her

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[5] The proposed one-day costs hearing was being pursued on the basis of each party pays their own costs. The consequence of this was that the communicant's instructing solicitors were effectively proposing to work on a *pro bono* basis to help ensure that the costs hearing was affordable and could proceed.

[6] The Welsh Index of Multiple Deprivation (Aug. 2011, Welsh Government); "Merthyr Tydfil has the highest fraction of its lower-layer super output areas (LSOAs – see Notes for definition) in the most deprived 10% in Wales, with about one in four (25.0%) of its 36 LSOAs the most deprived 10% of areas in Wales. Blaenau Gwent is the next most deprived local authority by this measure, with just under one in four (23.4%) of its 47 LSOAs in the most deprived 10% in Wales."

case. The operator, despite repeated requests, has not provided any documentation to the communicant. In a letter of 15.6.12 the communicant expressly requested (i) all correspondence with the communicant and other residents relating to dust, noise and other environmental harm; (ii) all correspondence or other documentation with any other person relating to dust, noise and other environmental harm e.g. the Merthyr and Caerphilly Councils; and (iii) all data and information relating to dust and noise confirming conclusively that the communicant's claim was unjustified [**5.307**]. No information whatsoever was provided. The request for information was repeated on 30.7.12 [**5.315**].

29. Evidence submitted by the operator to the High Court in response to the costs protection application included a witness statement of over 30 pages in length. It included around 6 pages discussing the communicant's financial and costs position, 5 pages complaining about other proceedings, some 5 pages discussing the communicant's evidence and around 4 pages discussing the background to the scheme. There is not one piece of evidence relating to noise or dust or that goes any distance to undermining the evidence presented on behalf of the communicant.

30. The communicant has attempted to resolve the dust and noise problems without reference to the Court. The operator has been unwilling to engage in any pre-proceeding discussions, meetings, without prejudice negotiations or any form of alternative dispute resolution: see e.g. the correspondence between the parties' legal representatives [**5.301-343**].

5. Legal proceedings and regulation relating to the opencast

31. There have been legal proceedings by other parties challenging the grant of permission for the opencast operations and the lawfulness of decisions associated with further development. As noted above, the communicant also applied, along with other residents, for a GLO. That there has been other legal action is unsurprising. The operator was, contrary to present land use planning policy, granted permission to develop the largest opencast coal mine in the UK within 36 metres from homes. The concerns about noise and dust pollution raised by local residents as part of the planning inquiry have been realised. Local residents, perhaps

unsurprisingly, have tried to prevent an opencast coal mine from operating literally at the edge of their community.

32. The operator's comment on the other proceedings varies. It wrote in a meeting report of July 2012 in relation to a proposal to carry out further opencast coal mining at Nant Llesg (a site immediately to the west of Ffos-y-fran):

> "… Miller Argent has participated, as "an interested party", in defending a number of legal challenges brought by a small group of campaigners against either the Ffos-y-fran Land Reclamation Scheme and/or Miller Argent. These challenges were mainly against the Local Planning Authorities, Regional Government and/or Central Government. All of these challenges were unsuccessful." [**5.298**]

33. In a leaflet published in April 2010 the operator listed 10 legal challenges [**5.290**]. The operator's account is not accurate. Concerns about non-compliance with European Union legislation relating to environmental impact assessment (EIA) remains under review by the European Parliament[7] [**7.666-671**]. A claim in 2008 challenging a failure by MTCBC to act on a proposed breach of planning permission resulted in the Respondent conceding that it would not, contrary to an earlier statement, extract coal right up to the site boundary[8]. It was correct not to pursue a claim when the operator's non-compliance had been resolved; notwithstanding that it required the issue of proceedings to prompt action by MTCBC and the operator. In terms of the application for a GLO, the High Court explained that the decision would not prevent a further application[9].

34. MTCBC, the local environmental regulator responsible for regulating dust and noise pollution, supports the opencast operations and is an interested party. It receives a royalty payment of £1 for every tonne of coal sold. This enables it to pay historical debts to the operator and its predecessors.

35. MTCBC does not regulate the site nor act effectively upon any complaints it receives. If a resident contacts MTCBC about excessive noise or dust or

[7] Petition no. 617/2008.
[8] *R (Elizabeth Condron) v MTCBC* CO/1272/2008
[9] §14, *Austin & others v Miller Argent (South Wales) Ltd* [2010] (unreported, 11.11.10) 0CF90274.

how the operations are proceeding, it refers them directly to the opencast operator. In effect, the operator carries on its activities without any effective regulation and without any independent monitoring or environmental regulation by the environmental regulator.

C LAW

1. The Aarhus Convention and the EIA Directive 2011/92/EU

36. The relevant legislative provisions are Article 9 of the Aarhus Convention 1998 and, in particular:

> 2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
>
> (a) Having a sufficient interest or, alternatively,
>
> (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, or other relevant provisions of this Convention.
>
> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-government organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.
>
> The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
>
> 3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

> 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decision under this article shall be given or recorded in writing. Decisions of Courts, and whenever possible of other bodies, shall be publicly accessible.

37. The communicant further submits that Article 11 of the EIA Directive 2011/92/EU applies and, in particular:

> 1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> a) having a sufficient interest, or alternatively;
> b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
>
> 2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.
>
> 3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.
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> 4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
>
> Any such procedure shall be fair, equitable, timely and not prohibitively expensive. …

38. The communicant submits that the opencast operations granted permission on 11.4.05, and which was affirmed by the Planning Inspector in his decision of 6.5.11 were subject to the public participation provisions

of the Aarhus Convention and the EIA Directive. In particular, Condition 6 of the 6.5.11 decision notice requires that:

> The development hereby permitted shall not be carried out other than wholly in accordance with the details shown on the submitted drawings; with details approved pursuant to condition 6 of permission APP 152-07-014; and in accordance with the 2003 Environmental Statement and supporting documents, unless the LPA gives written consent to any variation.

39. The communicant submits that the opencast operations have not been carried out in accordance with the 2003 environmental statement and supporting documents and that the proposed High Court proceedings are to challenge the substantive legality of the acts and/or omissions in accordance with Article 9(2) of the Convention and Article 11 of the Directive.

2. Application of the Aarhus Convention to private nuisance

40. The communicant submits that Article 9(2), (3) and (4) of the Aarhus Convention applies to her proposed claim in private nuisance. The claim stems from the impact which the opencast mining has had on the environment in which the claimant's property is situated: it is therefore within that part of the UK's law which relates to the environment.

41. The Aarhus Compliance Committee stated at §§45-46 of Communication ACCC/23/2008 that the Convention applies to private nuisance proceedings which form part of the law relating to the environment (in that case an issue of odour nuisance). The Compliance Committee stated:

> 47. "Private nuisance is a tort (civil wrong) under the United Kingdom's common law system. A private nuisance is defined as an act or omission generally connected with the use or occupation or land which causes damage to another person in connection with that others use of land or interference with the enjoyment of land or some right connected with the land. The committee finds that in the context of the present case, the law of private nuisance as part of the parties concerns the law relating to the environment and therefore within the scope of Article 9 paragraph 3 of the convention".

42. This position has also been endorsed under the UK domestic regime. At §44 of *Morgan & Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 the Court of Appeal was content to proceed on the basis that the Convention was capable of applying to private nuisance proceedings.

43. More recently, the role of private nuisance as an independent common law route to environmental justice in the UK has been affirmed by the Court of Appeal in *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312. At §46 Lord Justice Carnwath (as he then was) laid out key principles which explained why the High Court judge had been wrong to hold that a claimant's right to sue against a nuisance was curtailed by the grant of an environmental permit:

> 46. "In my view there are short answers to all these points:
>
> i) "Reasonable user" is at most a different way of describing old principles, not an excuse for reinventing them.
>
> ii) The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should "march with" a statutory scheme covering similar subject-matter. Short of express or implied statutory authority to commit a nuisance (rule (v) above), there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights.
>
> iii) Further:
>
> a) The 2003 permit was not "strategic" in nature, nor did it change the essential "character" of the neighbourhood, which had long included tipping. The only change was the introduction of a more offensive form of waste, producing a new type of smell emission.
>
> b) The permit did not, and did not purport to, authorise the emission of such smells. Far from being anticipated and impliedly authorised, the problem was not covered by the original Waste Management Plan, and the effects of the change seem to have come as a surprise to both Biffa and the Environment Agency. Nor can they be dismissed as mere "teething troubles", since they continued intermittently without a permanent solution for five years.
>
> iv) There was no requirement for the claimants to allege or prove negligence or breach of condition. Even if compliance with a statutory permit is capable of being a relevant factor, it would be for the defendant to prove compliance, not the other way round.

v) There is no general rule requiring or justifying the setting of a threshold in nuisance cases. The two cases mentioned do not support such a general rule, and in any event concerned noisy activities which could readily be limited to specific days (unlike smelly tipping at Westmill).

vi) By adopting such a threshold, the judge deprived at least some of the claimants of their right to have their individual cases assessed on their merits."

44. At §64, Carnwath LJ explained the role of reasonable user in private nuisance citing Lord Goff in *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 who said that the principle constitutes a "control mechanism" within the tort (at 297G):

> "… although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land".

45. Further, Carnwath LJ at §69 referred to Lord Millett's comments on Lord Goff's use of this expression in Southwark LBC v Mills [2001] AC 1, 20:

> "The use of the word 'reasonable' in this context is apt to be misunderstood. It is no answer to an action for nuisance to say that the defendant is only making reasonable use of his land… What is reasonable from the point of view of one party may be completely unreasonable from the point of view of the other. It is not enough for a landowner to act reasonably in his own interest. He must also be considerate of the interest of his neighbour. The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him."

46. Finally, Carnwath LJ states at §72 of *Barr v Biffa* that reasonableness should be judged by the well-settled tests and that the matter was stated simply and accurately by Tony Weir:

> "Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with." (Weir, An Introduction to Tort Law p160)

47. Applying this approach, the communicant submits (and did so to the High Court) that considered objectively a normal person would not find it reasonable to have to put up with the frequency, intensity, duration and level of noise and dust that the communicant does.

The application of the EIA Directive 2011/92/EU

48. At §24 of the statement of case, the communicant submitted to the High Court that it could not ignore the fact that it and the regulatory authorities must also comply with Directive 2011/92/EU[10]. Notwithstanding that the opencast was granted permission in April 2005, the opencast operations continue to be subject to the Directive. Condition 6 of the opencast permission expressly requires the development to be carried out wholly in accordance with the 2003 Environmental Statement and supporting documents, unless the local planning authority gives written consent to any variation. The relevance and importance of the continued application of the EIA Directive is that the Court is required to give effect to Article 11 of the Directive which requires that legal proceedings must be 'fair, equitable, timely and not prohibitively expensive'.

49. The operator denies that the EIA Directive has any relevance: see e.g. §10 of the operator's skeleton argument because (i) the obligation under the EIA is only engaged 'before consent is given'; (ii) private nuisance is not a 'review procedure' under Article 11 of the Directive; (iii) the chance to challenge the EIA procedure was following the grant of permission and this failed in earlier proceedings; and (iv) the Court of Appeal in *Austin v Miller Argent* [2011] considered that the EIA Directive did not apply.

50. The communicant submits that if the operator's points (i) to (iv) are correct then the permission of 11.4.05 is unworkable and Condition 6, which is critical to that permission, is unlawful. In those circumstances, the permission should be revoked. In short, the operator cannot have it both ways: the non-application of the EIA Directive and the benefit of a planning permission that requires compliance with an environmental statement prepared in order to comply with the public participation

[10] The Town and Country Planning (EIA) Regulations 1999 transpose the EIA Directive in Wales. It is recognised by the UK that the EIA Regulations 1999 do not effectively transpose the EIA Directive. In 2011 England and Scotland enacted updated and consolidated regulations. Wales has yet to issue revised regulations.

provisions of the EIA Directive. The communicant submits that the correct view is that the review procedures anticipated by Article 11 are not constrained or limited in any way and that private nuisance proceedings are a legitimate 'review procedure' reasonably falling within Article 11 of the EIA Directive. As such, the communicant should be able to challenge the effectiveness of any operations that are expressly defined in an environmental statement which was relied upon when granting permission to operate.

51. The Aarhus Implementation Guide (2000) published by the UNECE explains that Article 9(3) covers:

> In direct citizen enforcement, citizens are given standing to go to court or other review bodies to enforce the law rather than simply to redress personal harm. Indirect citizen enforcement means that citizens can participate in the enforcement process through, for example, citizen complaints. However for indirect enforcement to satisfy this provision of the Convention, it must provide for clear administrative or judicial procedures in which the particular member of the public has official status. Otherwise it could not be said that the member of the public has access to such procedures. Public enforcement of the law, besides allowing the public to achieve the results it seeks, has also proven to be a major help to understaffed environmental enforcement agencies in many countries. In some countries, moreover, the citizen enforcer can even collect civil monetary penalties from the owner or operator of a facility transgressing environmental law or rules on behalf of the appropriate government agency.[11]

52. In the circumstances, the communicant submits that Article 9 of the Aarhus Convention, and by transposition through the Public Participation Directive 2003, Article 11 of the EIA Directive provide a mechanism permitting private nuisance in cases where the EIA Directive is engaged (such as this one) to fall within the a review procedure envisaged by the Convention and the Directive.

3. Alternatives to private nuisance?

53. The costs involved in private nuisance has prompted the UK to suggest in previous communications that there are alternative legal options available

[11] p. 130, Economic Commission for Europe (2000), *The Aarhus Convention: an implementation guide.* United Nations: New York & Geneva (see also p. 206 of the draft revised guide (Jun 2011).

to those experiencing environmental pollution which mitigates the communicant's need due in private nuisance. These include:

a) summary proceedings under s82 of the Environmental Protection Act 1990 (EPA 1990);
b) a complaint to the ombudsman;
c) judicial review challenging the failure of regulators to act;
d) a private prosecution; and
e) using before the event (BTE) insurance to cover the costs of a claim.

54. The communicant does not have BTE cover. Further, it is submitted that items (b) to (d) do not provide a realistic or effective review procedure and the UK cannot substantiate the suggestion that they can. A complaint to the ombudsman can only ever make recommendations about a public body's maladministration which may or may not resolve matters.[12] Judicial review of a regulator is expensive in itself and unrealistic with any remedy by the High Court unlikely to require a regulator to take effective enforcement action. There is also concern in circumstances such as the present case where the regulator has an interest in coal extraction (i.e. it is paid a royalty for coal sales) and it owns the land (or part of it) upon which coal extraction is being carried out. Finally, role of an individual as a private prosecutor cannot sensibly be relied upon for reasons discussed below in relation to s. 82.

55. In terms of s. 82 proceedings, the communicant submits that these are too limited in scope and application to be a realistic option in many instances of environmental nuisance because of:

1) the statutory defences of Best Practicable Means and reasonable use;
2) procedural and evidential factors;
3) the Prosecution of Offenders Act 1985;
4) the limits on the level of compensation payable; and

[12] A striking illustration of maladministration and prolonged criticism of a public body which nevertheless failed to resolve flooding and surface water drainage problems is the Public Service Ombudsman's report on Carmarthenshire County Council's inaction in relation to a Coach Depot at Cwmgwili, Lanelli, Carmarthenshire: see *R (Rayner Thomas) v Carmarthenshire County Council* CO/6926/12.

5) the potential risk of a costs claim by the operator.

1) The defence of Best Practicable Means

56. Section 80(7) of the EPA 1990 provides that it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance. The defence is not available in certain limited exceptions, primarily when the nuisance activities emanate from a private dwelling. There is no similar defence in private nuisance. In *Barr v Biffa* it was held that in a private nuisance action "there was no requirement for the Claimants to allege or prove negligence ..."

57. While the application of a defence may not, at first glance, appear unreasonable, it can lead to a continuing nuisance occurring in circumstances where this would otherwise constitute a nuisance in civil law proceedings. The following extract from Malcolm and Pointing: *Statutory Nuisance Law and Practice 2e* (OUP, 2011, pp 276-7) concisely explains the point:

> 17.05 It is not necessary to show that the means deployed brought the nuisance to an end. It is enough if they were adequate to 'prevent, or to counteract the effects of, the nuisance'. So, while it may be possible to show that use of BPM eliminated the nuisance, that is not essential. It would be enough to show that the effects of the nuisance were counteracted to a sufficient extent. Thus, in a case involving barking dogs, removal of the dogs would remove the nuisance. But it might be sufficient to reduce the number of dogs, thus reducing the level of the noise without eliminating it[13]. 'Short of eliminating the nuisance, the "best practicable means" concept involves consideration of the scope for counteracting the effects of the nuisance.' Thus, the defence operates so that, although the nuisance may otherwise have been established, it is not actionable because the defendant has succeeded in showing that BPM have been used to deal with it. No more can be required of the defendant, within the context of Part III of the EPA 1990, than this. A defence case, therefore, may accept that a nuisance has been committed, but focus exclusively on the means used to counteract its effects. …
>
> … Whether or not the BPM defence is made out remains a decision for the court. The establishment of the defence is designed to achieve a balance between the interests of the parties involved. It may well have the effect of enabling a

[13] See e.g. *Manley v New Forest DC* [2000] EHLR 113 (the case of the howling Siberian huskies which reappears in *Manley v New Forest DC* [2007] EWHC 3188 (Admin), [2008] Env LR 23): *Budd v Colchester BC* [1999] Env LR 739.

business to carry on its activities, while leaving residents with a nuisance which they must tolerate. …

[underlining added]

58. The question of balancing the interest between the parties also arises in private nuisance proceedings. The critical difference between the two regimes is that private nuisance recognises the continuance of a nuisance and will, if appropriate, provide compensation for a continuing nuisance see e.g. *Shelfer v City of London Electrical Lighting Co* [1895] 1 Ch 287 (and the claimant succeeds) whereas in statutory nuisance, the prosecutor (the applicant) would have unsuccessfully prosecuted the case and would have lost.

59. There are further concerns with the standard at which BPM can be attained. For the purpose of statutory nuisance, BPM is defined in s. 79(9) of the EPA 1990 as:

(a) ‘practicable’ means reasonably practicable having regard among other things to local conditions and circumstances, to the current state of technical knowledge, and to the financial implications;

(b) the means employed include the design, installation, maintenance and manner and periods of operation of plant and machinery, and the design, construction, and maintenance of buildings and structures;

(c) the test is to apply only so far as compatible with any duty imposed by law;

(d) the test is to apply only so far as compatible with safety and safe conditions, and with the exigencies of any emergency or unforeseeable circumstances;

and, in circumstances where a code of practice under s. 71 of Control of Pollution Act 1974 (noise minimization) is applicable, regard shall also be had to guidance given in it.

60. In *Chapman v Gosberton* [1993] Env LR 218, the High Court held that the BPM defence involved the defendant having to discharge the onus of proof, on a balance of probabilities, in that they had taken reasonably practicable means to prevent or counteract the effect of their noise. The weakness in the reasonably practicable means defence threshold is compounded by the misapplication and scope of the defence. Newman J in *Manley v New Forest DC* [1999] PLR 36 commented that BPM was developed as a means of pollution control and that an important part of the concept had always been that it allowed for flexibility to cater for local and individual circumstances. He noted that: 'Its introduction reflected a conciliatory and co-operational approach, so that the method of enforcement would not place an undue burden on manufacturing industry and on businesses.[14]'

61. In summary, the defence of BPM provides a mechanism to avoid a finding of nuisance in circumstances where a nuisance exists but financial factors may make its removal onerous, and where the defendant has taken the 'best' (meaning 'reasonably practicable') practical measures available to them. In contrast, in civil proceedings this provision is not available to the Defendant.

The defence of reasonable excuse

62. Section 80(4) of the EPA 1990 provides that:

> If a person on whom an abatement notice is served, *without reasonable excuse*, contravenes or fails to comply with any requirement or prohibition imposed by the notice, he shall be guilty of an offence.

63. It is unclear whether the 'reasonable excuse' defence applies to s. 82 proceedings. Essentially it is a defence for failure to comply with the abatement notice and under s. 82, the abatement order issued by the Magistrates' Court may reasonably be regarded as the equivalent as that abatement notice. If s. 80(4) could be applied to the abatement order served then a brief analysis of this defence is appropriate.

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[14] *Manley v New Forest DC* [2000] EHLR 113 per Newman J.

64. There is no further definition of what may amount to a 'reasonable excuse'. There is some judicial guidance: for example in *Wellingborough DC v Gordon* [1993] Env LR 218 the court held that the defence of reasonable excuse is unavailable for the deliberate and intentional contravention of an abatement notice and in *Saddleworth UDC v Aggregate and Sand* (1970) 114 SJ 931 it was held that lack of finance was held not to be a reasonable excuse. However, in *Hope Butuyuyu v LB Hammersmith & Fulham* [1997] Env LR D13 the significance of personal circumstances was taken into account when assessing whether a reasonable excuse existed, while in *Lambert Flat Management Ltd v Lomas* [1981] 1 WLR 898 it was suggested that there may be some 'special reason such as illness, non receipt of the notice or other potential excuse for not entering an appeal'. In contrast with BPM, the burden of proving that the reasonable excuse defence does not apply rests with the prosecution.

65. In summary, the defence of reasonable excuse, although quite limited in scope and application to s. 82 proceedings, adds an additional burden on a prosecutor seeking to resolve environmental harm which does not arise in private nuisance proceedings.

2) Procedural and evidential limitations of s. 82 proceedings

66. Section 82 proceedings are criminal in nature and the 'person aggrieved' by the environmental harm and who is entitled to bring proceedings is the prosecutor. The prosecutor is required to progress the prosecution based upon proving a nuisance existed according to the criminal standard of proof (beyond reasonable doubt). This is a higher burden upon the 'person aggrieved' than is the case in private nuisance proceedings that the nuisance is 'more probable than not'. Further, the prosecutor will generally be required to comply with the standards set by the Code for Crown Prosecutors published by the CPS (see e.g. www.cps.gov.uk). The Code notes in its introductory paragraph that:

> "The decision to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. The CPS [and other prosecutors] should apply the Code for Crown Prosecutors so that it can make fair and consistent decisions about prosecutions."

67. Thus, while s. 82 proceedings are intended to provide a relatively simple and straightforward mechanism for lay people to resolve environmental concerns. Many defendants seek to place pressure (including financial pressure) on lay prosecutors to ensure formal prosecution due process is followed. See e.g. the *McCaw v Middlesex SARL* (2008) (unreported, 29.9.08) City of London Magistrates Court, which involved a hearing over a three week period and an interim appeal to the High Court in *R (Lynn McCaw) v City of Westminster Magistrates Court and Middlesex SARL* [2008] EWHC 1504 (Admin) by way of case stated in relation to an application for a PCO and other procedural matters.

3) The Prosecution of Offenders Act 1985

68. The statutory nuisance provisions do not lend themselves to claims by multiple complainants. There is no reason in principle why a number of s. 82 proceedings cannot be brought jointly although there is no provision for the joining s. 82 prosecutions together or comparable rules as found under CPR Part 19 for Group Litigation Orders.

4) Limited claim for compensation

69. Claims in private nuisance will invariably seek two remedies (a) an injunction to prevent any continuing harm and (b) damages for past nuisance (up until the point that the nuisance activities cease). Due to the application of the ss. 2 & 5 of the Limitation Act 1980, the claim for past nuisance damages is limited to up to six years prior to the date of the issue of the claim.

70. Damages for past nuisance in private nuisance proceeding are a matter for the Court. In private nuisance these damages awards tend to be low compared to say compensation for personal injury. In *Watson v Croft Promo-sport Ltd* [2009] EWCA Civ 15, the Court of Appeal did not disturb a High Court finding of £2,000 per annum for noise nuisance with a total of £16,000 for eight years, while in *Bontoft v East Lindsey DC,* the Court awarded a sum ranging from £3,000 - £4,000 per annum to each claimant which resulted in total claims of £7,500 to £10,000 for two and a half years of past nuisance. In *Thornhill v Nationwide Metal Recycling Ltd* [2011] EWCA Civ 919 a sum of £5,000 for one year's nuisance per claimant was agreed for past noise nuisance.

71. In contrast, the primary purpose of s. 82 proceedings is to secure an abatement order. Although, under s. 130 of the Powers of Criminal Court (Sentencing) Act 2000 (PCCSA 2000), the court has discretion to make a compensation order for 'any personal injury, loss or damage' arising from the offence. However, the starting date for compensation is between the date the notice of intention to start proceedings expires and the date of the s. 82 hearing. This will inevitably lead to a very modest compensation payment comprising special damages (e.g. damages to clothes, furniture etc) plus any personal or familial distress subject to evidence being adduced to substantiate such distress. Further, the compensation payable is limited to a maximum payment of up to Level 5 in the magistrates court (currently £5,000) see s. 131 of the PCCSA 2000.

72. In summary, the compensation claims in s. 82 are prospective in nature and so damages are limited to the period after date of any letter before action expires compared with a period of up to six years before, and are limited to a maximum of £5,000 in any event. Compared even to the modest damages awarded in private nuisance proceedings the s. 82 sums are extremely low and are unlikely to have little if any deterrent effect or compensatory value to a person aggrieved.

73. In the present case, the primary concern of the communicant is to prevent noise and dust nuisance and were any negotiated settlement achieved then, a claim for compensation is unlikely to have been pursued. However, the operator's response is such that the communicant would on issuing proceedings claim compensation for past damage. The amount would be from the date nuisance began in 2008. At a typical award of £2,000 per annum since 2008, this would be £10,000 to date. This far exceeds any compensation payable under s. 82 of the EPA 1990. It would make no sense at all to issue s. 82 proceedings for an abatement order, particularly given the difficulties in pares 63-4 above, and to be entitled to a much reduced compensation payment.

5) The potential for a costs claim by a successful defendant

74. Although s. 82(12) does not provide an express statutory mechanism for a defendant to claim its costs from an unsuccessful application there is the possibility to claim costs under Reg. 3 of the Costs in Criminal Cases

(General) Regulations 1986 (costs unnecessarily or improperly incurred) and s. 19A of the Prosecution of Offences Act 1985 (an application for costs against legal representatives). The application of these rules will tend to be the exception rather than the rule. Nevertheless, the option remains open to a defendant to seek to rely on the provisions and argue that an unsuccessful prosecutor has acted unreasonably in pursuing proceedings. In the present case, the operator has made it clear that it will pursue a costs claim against any individual that seeks to pursue nuisance proceedings and that it is using the threat of costs of legal proceedings to attempt to prevent legal proceedings rather than address the pollution problems that exist. In its leaflet of April 2010 it noted:

> So far as the proposed Private Nuisance Claim is concerned - Miller Argent denies that its operations are creating a nuisance and will vigorously defend any legal action brought against it and **will seek to recover its costs in defending the proceedings from the Applicants through the courts.**
>
> Therefore Miller Argent asks everyone who is minded to sign up to the proposed legal action to fully consider the consequences should the action fail. For those who may believe that they may be entitled to a payout simply by signing up then please think again - what they should be considering is "*it is not what we may win but what we could lose.*" [**5.290**]

75. In summary, s. 82 of the EPA 1990 simply does not provide an adequate alternative to private nuisance proceedings.

4. Civil Procedure Rules and PCOs

76. The communicant submits that the domestic basis for costs protection may be found in CPR Parts 1 and 3 including the overriding objective of enabling the court to deal with cases justly.

1) CPR Part 1 Overriding objective

77. CPR Rule 1.1 includes:

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

2) CPR Part 3 The Courts case management powers

78. The courts general powers of management are set out in CPR Part 3. Rule 3.1 provides, among other things, that:

(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may:

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

3) PCOs

79. The cases of *Garner v Elmbridge BC* [2010] EWCA Civ 1006 and *Edwards v Environment Agency* [2011] UKSC 57 considered in some detail cases involving the Aarhus Convention and the EIA Directive and concluded that environmental cases should not be prohibitively expensive by application of the Convention and the Directive. Moreover, the case of *Garner* v *Elmbridge BC* provides that the assessment as to whether proceedings may be prohibitively expensive, but for a PCO, should be based upon 'ordinary members of the public'. The communicant submits that she is 'an ordinary member of the public'.

80. The case of *Eweida v British Airways Plc* [2009] EWCA 1025 may be cited to the effect that PCOs are not available in private law proceedings. However, *Eweida* was a private employment dispute and did not engage the provisions of the Aarhus Convention or the EIA Directive. The communicant submits that *Eweida* cannot be authority for a general prohibition on the use of PCOs for environmental cases.

81. As indicated above, the UK acknowledges and the Aarhus Compliance Committee has found that the Aarhus Convention applies to private nuisance proceedings[15].

4) CPR Part 44.18 Cost capping orders

82. The courts cost capping powers are in CPR Part 44. Rule 44.18 provides that:

> (1) A costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made.
>
> (2) In this rule, 'future costs' means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability.
>
> (3) This rule does not apply to protective costs orders.
>
> (4) A costs capping order may be in respect of –
>
> (a) the whole litigation; or
> (b) any issues which are ordered to be tried separately.
>
> (5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –
>
> (a) it is in the interests of justice to do so;
> (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
> (c) it is not satisfied that the risk in sub-paragraph (b) can be adequately controlled by –
>
> (i) case management directions or orders made under Part 3; and
> (ii) detailed assessment of costs.
>
> (6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including-
>
> (a) whether there is a substantial imbalance between the financial position of the parties;
> (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;
> (c) the stage which the proceedings have reached; and
> (d) the costs which have been incurred to date and the future costs.

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[15] §45-46 of Communication ACCC/23/2008. See also §44 of *Morgan & Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 in which the Court of Appeal was content to proceed on the basis that the Convention was capable of applying to private nuisance proceedings.

(7) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a party successfully applies to vary the order. No such variation will be made unless –

(a) there has been a material and substantial change of circumstances since the date when the order was made; or
(b) there is some other compelling reason why a variation should be made.

83. The communicant recognises that CPR 44.3 (2)(a) notes that the general costs rule is that ‘the unsuccessful party will be ordered to pay the costs of the successful party’. However, in environmental cases, this general rule must be considered in the light of the Aarhus Convention and is displaced by the obligation to ensure that legal proceedings must be ‘fair, equitable, timely and not prohibitive expensive’ under Article 9. There are, as noted above, a number of domestic rules that could and should shift the ‘general costs rule’ in environmental cases.

84. In the present case, the High Court noted the Convention and then proceeded to make an order for the proposed costs protection hearing that was contrary to the provisions of Article 9 because it exposed the communicant to significant costs exposure.

4) The proposed Civil Procedure (Amendment) Rules 2013

85. The UK has published proposed amendments to the CPR which are understood to come into force on 1.4.13. The amendments include new rules CPR 45.41 to 44 which provide:

SECTION VII
Costs Limits in Aarhus Convention Claims

Scope and interpretation
45.41.—(1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section, “Aarhus Convention claim” means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.

(Rule 52.9A makes provision in relation to costs of an appeal.)

Opting out
45.42 Rules 45.43 to 45.44 do not apply where the claimant -

(a) has not stated in the claim form that the claim is an Aarhus Convention claim; or
(b) has stated in the claim form that
   (i) the claim is not an Aarhus Convention claim, or
   (ii) although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

Limit on costs recoverable from a party in an Aarhus Convention claim
45.43 (1) Subject to rule 45.44, a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45.
(2) Practice Direction 45 may prescribe a different amount for the purpose of paragraph (1) according to the nature of the claimant.

Challenging whether the claim is an Aarhus Convention claim
45.44 (1) If the claimant has stated in the claim form that the claim is an Aarhus Convention claim, rule 45.43 will apply unless -

(a) the defendant has in the acknowledgment of service filed in accordance with rule 54.8—
   (i) denied that the claim is an Aarhus Convention claim; and
   (ii) set out the defendant's grounds for such denial; and
(b) the court has determined that the claim is not an Aarhus Convention claim.

(2) Where the defendant argues that the claim is not an Aarhus Convention claim, the court will determine that issue at the earliest opportunity.

(3) In any proceedings to determine whether the claim is an Aarhus Convention claim -

(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;
(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings on the indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in Practice Direction 45.

86. The communicant submits that the proposals may be welcome in matters relating to judicial review and to clarify certain aspects of Aarhus claims. However, the definition of 'an Aarhus Convention claim' in Rule 45.41(2) limits the scope of the provisions to judicial review and although not explicit does not appear to cover private nuisance proceedings. Limiting

the definition of an Aarhus claim is contrary to the findings of the Compliance Committee in ACCC/23 and also contrary to the Court of Appeal conclusion in *Morgan & Baker.* In the circumstances, the proposed CPR amendments do not assist the communicant and the general non-compliance with the Convention in this area.[16]

D REMEDYING THE NON-COMPLIANCE

87. The non-compliance with Articles 9(3) & (4) of the Convention can be resolved by acknowledging that the costs protection afforded in matters relating to the Aarhus Convention extends to private nuisance proceedings. As noted above, the principle of costs protection is now established in the UK by the use of PCOs and now the proposed CPR amendments. Further, the CPR recognise that inequality of arms arises in legal proceedings; it is now incumbent on the UK courts to recognise that the Aarhus Convention requires the UK to take all necessary steps to ensure that proceedings are fair, equitable, timely and not prohibitively expensive. The proposed amendments to the CPR do not go far enough.

88. The CPR should not be used as they have in the present case and in earlier occasions before the court as a mechanism of preventing access to the courts. In the communicant's case compliance with the Convention can be limited by a costs protection order limiting her adverse costs liability to nil. The communicant sought to achieve this by her preliminary application.

89. In the light of these submissions, the communicant asks the Compliance Committee to make a finding that:

1. Private nuisance proceedings fall clearly within the Aarhus Convention and that if there is any doubt as to whether a private nuisance claim may not fall within the Convention a purposive, inclusive approach should be taken such that the Convention is assumed to apply.

[16] The communicant notes that the caps imposed in the associated Practice Direction is set at £5,000. Although not directly relevant to this communication, the communicant submits that this cap is likely to result in judicial proceedings being prohibitively expensive for many members of the public.

2. If the UK is going to continue to rely upon PCOs as a mechanism for costs protection in environmental cases and so ensure compliance with the Aarhus Convention, then the application of PCOs must apply to: (a) all cases falling within the Aarhus Convention without qualification and (b) to private nuisance proceeding that fall within the remit of the Convention.

3. Further, that if the UK is to rely upon PCOs as a mechanism for costs protection then that mechanism is not in itself prohibitively expensive.

4. That in the communicant's particular circumstances, the UK has failed to provide a system of access to justice that is compliant with the Aarhus Convention and that, as a consequence, the UK should take all necessary steps to ensure that there is compliance.

5. That s. 46 of the LASPOA 2012 is unduly restricting access to justice in environmental matters such that the UK is failing to comply with the Aarhus Convention. In the circumstances, the UK must provide an alternative mechanism for remedying that failure: the simplest one being to provide rules or regulations that s. 46 does not apply to cases falling within the scope of the Aarhus Convention including claims for private nuisance.