ACCC/C/2013/85
ACCC/C/2013/86

A communication to the Aarhus Convention Compliance Committee

(1) ENVIRONMENTAL LAW FOUNDATION

(2) ALYSON AUSTIN

Communicants

and

UNITED KINGDOM

Party concerned

COMMUNICANTS' JOINT REPLY TO ACCC QUESTIONS OF 12.8.14

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1. The Communicants for ACCC/C/2013/85 (C-85) (ELF) and C-86 (Mrs Alyson Austin) have prepared a joint reply to the Committee's questions of 12 August 2014. The answers are set out below and immediately follow each question.

A. To the communicants of ACCC/C/2013/85 & ACCC/C/2013/86 and the Party concerned

1. Please describe in a concise manner how the system of ATE insurance worked prior to the entry into force of the LASPOA in 2012 (including the financial aspects, namely the costs for obtaining ATE) and what has changed since then.

2. Prior to 1.4.13 there were a number of After the Event (ATE) insurance providers. These were private, commercial organisations who each offer slightly different insurance cover. Generally, an insurance provider entered into a contract with a claimant (or group of claimants) to underwrite (cover): (i) an opponent's costs; and (ii) the disbursements of a case (e.g. court fees, expert reports, travel fares) if a claim was unsuccessful and a claimant became liable for those costs under the general costs rule that applies in the UK i.e. the loser pays the winner's costs.

3. The premium (or fee) for the insurance cover was expensive. It was calculated on anything between 50-90% of the total sum of the opponent's costs and the claimant's expenses. However, the premium was generally only payable by a claimant on a 'no-win, no fee' basis. This meant that a claimant could afford to issue proceedings and not be exposed to an opponent's costs because the insurance was in place to cover this. It was very expensive for the opponent because if it lost the case it would have to pay that very high insurance premium under the 'loser pay's the winner's costs' rule.

4. The Communicants accept that the system was not ideal because of the high costs involved. However, with the reduction of public funding (legal aid) in 1999/2000 it did help to ensure that an individual claimant or group of claimants with, perhaps understandably, not much money could bring legal proceedings against an opponent that was often a large commercial organisation that may well have benefited financially from causing the pollution that was affecting the public concerned. This ability for a claimant to bring proceedings with protection against the risk of liability for an opponent's costs risk has not been possible since 1.4.13.

5. An example of the types of costs and the concerns raised by ATE insurance is summarised in the recent UK Supreme Court decision *Coventry and others v Lawrence and another No. 2* [2014] UKSC 46 (handed down on 23.4.14 (copy enclosed); see e.g. §§33-48 dealing with the claimants' claim for costs including an ATE fee. The costs question in *Coventry No. 2* has yet to be determined by the Supreme Court and it may result in a further judgment *'Coventry No. 3'*.

2. Please give your opinion of the impact of recent UK case law concerning private nuisance claims, namely the Supreme Court judgment in Coventry and others v Lawrence and another for the issues put before the Compliance Committee during the discussion at its 44th meeting (Geneva, 25-28 March 2014). In particular, please explain, in the light of the recent case law, under which conditions the courts would issue injunctions to stop the activity in question and under which conditions they would decide that it is appropriate to provide compensations.

a) The conditions for granting an injunction

6. Up until *Coventry and others v Lawrence and another (Coventry No. 1),* the Court of Appeal decision in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 provided the legal proposition that, unless very exceptional circumstances provide otherwise, an injunction should follow the finding of nuisance (see e.g. *Watson v Croft Promosport Ltd* [2009] 3 All ER 249). Only in those 'exceptional circumstances' should damages be awarded in place of an injunction.

7. The Court in *Lawrence* has, arguably, shifted the *Shelfer* position slightly such that an injunction should still normally follow a finding of nuisance but that the award of damages instead may be more common. At paragraph 121 of *Coventry No. 1* Lord Neuberger stated that the *prima facie* position is that an injunction should be granted so that the legal burden is on the defendant to show why it should not (and so damages paid instead). He added at para. 125 that the existence of a planning permission which expressly or inherently authorises carrying on an activity in such a way as to cause a nuisance could be a factor in favour of refusing an injunction and compensating the claimant in damages.

8. More generally, *Coventry No. 1* affirms the importance of private nuisance as an important aspect of environmental law in the UK. The appeal in *Coventry No. 1* was allowed by all of the Lords and none expressed any suggestion that alternative approaches should be preferred. Lord Carnwath at para. 176 notes:

> "Ben Pontin in his valuable recent book *Nuisance Law and Environmental Protection* (2013) shows how since the middle of the 19th Century common law nuisance has played an important complementary role to regulatory controls, on the one hand stimulating industry to find better technical solutions to environmental problems, and, on the other, stimulating the legislature to fill gaps in the regulatory system. He sees the present appeal as an important opportunity for the Supreme Court to review the proper role of this part of the law of nuisance in the modern world (p 184).

9. This accords with other recent case law on private nuisance see e.g. *Thomas v Merthyr Tydfil Car Auction Ltd* [2013] Env LR 12 in which a High Court reached a finding of noise nuisance on the evidence presented to it and in circumstances where the local authority had failed to reach that conclusion on its limited investigation of the matters (the judgment was subsequently affirmed by the Court of Appeal in *Merthyr Tydfil Car Auction Ltd* [2014] Env LR4.

10. In summary, the impact of recent UK case law on private nuisance claims is to affirm its relevance as a 'national law relating to the environment' in accordance with Article 9(3) of the Convention.

3. Would it be possible for a member of the public to use UK private nuisance law to challenge an act or omission by an operator of a disturbing activity (e.g. industrial activity or a sewage treatment plant) if the activity which caused the harm was a "one-off" activity? Alternatively, what if the disturbing activity had been ongoing for a certain period of time but had subsequently ceased? Lastly, what if the activity (and thus the resulting harm) has not yet commenced but if the activity goes ahead, the harm will result? If nuisance law could apply in such cases, what other legal alternatives to challenge the act or omission might exist in each case?

<u>One-off nuisance activity</u>

11. It would be possible for a member of the public to use UK private nuisance law to challenge a 'one-off' activity of environmental harm if that harm was sufficiently serious. This specific type of private nuisance claim is known as the *Rule in Rylands v Fletcher* based upon a 19th House of Lords ruling that a landowner was liable for flooding after a water reservoir burst into the shafts of the claimant's working mines and so claimed damages for the harm caused by this. Thus, while private nuisance generally requires a continuing state of affairs it can cover what may be regarded as catastrophic environmental harm e.g. a fire or large flood. The *Rule in Rylands v Fletcher* was recently applied in the case of *Vernon Knights Associates v Cornwall Council* [2014] Env LR 6 in which the Court of Appeal affirmed the High Court decision in a finding of liability. On discussion the *Rule in Rylands v Fletcher* Jackson LJ said this:

> 38 Society has changed over the last century and the common law, as always, has adapted to those changes. There is now liability on landowners for non-feasance in respect of natural nuisances. Nevertheless the common law rules imposing such liability still bear the imprint of an earlier age. The landowner's liability is described as a

> "measured duty" and it is subject to qualifications not usually found in the law of tort.
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> 39 Two major decisions mark the development of the common law, namely *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 and *Goldman v Hargrave* [1967] AC 645. In *Sedleigh-Denfield* the House of Lords held landowners liable for the escape of water which they could have prevented by taking a simple and obvious step. In reaching this momentous decision the House of Lords approved the dissenting judgment of Scrutton L.J in *Job Edwards Ltd v Birmingham Navigation Proprietors* [1924] 1KB 341. The House of Lords' decision was widely welcomed by textbook writers and commentators.

Ongoing disturbance that subsequently ceases

12. If, alternatively, a disturbing activity had been ongoing for a certain period of time but had subsequently ceased private nuisance could be relied upon to assist a claimant to permanently resolve the concern. In contrast, the suggested alternatives to private nuisance suggested by the UK would not be effective. In particular a statutory nuisance claim under s. 82 of the Environmental Protection Act 1990 (EPA 1990) must have a nuisance activity existing at the date the proceedings are issued in order to be substantiated. This can be very problematic where nuisance incidents are intense, regular but intermittent or may otherwise be seasonal as, for instance, with odour nuisance from waste sites.

13. Indeed, the threat of proceedings (certainly the threat of a trial) will often be enough to stop the nuisance activity, at least temporarily, yet the proceedings often need to be pursued to ensure that nuisance can be avoided in the long term. Indeed, this is precisely the circumstances that arose in *Thomas v Merthyr Tydfil Car Auction Ltd* when around the date witness statements were exchanged, the noise nuisance was resolved by the defendant and the Claimants sought to modify the extent and the nature of the proceedings accordingly.

14. Further, in circumstances, where a nuisance has existed for a number of years but has stopped e.g. by the cessation of the nuisance activity those suffering should still be entitled to claim compensation for the nuisance suffered see e.g. *Barr v Biffa Waste Services Ltd* [2013] QB 455. Private nuisance is the most appropriate form of proceedings for this whereas statutory nuisance/s. 82 would not permit this. A number of examples are provided in reply to question B1 below.

The environmental harm has not yet commenced

15. If an activity is likely to cause environmental harm but has not yet commenced it is possible to apply in private nuisance proceedings for a *quia timet* injunction to prevent such harm. A similar provision is not available under the statutory provision relied upon by the UK for individuals under s. 82 of the EPA 1990. In particular, in *Pearhouse v Birmingham City Council* [1999] Env LR 536, Collins J at 539 noted that 'a complaint under section 82 can only be made if there exists a statutory nuisance'.

16. The court will grant a *quia timet* injunction sparingly and only where damage is substantial and imminent see e.g. *Fletcher v Bealey* (1884) ChD 688. However, the power of the court to grant a *quia timet* injunction is undoubted, see e.g. Chapter 29, *Clerk & Lindsell on Torts 20th ed* (2010).

4. Please give your opinion on the impact of the recent judgment of the Court of Appeal in Austin v Miller Argent (South Wales) Limited [2014] EWCA Civ 1021 for the issues before the Committee.

17. The Committee will be aware that the Court of Appeal dismissed the application by Mrs Austin (C-86) for costs protection in a private nuisance claim. The relevance of the judgment to the issues before the Committee is set out below. However, it is important to explain the Court of Appeal judgment in some detail. There appear to be 2 broad reasons for dismissing the appeal and therefore the costs application:

    1) While the Court of Appeal affirmed that the Aarhus Convention could apply to private nuisance proceedings it added that this required there to be a 'significant public environmental benefit' as a pre-requisite (see §17 & §22 of the judgment; discussed below).

       The Communicants consider this to be an error of law. They recognise that for the Aarhus Convention to apply a private nuisance claim does need to relate to an environmental concern, however a requirement for 'significant public environmental benefit' is too restrictive and is likely to have the effect of excluding a large number of environmental claims that should fall within the scope of the Convention. The Court of Appeal provides no authority for its finding.

    2) The Court of Appeal found that the facts of *Austin v Miller Argent* (and therefore C-86) are such that the case did not involve 'significant public environmental benefit'.

       This is a surprising conclusion. Even if the Convention did require a 'significant public environmental benefit' to arise from the proceedings (which is not conceded) the case brought by Mrs Austin would fall within its scope. It is correct that the proceedings are being taken by one individual but underlying the present proceedings is the application by 500 proposed claimants in a previous application for a group litigation order (GLO). These include local residents who have been effectively prevented from pursuing legal proceedings by the fear and threat of costs claims by the Respondent if they did pursue a claim. Thus, if ever there was a case that had 'significant public environmental benefit', it was the case of dust and noise from an opencast coal mine experienced by Mrs Austin. The practical effect of findings in (1) and (2) is to place an unduly high hurdle on any private nuisance proceedings being pursued and costs protection being afforded by the courts.

18. Further, the Court of Appeal held that even if it had concluded that a costs protection order was appropriate, then it would agree with the High Court judge

that the terms of this would be that a claimant's costs cap of £7,500 would be appropriate and a reciprocal cap of £40,000. A costs protection order in these terms would still render the proceedings prohibitively expensive.

19. Mrs Austin has applied to the Supreme Court for permission to appeal the Court of Appeal order and judgment. A copy of the facts and grounds of appeal, together with the application for costs remission, is attached. The grounds of appeal are, in summary:

    1) The Court of Appeal was wrong in law in its approach to the conditions under which an action in private nuisance will fall within Article 9(3).

    2) Consequently, the Court was wrong in finding that the Appellant's intended claim was not within Article 9(3) and should not attract costs protection.

    3) The Court of Appeal was wrong to hold that Article 9(2) of the Convention and Article 11 of the EIA Directive are not engaged.

    4) The Court of Appeal was wrong to find that the principles in Case C-240/09 Lesoochranárske zoskupenie VLK were not applicable to the exercise of discretion as to costs.

    5) The Court of Appeal was wrong to regard the Article 9(4) requirement that costs should not be prohibitive as no more than a factor to take into consideration when deciding whether to grant a PCO.

    6) The decision of the Court of Appeal was incompatible with the Appellant's rights under the European Convention of Human Rights.

The relevance of the judgment in *Austin v Miller Argent* to the Committee

20. The following points arising out of the judgment in *Austin v Miller Argent* are relevant to the issues before the Committee.

    1) The Court of Appeal found that the Aarhus Convention does apply to private nuisance claims ("… it would be wrong to exclude all claims of private nuisance from the scope of Article 9.3 …" §17 of the judgment) apparently, at this stage, without qualification, ("… irrespective of the potentially significant public interest in the wider environmental benefits …") and also at §21: "private nuisance actions are in principle capable of constituting procedures which fall within the scope of Article 9.3. …

    2) However, the Court of Appeal then (the Communicants say unlawfully) places a limit on the application of the Convention. Later, at §21 the Court states (contradicting its statement in §17) that: "… there must be a significant public interest in the action to justify conferring special costs protection on the claimant".

       At §22 the Court of Appeal concludes:

> "It seems to us that there are two requirements which have to be met before a particular claim can fall within the scope of the provision. First, the nature of the complaint must have a close link with the particular environmental matters regulated by the Convention, even although the action in private nuisance does not directly raise them. Second, the claim must, if successful, confer significant public environmental benefits. In our judgment, if on the particular facts the court were to conclude that the purpose of the claim was principally to protect private property interests and any public benefit was limited and incidental, it ought not to attract the procedural costs protections afforded by Article 9.4." (§22 of judgment)

The Communicants do not disagree with the first criteria, but strongly disagree with the second; there is no requirement that the claim must 'confer significant public environmental benefits' for the Convention to apply.

3) The Court affirmed the: 'merit in recognising the valuable function which individual litigants can play in helping to ensure that high environmental standards are kept, even if in the process they are also vindicating a private interest' (§17 of the judgment)

4) The Court of Appeal also affirmed the Communicants' view that it was unrealistic to rely upon public bodies to secure environmental protection stating that:

> "It seems to us unrealistic to believe that the powers conferred upon public authorities will suffice to achieve the Convention's objectives. Pubic bodies are often under staff and under resources and do not have the same direct concerns to uphold environmental standards as do members of the public. …" (§18 of the judgment).

5) Further, the Court of Appeal rejected the Respondent's submission (which was consistent with the UK's approach) that there are other remedies that a claimant should use to try to avoid the use of private nuisance see e.g. §16-17 of the judgment and also at §24 in which it was noted that the Court did not accept the analysis that the range of alternative procedures constituted compliance with the Convention.

6) On the extent that the Convention is engaged in domestic law, the Court of Appeal stated that in its view Article 9.4 was "… no more than a factor to take into account when deciding whether to grant a PCO …"

   The Communicants submit that this approach is inadequate if it results in uncertainty in costs in environmental matters; which it does. That is, the application of the Convention to ensure proceedings are 'fair, equitable, timely and not prohibitively expensive' should apply to all environmental proceedings. The certainty for this is not so contentious and since 1.4.13, the Civil Procedure Rules (CPR) have provided much greater certainty in relation to 'judicial review' proceedings, albeit that the UK government appears to insist (wrongly, in the Communicants' view) that the scope of the term 'judicial review' only applies to a particular type of environmental

proceedings, namely those public law proceedings that fall within CPR 54. (In fairness, on this point some UK judges appear to be taking a broader general approach applying the costs principles in CPR 45.41-44 to other comparable public law cases, see e.g. *Venn v Secretary of State* [2013] EWHC 3546 (Admin) a case where protective costs order (PCO) was granted for a public law challenge akin to judicial review (under s. 288 of the TCPA 1990) but in which the PCO is being challenged by the UK government on, among other grounds, (contrary to ACCC/2005/11) the planning permission is not an 'act or omission' within Article 9(3).

7) Dealing specifically with C-86's position, the Court of Appeal affirmed (or did not disturb) the High Court findings that the Communicant's private nuisance case had reasonable prospects of success. Noting that the High Court considered she had a 'reasonably arguable case' (§5 of the judgment).

8) Similarly, the Court of Appeal acknowledged the High Court finding that the communicant was of 'modest means', that public funding (legal aid) was not available and that insurance was not available. It also recognised that other residents who live in the vicinity would also benefit from a successful outcome in the litigation (§5 of the judgment).

9) However, and quite remarkably, the Court held that the case would only have limited public benefit and such that if would not fall within the scope of Article 9.3. As suggested at para. 16(2) above, if ever there was a case of private nuisance that may be regarded as an environmental claim it is C-86's claim to prevent noise and dust pollution from an opencast coal mine. Moreover, the Court of Appeal was aware that over 500 claimants had tried to bring a group action by applying for a GLO but the application was dismissed because the Judge was uncertain whether the claimants could afford to bring proceedings (costs protection by the Court was then sought but refused by the Court of Appeal in 2011). The 500 proposed claimants were then effectively prevented from any further claim due to costs uncertainty and the threat by the Respondent that if they issued further proceedings they would enforce costs orders against them.

10) Finally, the Court of Appeal did consider the possible terms of a PCO in the event that a PCO should have been granted and affirmed the High Court proposals of a cost cap of £7,500 and £40,000 respectively.

    The Communicants submit that these costs limits are unworkable because:

    a) Mrs Austin could not afford an additional costs liability of £7,500 on top of the costs liability now already incurred of around £7,500 and with a further minimum costs of £2,200 in court fees alone, if private nuisance proceedings were ever issued. In essence, well over £17,000 of costs liability. The costs already incurred and likely to be incurred is a relevant factor when assessing prohibitive expense see e.g. Case C-530/11 *Commission v UK* [2014] §§44, 49. Indeed, there is no rational comparison between the sums proposed by the Court of Appeal and what the UK considers as a <u>maximum</u> cost liability under CPR 45.41-44 for judicial review claims of £5,000 for an individual and £10,000 for a group.

b) The limit of £40,000 on Mrs Austin's own claim for costs if successful would mean that she would be unable to obtain adequate legal representation, even on the basis of her own lawyers working on a conditional fee agreement (CFA) (aka 'no win, no fee'). This is because the likely costs of private nuisance proceedings involve legal costs far in excess of £40,000. An estimate of her costs in the private nuisance case was around £195,000 in October 2012; the costs of the appeals not being predicted at that date (see e.g. Annex 5, pp 342-3 of the Communication bundle of Feb 2013).

However, there can be a reasonable limit on Mrs Austin's costs by application of the new costs budgeting provisions introduced since 1.4.13 in CPR 3.12-16, which were brought in to ensure that costs were reasonable and proportionate to the claim.

The underlying problem with the proposed PCO of £7,500 cap on the claimant's liability and £40,000 cap on the respondent's liability is that it fails to take account of the inherent inequality of arms that exists when an individual of modest means is taking on very well resourced opponent that, in this instance, is generating millions of pounds sterling each year from opencast coal mining.

11) Finally, the Court of Appeal has failed to address a key concern raised by C-86 that proceedings under the Convention must be 'timely' as well as fair, equitable and not prohibitive expensive. And, once again, the judicial system is failing the Communicant in this regard. That is, concern about noise and dust pollution has been carrying on since 2008 and the Communicant has been trying since then to resolve the concerns using informal negotiation, correspondence with the operator, contact with the Council and formal legal procedures.

B. To the communicants of ACCC/C/2013/85 and ACCC/C/2013/86 (the Party is welcome to comment if it so wishes)

1. Please summarize under which conditions, or in which types of cases, you consider a private nuisance claim to be the only adequate and effective legal instrument for an aggrieved person to challenge acts or omissions which allegedly contravene provisions of the national law relating to the environment. Please provide a list of such situations.

21. First, reliance by the UK on trying to get a regulatory body to take effective steps is not, in the Communicants' view, an effective remedy. This is because regulators either do not respond or, if they do, respond inadequately. As noted above, the Court of Appeal in *Austin v Miller Argent* agreed that this was not an alternative to private nuisance and it appears so from the submissions and evidence presented previously to the Committee (see the comments below on this point). Also, the Convention requires that private individuals are in a position to take action in their own right rather than have to rely upon another.

22. Thus, the only other purported alternative remedy raised by the UK are proceedings under s. 82 of the EPA 1990 for an abatement order in statutory

nuisance proceedings, which are, in essence, criminal proceedings in nature. The Communicants do not regard this option as an effective remedy for the reasons set out in their original communications together with their Joint Note of 14.1.14. In summary, the Communicants maintain that:

a) The scope of statutory nuisance, i.e. expressly defined pollution activities stated to be a nuisance in the statute, prohibits certain forms of environmental pollution from being considered at all under s. 82 see e.g. the definition of 'watercourse' does not for instance include water areas such as an estuary see e.g. *R v Falmouth and Truro Port Health Authority ex p. South West Water Ltd* [2001] QB 445. There is no such restriction on scope in private nuisance proceedings.

b) Within that narrower band of 'statutory' nuisances the application of the statutory defences of Best Practicable Means and reasonable excuse mean that the standard of environmental protection and regulation by court proceedings is inadequate. The Communicants explained in their Joint Note of 14.1.14 that the UK's suggestion that the defences do not apply was unrealistic.

c) s. 82 presents additional procedural and evidential hurdles including: the lack of pre-action judicial procedures, the lack of option to join cases or bring a group action (as attempted by Mrs Austin in C-86) and also noted below in relation to many other group litigation matters; and the higher burden of proof placed upon claimants to show that a nuisance exists.

d) Any proposed litigant in s. 82 proceedings must establish a nuisance existing at the date those proceedings are issued. This places an unrealistic burden on an applicant, particularly when the alleged nuisance is one of odour, noise or dust which may be influenced significantly by e.g. meteorological conditions or by a polluting activities change in operations. The burden of proving that a nuisance existed at the date of issued may be difficult.

e) Any abatement order in s.82 proceedings is likely to be ineffective in circumstances, where a sanction for non-compliance is limited to a fine of up to £5,000 plus a daily fine of up to £500. The cost of providing evidence of a breach of an order in any subsequent prosecution is, itself, likely to be prohibitively expensive.

f) The scope for paying compensation under s. 82 for past nuisance is limited.

g) There remains a potential risk of a costs claim by a defendant.

23. Annex 2 of the Communicants' speaking note for the meeting of 26.3.14 listed examples of case which they considered private nuisance was the only adequate and effective legal instrument to challenge acts or omission which contravened provisions of national law relating to the environment. A copy of the speaking note with Annex 2 is attached for convenience. In summary, this noted the following:

1) In relation to odour nuisance from a waste site: *Barr v Biffa Waste Services Ltd* [2010], private nuisance was the only effective form of proceedings;

reporting to the public body (Environment Agency) was attempted but inadequate, a claim for an abatement order would not be possible because odours were intermittent and may not be 'existing' at the date of the issue of claim, any claim for compensation for past nuisance would be inadequate under statutory nuisance/s.82 due to this being limited to nuisance for last 6 months (rather than 6 years in private nuisance) and a maximum compensation payment of £5,000 under the legislation.

2) *Re: continuing dust & noise from Ffos-y-fran opencast coal mine (Austin C-86).* Complaint over a number of years to the Respondent and public body was ineffective, an abatement order was impracticable, a claim for adequate compensation would only be available in private nuisance.

3) Noise from a scrapyard - *Thornhill v NMR* [2011] EWHC 1405 (QB). The Environment Agency and local authority failed to act over many years. An abatement order would not have been effective due to reliance upon the defence of 'Best Practicable Means' (BPM) and 'reasonable excuse'.

4) Noise from 2nd hand car auction site - *Thomas v MTCAL* [2013] Env. LR 12. The claimants complained over many years. The local authority concluded it was not a statutory nuisance, whereas the High Court found a private nuisance had existed. Compensation payable under s. 82 would have been inadequate.

5) Odours from a perfume factory - *Tonbridge 'odours'. Local authority report 26.11.13.* The Environment Agency and local authority failed to act over many years. Odours intermittent and therefore s.82 proceedings for an abatement order would not be practicable. It is possible that there would be 'no odour' at date s. 82 proceedings issued. Any compensation under s. 82 would be inadequate. The odours were experienced over many years.

24. Further examples of where private nuisance proceedings would be the only effective remedy and s.82 not available are listed below. These include at (10)-(22) a number of GLO cases involving long-standing nuisances over a number of years which affected large numbers of people. Section 82 proceedings would not have been effective because of the long-term problems, the levels of compensation payable and the procedural problems in the criminal process in bringing a large number of claims collectively (in contrast to private nuisance and civil procedures which allows precisely that):

6) Noise from scrap metal works *EMR, Shoreham by Sea (noise nuisance)* (2014). Local authority acknowledges disturbance but stated BPM being used. Claimant can no longer claim s. 82 proceedings because he has had to move out of his home due to noise. Compensation claim under s.82 would be inadequate with noise carrying on for over 6 years.

7) *Watson v Croft Promosport Ltd* [2009]. An injunction order granted by Court of Appeal limiting noise nuisance where previously an abatement notice (issued under s. 80 of the EPA 1990) had been withdrawn following the defendant's appeal.

8) *Willis v Derwentside DC* [2013] EWHC 738 (Ch). A claim in private nuisance relating to the escape of CO2 from coal mining seams a number of years prior to the action and a failure to remedy the inherent problem.

9) *Vernon Knights Associates v Cornwall Council* [2014] Env LR 6 in which intermittent flooding and consequent damage arose over a number of years and compensation would have been inadequate under s. 82.

10) *Nantygwyddon litigation* : GLO of 5/08/01 in Cardiff District Registry – GLO defining issues: Whether the management by the Defendant of the Nant-Y-Gwyddon landfill site since March 1995 constituted a nuisance to the Claimants and/or negligence on behalf of the Defendant.

11) *Trecatti Group Litigation*, GLO of 26/11/01 in Cardiff District Registry Defining issues: Whether the management by Biffa Waste Services Ltd of the Trecatti landfill site since July 1994 constituted a nuisance to the Claimants and what, if any, relief are the Claimants entitled to in respect of any such nuisance.

12) *United Utilities Sandon Dock Group Litigation*, GLO of 20/03/02, Liverpool District Registry. Defining Issues: Whether the defendant is liable to the claimants in respect of losses sustained as a result of allege exposure to odour or other emissions from the defendant's wastewater treatment works at Sandon Dock, Liverpool.

13) *Newton Longville Group Litigation*, GLO of 27/03/03, London, Technology and Construction Court (TCC). Defining Issues: Common or related issues of fact or law namely whether the management by the Defendant of the Newton Longville landfill site has constituted a nuisance to the Claimants.

14) *Mogden Group Litigation*: GLO of 21/12/05. London TCC. Defining Issues: To determine whether the Defendant is liable to the Claimants in respect of odour emissions and / or in respect of mosquitoes from the Mogden Sewage Treatment Works.

15) *Parkwood Group Litigation*. GLO of 23/08/06, Sheffield District Registry Defining Issues: Whether the Defendant (Viridor Waste Management Ltd) is liable to the Claimants in private nuisance by reason of malodours, litter, dust, scavenging birds, flies and other pests from the landfill site at Parkwood, Sheffield.

16) *Westmill Landfill Group Litigation*: Order of 27/03/09. London, Queen's Bench Division. Defining Issues: Whether the Defendant is liable to the Claimants in respect of odour emissions from Westmill Landfill site.

17) *The Norton Aluminium Group Litigation*: Order of 26/05/10. London, Queen's Bench Division Defining Issues: Whether for the period beginning on 26th February 2002 the Claimants' complaints of nuisance as a result of phenolic, sulphurous or other odours, noise, smoke and fumes and particulate matter/dust are complaints about emissions caused by the Defendant as a result of the management and operation of its foundry

business at Norton Canes, Cannock, Staffordshire. (two other common or related issues of fact or law are included)

18) *The Wildriggs Rendering Site Group Litigation*, Order of 5.05.11. London, Queens Bench Division. Defining Issues: 1. Whether, for the period beginning on 1st January 2005 the Claimants' complaints of nuisance as a result of odours are complaints about emissions caused by the Defendant as a result of its operation of its Wildriggs Rendering Site at Greystoke Road, Penrith, Cumbria, CA11 0BX; 2. What is the distance beyond which the Claimants' complaints of nuisance are unlikely to have been of such a degree as to constitute an actionable nuisance; 3. What levels of damages should be awarded to the Claimant if their complaints of nuisance are justified; 4. Whether the Claimants are entitled to injunctive relief.

19) *The Fleetwood Group Litigation*. GLO of 15.11.12: London, Queens Bench Division. Defining Issues: Whether the Defendant is liable to the Claimants for nuisance caused by odour emissions from the Fleetwood Waste Water Treatment Works.

20) *The Monckton Group Litigation*. GLO of 7.12.12: London, Queens Bench Division. Defining Issues: Whether the Defendant is liable to the Claimants for nuisance caused by odour emissions and/or dust and/or noise from the Monckton Coke and Chemical Works.

21) *The Hafod Landfill Group Litigation*, GLO of 22.10.13: London, TCC. Defining Issues: 1. Whether the Defendant is liable to the Claimants for nuisance caused by odour emissions from the Hafod Landfill Site; 2. Whether the Claimants are entitled to an injunction.

22) *The Lyme & Wood Landfill Group Litigation*. GLO of 21.11.13: London, TCC. Defining Issues: 1. Whether the Defendant is liable to the Claimants for nuisance caused by odour emissions from the Lyme & Wood Landfill Site. 2. Whether the Claimants are entitled to an injunction

25. Two concluding points emerge from the above discussion.

a) The use of Group Litigation Orders (GLOs) as an efficient means of bringing nuisance cases affecting a number of people has been prevented by the introduction of s. 46 of LASPO. As noted above, Mrs Austin and other residents originally sought to secure a GLO but the application was dismissed due to uncertainty as to whether the proposed claimants could afford the proceedings. The basis of the dismissed application was challenged unsuccessfully on appeal.

b) The UK's suggestion of s. 82 proceedings as an alternative to private nuisance is, in reality, a much weakened form of environmental regulatory control compared to private nuisance which is, in itself, a 'national law relating to the environment' based upon the common law rather than legislation. For the reasons noted above, s. 82 procedures will enable a polluting activity or operator to continue polluting by virtue of the defences available, the greater evidential burden on a claimant, the greater procedural burdens on an applicant and the lower financial risk to an operator.

2. Please give your view on the extent which the amendments of the Civil Procedure Rules (England and Wales) that entered into force on 1 April 2013, (including the definition of an "Aarhus Convention claim" in section 45.41(2) of those Rules), will ensure that private nuisance claims are not prohibitively expensive in practice.

26. The definition of an 'Aarhus Convention claim' in 45.41(2) limits the fixed costs regime introduced by CPR 45.41 to environmental judicial review claims (i.e. public law challenged). Private nuisance claims do not benefit from the fixed cost regime. CPR 45.41 therefore does nothing to help ensure compliance with Articles 9(4) of 9(5) of the Convention in so far a private nuisance claims are concerned.

Conclusion

27. The Communicants noted in the conclusion to their speaking note of 22.3.14 that there is a very simple remedy to the concerns address in C-85 and C-86 which is to introduce one-way costs shifting in private nuisance claims and indeed all proceedings which engaged the Aarhus Convention. The justification for this is the inherent public interest in protecting the environment in which individuals have a valuable and legitimate role to play.

Stephen Tromans QC

Paul Stookes

Hugh James Solicitors (for C-85)

Richard Buxton Environmental & Public Law (for C-86)

5 September 2014