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 SPEAKING NOTE
For meeting 26.3.14

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1. The Communicants for ACCC/C/2013/85 (ELF) and 86 (Mrs Austin) have collaborated to prepare this Joint Speaking Note. The Communicants submit that the UK has enacted legislation which restricts the ability of individuals to bring claims in environmental nuisance without incurring or being at risk of incurring prohibitive expense. In doing so, the UK has restricted access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of the national law relating to the environment contrary to article 9 of the Convention. This is a systemic error, of which the case of the Communicant in ACCC/C/86 provides a concrete example. The Note concludes with a suggestion as to how the systemic error could readily be rectified.

2. There are three parts to the Communicants' case:

   (1) Private nuisance proceedings concerning environmental matters fall within the scope of Article 9 of the Convention.

   (2) By enacting section 46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 (LASPOA 2012), the UK government had made it prohibitively expensive for many individuals to bring claims in private nuisance in relation to environmental matters.

   (3) Private nuisance claims provide a key means of remedying and compensating environmental harm; removing the availability to take

proceedings in private nuisance will result in gaps in access to environmental justice which cannot be filled by alternative remedies.

3. The communications of 18.9.2012 (C/85) and 28.2.13 (C/86) set out the factual and legal background and the Communicants' detailed submissions on non-compliance. The Communicants also submitted a joint reply to the UK's response on 14.1.14. This Note does not repeat those submissions. Rather it serves to bring together the Communicants' respective arguments (references are provided to relevant passages of the Communications).

4. In order to demonstrate that domestic remedies in relation to environmental matters are not available as a result of section 46 LASPO 2012, the communicants also provide examples of attempts to bring private claims in nuisance which have been prevented, or would now be prevented by the application of s. 46.

(1) Private nuisance proceedings fall within Article 9 of the Convention

5. The first issue is whether Article 9(3) of the Convention applies to private nuisance claims concerning environmental matters. This is addressed at paragraphs 6 to 14 of ELF's written submissions and paragraphs 37 to 43 of Mrs Austin's written submissions.

6. As is made clear at paragraph 3 of the Communicants' Summary Note on the UK Response dated 14.1.14, it is not suggested that all private nuisance claims fall within the scope of the Convention; rather only those that concern environmental matters. To give an example, a simple neighbour dispute over tree roots would be a claim in private nuisance, but it is not suggested that it falls within the Convention. On the other hand, a dispute over noise from a car racetrack, or over odours from a waste facility are part of the national law concerning the environment. In the recent decision of the Supreme Court in Coventry v. Lawrence [2014] UKSC 13, for example, at para. 183 Lord Carnwath pointed to the continued importance of private nuisance even in an age where there are many statutory planning and environmental controls:

> "After more than 60 years of modern planning and environmental controls, it is not unreasonable to start from the presumption that the established pattern of uses generally represents society's view of the appropriate balance of uses in a particular area, taking account both of the social needs of the area and of the maintenance of an acceptable environment for its occupants. The common law of nuisance is there to provide a residual control to ensure that new or intensified activities do

> not need lead to conditions which, within that pattern, go beyond what a normal person should be expected to put up with."

7. The UK government does not contend that private nuisance proceedings cannot raise environmental concerns and therefore fall within the scope of article 9(3). Nor could it: the Compliance Committee found in its final report relating to Communication ACCC/C/2008/23 that that law of private nuisance may concern the law relating to the environment and, that when it does so, claims will fall within the scope of Article 9. The Committee (para. 45) found that in the context of that case (a claim for an injunction to restrain the emission of offending odours) the law of private nuisance was part of the UK's law relating to the environment and therefore within the scope of Article 9(3). The finding of the Committee in that communication was endorsed by the Fourth Session of the Meeting of Parties in Decision IV/9i. An argument that private nuisance cannot be within the scope of Article 9(3) is therefore hopeless. Rather, the UK Government's position appears to be that only a small number of private nuisance cases concern the law relating to the environment.

8. It therefore appears to be common ground that private nuisance cases are capable of constituting environmental claims within the meaning of Article 9(3) of the Convention. Private nuisance is of course not a form of proceeding unique to the UK – the legal systems of many parties include civil procedures giving private citizens the ability to take action against harmful emissions from nearby properties and to seek either damages or an injunction.

9. The question of whether a particular private nuisance claim will fall within the scope of Article 9(3) will be a fact-sensitive enquiry. The starting point will be that that "environment" is defined broadly under the Convention. This has been reiterated in a number of decisions of the ACCC, including most recently the findings and recommendations of the Aarhus Convention Compliance Committee in relation to communication ACCC/C/2011/63 (Austria). The Committee noted that:

> 52. Article 9, paragraph 3, is not limited to "environmental laws", e.g., laws that explicitly include the term "environment" in their title or provisions. Rather, it covers any law that relates to the environment, i.e. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment.
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> […]

> 54. The broad understanding of "environment" under the Convention is drawn from the broad definition of "environmental information" under Article 2, paragraph 3, which also extends to "biodiversity and its components, including genetically modified organisms". The fact that components of biodiversity have been removed from their habitat does not necessarily mean that they lose their property as biodiversity components."

10. Applying these principles, the Communicants submit that various categories of private nuisance claims are likely to fall within the scope of the Convention. Nuisance can occur where environmental conditions caused by a defendant result in damage to property or in undue interference with objectively reasonable levels of enjoyment of property. Therefore examples would include: damage to crops or other property by dust or other polluting airborne emissions; odour which affects enjoyment of property; noise which has the same effect; vibrations which cause damage to property; light pollution; the escape of hazardous or radioactive material which contaminates land; flooding; the pollution of watercourses, lakes or canals.

11. The UK's Government's suggested distinction between actions brought to protect property rights and actions to vindicate general public rights to a clean environment is untenable. Private nuisance depends upon the claimant showing some interference with rights in land. An action to protect "common" rights such as the environment in an unowned forest, or to clean air generally in an urban environment, or to a clean beach, would not by definition be capable of being brought as a private nuisance claim. Environmental problems may manifest themselves equally as adverse effects on the enjoyment of property such as noise or odours. The law which provides a remedy in respect of such problems is plainly a law relating to the environment.

(2) Section 46 LASPO 2012 creates a real and systemic barrier to claims in private nuisance

The impact of section 46 LASPO 2012

12. A detailed background to the introduction of section 46 LASPO 2012 is set out at paragraphs 65 to 81 of ELF's submissions. Section 46 entered into force in April 2013.

13. In brief, section 46 LASPOA removes the availability of After the Event (ATE) insurance to: (a) fund the costs and expenses of private nuisance proceedings and (b) cover the risk of exposure to an opponent's costs.

14. The availability of ATE insurance has been critical to ensuring that private nuisance proceedings can be pursued. This is because environmental nuisance cases are expensive to run – legal costs almost always exceed £100,000 and often can exceed £2 million per party – and damages awarded (if they are sought at all) are often moderate – on average no more than £ 2000 per claimant per year of nuisance in cases where the nuisance consists of interference with normal enjoyment of land. The appropriate remedy in some cases may be an injunction to restrain the nuisance rather than damages. There is thus in general a significantly disparity between the sums at stake by way of damages and the costs involved in bringing the claim.

15. Consequently, in the absence of insurance, private nuisance proceedings are prohibitively expensive for all those that are unable to afford the risk of the costs and expenses of private nuisance proceedings and the risk of exposure to an opponent's costs.

16. Mrs Austin's case provides an example of a case where the risk of exposure to opponent's costs has proved prohibitive (where the prospective claimants in an environmental nuisance claim faced an adverse costs order of £257,104 in respect of a preliminary application for a Group Litigation Order). Another recent example is the case of *Derek Barr & Others v Biffa Waste Services Limited*, discussed at paragraph 16 of ELF's submissions, where claimants in an environmental nuisance claim were ordered to pay £1,900,000 of the defendant's costs. The decision of the first instance judge was reversed on appeal, and the matter is shortly to be re-heard, with further costs being incurred. A list of cases where claimants would have been prevented from taking legal action against environmental harm without the benefit of ATE insurance is set out at paragraph 76 of ELF's submissions. A further list of claims in nuisance which are not being pursued as a result of the lack of availability of ATE insurance is attached to this note at Annex 1.

Before the Event insurance is no answer

17. The UK government argues that Before the Event (BTE) insurance will enable claims in to be brought in private nuisance. In support of this contention, the UK's submissions adopt without further scrutiny or question Lord Justice Jackson's conclusion in *The Jackson Report* that if claimants have BTE insurance cover as part of their household insurance, they will be able to bring a civil action without the need for ATE insurance.

18. However, as explained in detail at paragraphs 58 to 64 of ELF's submissions, BTE insurance is not available in practice for the overwhelming majority of proposed private nuisance claims.

19. The communicants rely on the results of research carried out by Hugh James Solicitors on the availability of BTE insurance in prospective environmental nuisance claims: see paragraphs 59 to 61 of ELF's submissions. These show that out of a sample of 4,333 potential claimants with legitimate environmental nuisance claims, only 35 (0.08%) had an effective BTE insurance policy. The reasons for lack of availability relate to restrictions placed on the cover available (exclusion of cover for group actions, actions relating to work by or under the order of government, public or local authorities and applications for judicial review) and strict time limits for notifying an insurer of the nuisance problem.

20. The UK government has failed to engage with this evidence of the lack of effective BTE Insurance to cover environmental nuisance claims.

21. In any event, the Convention requires parties to ensure that members of the public have access to procedures which are not prohibitively expensive. The UK government has no power to ensure that BTE insurance is made available, or is made available on acceptable terms. It is no answer to the requirements of the Convention to point to insurance which may or may not be available by private enterprises on commercial terms. This does not create the conditions of certainty required to ensure compliance.

22. One consequence of the UK's approach of reliance upon BTE insurance is that it appears to suggest that private nuisance proceedings are an acceptable form of environmental regulation but only if you can afford it or secure insurance to cover your costs.

Alternative domestic remedies are not available

23. Private nuisance proceedings are an important, and often the only, judicial procedure available to the public to prevent environmental pollution and to compensate for harm. The Compliance Committee, the UK and the UK judiciary have recognised this: see e.g. the findings at ACCC/C/2008/23, paras 45-47; the UK's own submissions in ACCC/C/2008/23, para 47 and ACCC/C/2008/33 para 79; and the Court of Appeal in *Morgan & Baker v Hinton Organics (Wessex) Limited* [2009] EWCA Civ 107, para 44 (cited at para. 7 of ELF submissions).

24. The Communicants agree that other dispute resolution mechanisms available in the UK may also fall within the scope of article 9(3), for example judicial review and statutory nuisance. However, these alternatives fail to provide an effective alternative judicial remedy to prevent environmental pollution or to compensate for environmental harm. The communicants have provided detailed submissions as to the inadequacy of 'alternatives' to private nuisance in environmental cases. For ease of reference there are found at:

    a. Paragraph 19 to 73 of submissions on behalf of ELF;

    b. Paragraphs 49 to 71 of submissions on behalf of Mrs Austin;

    c. Paragraphs 6 to 16 of the Communicants' Summary Note on the UK Response.

25. In summary, the Communicants' concern is that in a significant number of cases concerning environmental harm, potential 'alternatives' to private nuisance are simply not realistic options and/or provide no effective remedy being either:

    a. ineffective (such as the ombudsman); or,

    b. limited in scope such that it will not be possible for the public to take legal action to prevent or seek compensation for many common environmental concerns. For statutory nuisance, this is because of the statutory limits of the legislative definition of 'statutory nuisance' and because of the operations of specific defences.

26. In any event, if (as is the case) private nuisance claims are within the scope of Article 9(3) then the UK Government must ensure that it is not a prohibitively expensive procedure: see the findings in ACCC/C/33/2008 para. 141: *"... failing to ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive ..."*

27. The remainder of this note supplements those detailed submissions, demonstrating by reference to UK cases (a) that private nuisance claims provide a key means of remedying and compensating environmental harm and (b) the inadequacy of 'alternatives' to private nuisance in environmental cases.

The range of environmental nuisance cases

28. The relevance and role of private nuisance in securing redress for environment harm is clearly illustrated by examples of recent private nuisance proceedings brought in the UK:

a. Odour nuisances cases:

- *Barr & Others v Biffa Waste Services Limited:* Over 150 claimants are seeking damages for loss of amenity for odour nuisance allegedly caused by the Defendant's landfill site near Ware, Hertfordshire.

- *Dobson & others v Thames Water Utilities Limited:* Judgment for over 1,000 residents for nuisance caused by odour from the Mogden Sewage Treatment Works

- *Anslow & Others v Norton Aluminium Limited:* Judgment for over 130 claimants in relation to odour nuisance caused by the Defendant's castings foundry in Norton Canes, Cannock.

- *Parkin & Others v Alba Proteins (Penrith) Limited & Others:* Claimants seeking damages for loss of amenity for odour nuisance allegedly caused by the Defendant's animal rendering site in Penrith, Cumbria. Group Litigation Order in force and the trial is listed for July 2014.

b. Noise nuisances

- *Coventry v Lawrence:* Claim in private nuisance in relation to noise nuisance from a speedway and stock car racing stadium.

- *Thornhill v SITA:* claim in private nuisance in relation to noise and vibration nuisance from a scrap metal yard.

- *Bontoft v East Lindsey DC:* claim in private nuisance against defendant local authority for noise created by refuse vehicles leave the defendant's depot.

c. Dust nuisances

- *Austin v Miller Argent:* private nuisance claim in respect of dust and noise generated by opencast mine operation. Proceedings awaiting a decision by the court affording costs protection.

d. Flooding

- *Bybrook Barn Garden Centre Ltd v Kent County Council:* successful claim in private nuisance against highway authority for flooding which resulted from the fact that a culvert on the authority's land impeded the flow of a natural stream.

- *Green v Lord Somerleyton:* successful claim in nuisance after claimant's land has been seriously damaged by floodwater emanating from a lake owned by the defendant.

e. Damage

- *Shell UK Ltd v Total UK Ltd:* claim in private nuisance following an explosion at the Buncefield oil storage depot

Cases of environmental harm where alternative remedies would not have been available

29. To illustrate this point and to demonstrate that alternative domestic remedies are not available, the Communicants have provided a set of examples of scenarios where 'alternative' remedies would not have been available. These are set out in Annex 2 to these submissions.

30. It is clear from these examples that removing the availability to take proceedings in private nuisance will result in gaps in access to environmental justice which cannot be filled by alternative remedies. Nuisance is a critically important means of access to justice in this regard.

Conclusion

31. *The Jackson Report on Review of Civil Litigation Costs* (December 2009, Final Report) recommended the abolition of the rules allowing recoverability of ATE premiums. In respect of the Aarhus Convention, Lord Justice Jackson was not sure that abolition would give rise to such widespread problems as to put the UK in breach of its obligations under the Convention. It is clear in retrospect that widespread problems have arisen. Lord Justice Jackson concluded as a fallback, that if he was wrong it emerged that the abolition of recoverable ATE insurance premiums gave rise to a breach of the Aarhus Convention or were an obstacle to access to justice for claimants in private nuisance then there was a clear remedy, that of introducing qualified one-way costs shifting for claimants in private

nuisance claims falling within the Convention (paragraph 4.2, p. 318). To date and despite requests to do so, the UK has failed to address this gap.

32. The Communicants contend that this situation means that the UK Government has failed to ensure that costs for private nuisance, being a procedure subject to Article 9 is not prohibitively expensive, has failed to provide any legally binding directions to ensure implementation of Article 9(4) in a clear, binding and transparent manner, and has failed to ensure effectiveness pursuant to Article 9(5) by removing or reducing financial and other barriers to access to justice.

33. These are errors of a systemic nature. The Communicants submit that they could be rectified simply (as Lord Justice Jackson acknowledged) by a change to the Civil Procedure Rules to provide that in private nuisance proceedings relating to the environment within the meaning given to the environment by Article 2(3) of the Convention, then the rules on qualified one-way costs shifting which currently apply to personal injury claims under CPR 44.14 – 44.16 would apply.

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ANNEX 1
Examples of claimants unable to proceed

Activity	*Nuisance*	*Area*	*Approximate no. affected*
Intensive poultry farm	Odour	Lincolnshire	100
Landfill site	Dust	Gloucestershire	75
Landfill site	Odour	Tyne and Wear	100
Composting site	Odour & flies	Dorset	75
Landfill site	Odour	Northampton	200
Landfill site	Odour	Buckinghamshire	100
Landfill site	Odour	Berkshire	100
Rendering plant	Odour	Nottinghamshire	50
Composting site	Odour	Dorset	20
Scrap metal recycling	Noise & odour	Warrington	75

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ANNEX 2
Alternatives to private nuisance unavailable

Set out below are scenarios where alternatives to private nuisance have been unavailable.

1. Complaint to the relevant regulator or local authority

This should be a first step in resolving a nuisance. It is highly likely that all claimants in an environmental private nuisance claim would have been advised to do this. However, it is often (too often) ineffective e.g.

a) In *Barr v Biffa Waste Services Ltd* [2010] Coulson J noted:

> 579. I consider that the EA should have been much more forceful with Biffa. For example, they might have said that Biffa could only operate the site if, between April and September (when the bulk of the complaints were generated), they only worked at low levels. If that meant having more than one cell open at a time, then so be it. The EA should also have been approaching the odour problems in the technical and detailed way that Biffa's Mr Allum did, and should have made the same careful recommendations (see paragraphs 105-108 above). In my view, the EA should have been proactive in telling Biffa what they could – and what they could not – do, and should have threatened to rescind the permit if Biffa did not co-operate. …

b) Complaint of dust & noise re Ffos-y-fran opencast coal mine (Austin C-86)

See e.g. the statement of Robert Griffin 19.10.12 (former Councillor), (C-86, Annex 5 pp 347-352:

> "… 8. In my view, the pollution problems are compounded by the fact that there was no trustworthy recording basis of either noise or air quality which could be consulted retrospectively. This remains the case today. There is nothing that enables either a local resident or a council officer to look at dust or noise levels of, say, the last week and for these to be independently assessed.
>
> 9, I recall one occasion in Council that I opened a motion that the County Council should obtain some effective air quality and noise monitoring equipment (Exhibit RLG, pages 11-13). I got shouted down on the basis that the complaints recorded by

> the Council were not significant enough to justify monitoring. I found this perplexing. It was extraordinary that a public body with one of the largest opencast coal mines in the country situated adjacent to its main town centre was simply uninterested in assessing whether the opencast was giving rise to excessive pollution. …
>
> 12. I had as much more concern about the lack of diligence by Council officers than of the Defendant. My view was that the environmental health officers at the Council should be monitoring and controlling the Defendant's actions and they were simply not doing this. The Defendant was merely carrying on and seeing what it could get away with. "[349-350]

c) *Thornhill v NMR* [2011] EWHC 1405 (QB)

The High Court reached a finding of noise nuisance following many years of complaints and failure to act by the EA and local authority (see e.g. the discussion at paras 31-47).

d) *Thomas v MTCAL* [2013] Env. L.R. 12

In *Thomas*, the Claimants had complained over many years to the local authority who consistently concluded that the noise was not a statutory nuisance. While the High Court found a private nuisance had existed. On this, the Judge noted:

> ". Not surprisingly, the defendant relies heavily upon the documentary evidence obtained from the local authority. One of my difficulties, of course, is that none of the evidence has been challenged by cross-examination and, to repeat, the claimant's evidence is that officers of the local authority were less than vigilant when investigating justified complaints. All that said it seems to me that the documentary evidence generated by the local authority is bound to assist the defendant's case. There is no real suggestion that the local authority's officers were partial; if there is an implicit suggestion to that effect in the evidence of the First Claimant, in particular, there is no sound basis upon which I could reach such a conclusion. ….
>
> 79 However, I am satisfied that noise from the lower yard has occurred with a frequency and to an extent which does amount to a nuisance. Despite the lack of records for the period 2005 to 2007 I am satisfied that this was the state of affairs during those years as well as doing the period from 2008 to the commencement of proceedings for which records exist.
>
> 80 I make that finding notwithstanding the records from the local authority to which I have referred in [36] to [39] above. I am satisfied that the nature and extent of the investigation undertaken by the local authority as disclosed by those records was not such that it can displace the conclusions I have reached about nuisance based upon the claimants' own records and the evidence which I have identified as supporting that evidence."

e) Tonbridge 'odours'. Local authority report 26.11.13:

> "The Environmental Protection Team (EPT) have been investigating complaints of odour in Tonbridge for a number of years. The numbers of complaints received have increased significantly over the last two years. …
>
> The … Council's environmental protection powers in this matter are relatively narrow. For us to be able to take any formal action in this case, we have to be able to evidence that the Company is causing a statutory odour nuisance in accordance with the Environmental Protection Act 1990. To date this test has not been substantiated by either officers or our consultants.

> Residents are now raising a number of new concerns that our outside our statutory remit and which we have sought to resolve by involved other agencies as described above. Although our statutory role is relatively narrow here, this case remains a high priority for the EPT to deal with using informal means.
>
> We are concerned, nevertheless, that a number of residents are dissatisfied with the Council's apparent ability to improve the odour emissions. This cannot be in any way due to the lack of a professional approach and dedication of the EPT, which has been very sound. It is more to do with the understandable uncertainty and consequential frustration amongst the public at large about the responsibilities and powers available to the Council in a difficult case such as this. Commonly, the perception is that the Council is all powerful in restricting and controlling what the company can do; that is not the case." (see page 17-23 below)

2. Complaint to local authority to pursue statutory nuisance under s. 80 of the EPA 1990

This approach is one aspect of (1) above, and the complaints in *Austin, Thornhill, Thomas,* and the *Tonbridge odour case* would all relate to a request for s.80 statutory nuisance to be pursued. There is more evidence of this approach being ineffective where a private nuisance will exist e.g.

a) EMR, Shoreham by Sea (noise nuisance):

> (local authority letter of 11.2.14) "… although I acknowledge the noise from the scrap metal activity is likely to cause disturbance, during the daytime operating hours, I am satisfied EMR are using Best Practicable Means to minimise noise from their operation. Given EMR have a statutory defence against any nuisance action I must advise that the Council can not progress your complaint any further." (p. 24)

b) Coventry v Lawrence [2014] UKSC 13

The Supreme Court recently held that the High Court was correct to reach a finding of nuisance notwithstanding that the local authority had issued a statutory nuisance abatement notice in 2007 requiring certain works to prevent nuisance and that those works had been carried out in 2009 (see e.g. §14) and had failed to stop the nuisance.

c) Environmental nuisances excluded by the scope of the EPA 1990.

Paragraphs 22-24 of C-85 summarise where statutory nuisance will not cover environmental nuisances simply because it is excluded by the statutory definition including:

- dark smoke from business premises, *Anthony v Coal Authority* [2005] EWHC 1654 QB.

- Fumes or gases from business premises.

- Insects from non-business premises.

- Dust from certain activities and non-business premises.

- Artificial light from a range of excluded premises.

- Noise from military buildings and non-civil aircraft – *Dennis v MoD* [2003] EWHC 793

- Noise from traffic etc. *Bontoft & others v East Lindsey DC* [2009] EWCA, *Halsey v Esso Petroleum,*

- Harm from contaminated land, *Blue Circle Industries v MoD* [1999] Env LR 22.

- Shadowing and loss of light, *Tamares v Fairpoint Properties Ltd* [2006]

3. Individual proceedings under s. 82 of the EPA 1990

The examples limitations to the 'alternatives' noted in (1) and (2) above apply equally to s. 82 of the EPA 1990. Additionally there are further practical problems to overcome which are set out in detail in the Communications relating to procedure and evidence.

4. Complaint to the Ombudsman

Individuals can complain to the Ombudsman. However, the Ombudsman will not investigate the environmental harm itself but whether a public body has acted in a way that can be described as 'maladministration': www.lgo.org.uk. If a local authority has taken what in public law terms may be regarded is 'reasonable' – and being 'unreasonable' is often cited as being a very high hurdle, then there will be no finding of maladministration.

Even if the Ombudsman has made a finding of 'maladministration' it can only make recommendations to a local authority to act. The ineffectiveness of the Ombudsman is evident from *R (Rayner Thomas) v Carmarthenshire CC* [2013] EWHC, §5 in which Burton J noted that the Claimant complained about the Defendant's delay and alleged maladministration to the Ombudsman who delivered a report dated 29.3.11 which noted:

> "79. [The Claimant] has spent a considerable amount of time and money in trying to ensure that the development on her boundary, both authorised and unauthorised, does not pollute her land. This has proved a frustrating and stressful experience for her during a time of serious ill-health and has yet to be resolved. …
>
> 80. The planning history reveals the piecemeal nature of the development. Despite its situation in a rural environment, the site formerly housed a colliery and given that previous use, it is understandable that the Council believes that such a brownfield site is suitable for the use to which it is now being put which is a coach depot and driver training centre providing local employment.
>
> 81. I believe, however, that the recent planning history which I have included in this report in some detail discloses an inconsistent and confused approach by the Council's Planning Department. …
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> …
>
> 88. … To remedy the injustice caused to [the Claimant] by this maladministration, the Council should resolve the outstanding issues as speedily as possible. … If the proposed s106 agreement cannot be signed and the consent cannot be issued, then given that the Enforcement Notice is in existence and the date for compliance has passed, prompt consideration should be given to the issue. …
>
> 89. I also believe that the stress and frustration suffered by [the Claimant] Mrs T due to the Council's failings should be recognised by a financial payment of £1,000 to recompense her in some way for the considerable time and effort she has been put to try to protect her land. …"

Notwithstanding the above, the pollution problems of sewage and surface water discharge continued and a challenge to the permission allowing this was necessary.

5. Judicial review of a failure to act

As with (4) and a complaint to the Ombudsman, judicial review of a failure to act does not address the environmental harm but can only review whether a public body has acted unlawfully in not acting to address the concern. See e.g. the recent discussion of irrationality in relation to noise nuisance from a multi-use games area in *May v RDC* [2014] EWHC 456 (Admin) and the subsequent grant of planning permission by a public body when there was repeated advice from pollution officers that the noise was likely to cause a nuisance. In particular at §35 the Judge said this:

> "… I have ultimately concluded that the decision of the committee cannot be properly characterised as one which was irrational. …"

See also the skeleton argument for the Defendant which noted:

> §5. Further, whilst an allegation of perversity is in principle within the scope of judicial review, nonetheless "*the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits*".
>
> …
>
> §14. It is clear to any reasonable reader of the Planning Committee's summary reasons at [**B/204**] that the Committee was not applying a test of whether the impact of removing the condition restricting hours of use would result in a statutory nuisance or a private law nuisance claim."

6. Private prosecution

The Communicants are not aware of any occasions where an individual has used a private prosecution as a mechanism for resolving environmental harm and where private nuisance proceedings were more appropriate. This is unsurprising. The concerns are set out in detail in the communications, however an indication of the approach to private prosecutions in environmental matters is found in *R v Anglian Water Services Ltd* [2003] EWCA Crim, 2243, a case relating to pollution of a water course, and in which Scott-Baker LJ noted that:

> 3. This was a private prosecution brought by Mr Hart, a member of the public. The Environment Agency offered to take over the case but this offer was rejected by Mr Hart. This case, and others like it, should be prosecuted by the Environment Agency rather than by an individual member of the public and it is unfortunate that it was not. We have not explored the reason in any detail. Suffice it to say Mr Hart thought the Agency was dragging its feet, whereas the Agency said it was gathering evidence. Mr Hart felt the Agency lacked determination in discharging its responsibilities. ...

TONBRIDGE & MALLING BOROUGH COUNCIL

LOCAL ENVIRONMENTAL MANAGEMENT ADVISORY BOARD

26 November 2013

Report of the Director of Planning, Housing and Environmental Health

Part 1- Public

Matters for Recommendation to Cabinet - Non-Key Decision (Decision may be taken by the Cabinet Member)

1 TONBRIDGE ODOUR UPDATE

Summary
This report provides an update on the continuing issue of odours in Tonbridge.

1.1 Background

1.1.1 As Members will recall the Environmental Protection Team (EPT) have been investigating complaints of odour in Tonbridge for a number of years. The numbers of complaints received have increased significantly over the last two years. Earlier this year Drytec, a factory producing fragrances and food flavourings, located in close proximity to the town centre, publically took responsibility for being the source of the majority of odour complaints.

1.1.2 The Borough Council's environmental protection powers in this matter are relatively narrow. For us to be able to take any formal action in this case, we have to be able to evidence that the Company is causing a statutory odour nuisance in accordance with the Environmental Protection Act 1990.To date this test has not been substantiated by either officers or our consultants.

1.1.3 At the last Board meeting, in September 2013, Members were advised that the trial of the odour neutralising equipment installed at Drytec was due to finish at the end of September. It was reported that complaint levels had increased during the period of the trial but the Company had further work in hand intended to improve the effectiveness of the neutraliser. At that time Drytec had also been strongly advised to improve their housekeeping on site (particularly in relation to the storage of materials) and their management of the premises, to which they do seem to have responded positively.

1.2 Trial Period

1.2.1 The trial period for the odour neutralising equipment lasted from end of May to the end of September 2013.

1.2.2 There were a number of technical problems encountered during the trial, the most significant being the incorrect location of the dosing nozzles for the neutraliser by the supplier. These were re-positioned on 28 August. Throughout the monitoring period officers effectively continued daily monitoring and maintained frequent communication with Drytec via e-mail/telephone calls to update them on complaint levels and held fortnightly review meetings with the site manager. We have also been in direct contact with the Managing Director of the company.

1.2.3 A summary of the complaints received between May and September 2013 are detailed in **[Annex 1].** Complaints received for the same period in 2012 are provided for comparison. We should also note that throughout recent months there has been a regular contact with many residents and a meeting was held with residents' representatives attended by senior officers to clarify the Council's responsibilities, the role of other agencies, the action being taken and to hear first-hand accounts of the problem from local people.

1.2.4 With reference to **[Annex 1]**, officers in the Environmental Protection team (EPT) came to a clear conclusion that the odour neutralising equipment has not been as efficient as the afterburner, (the previous odour abatement technology employed) despite the supplier carrying out adjustments to the equipment throughout the trial with the intention of improving the performance of the equipment.

1.3 Recent interventions

1.3.1 Since early September, officers have initiated the following key actions to both assist the EPT with its ongoing investigations and address further concerns being expressed by residents:

- employment of a specialist environmental consultant to carry out an intense period of monitoring and an evaluation of the abatement equipment in situ;
- a meeting with representatives from the Environment Agency (EA); and
- a site survey with representatives from Public Health England (PHE).

1.3.2 The specialist environmental consultants were engaged with the following remit:

- to undertake a period of intense proactive monitoring;
- to provide a rapid 24/7 response service to complaints during that period;
- to complete an independent audit of the potential odour sources and odour control methods employed at Drytec; and
- to identify the measures the Company should be taking to constitute the best practicable means of abating odour.

1.3.3 For a 10 day period from Friday 27 September to Monday 4 October, a representative from the consultants was based in Tonbridge to respond

immediately to complaints of odour. The monitoring period was specifically chosen to include two weekends and provide a 24/7 response with direct call out contact to cover periods when it is difficult for officers to provide such an immediate response. If they detected an odour, the consultants were asked to assess whether they felt it would, in their opinion, constitute a statutory nuisance. This is vital because the presence of a clear statutory nuisance, as defined, is the Borough Council's only direct and formal remedy in abating such a problem and obviously that needs to be supported by clear and substantial evidence before such action could be taken.

1.3.4 The feedback indicates that 53 complaints were received and investigated by the consultant, in the monitoring period. These were mostly recorded in public places but included 6 occasions when residents detected the odour in their property, which were also subject to inspection. In none of these cases did the consultants find evidence that could support a case of statutory nuisance. This conclusion confirmed previous inspections made by officers in preceding periods.

1.3.5 We now also have the results of the assessment of the odour abatement equipment which clearly identifies emissions from the stack as having the greatest potential for odour impacts, particularly at locations distant from the site. They recommend that the afterburners are the preferable means of abatement, but these would benefit from technical improvements to increase their odour removal efficiency. Recommendations have also been made in respect of controlling fugitive emissions, although it is accepted that this is a minor source of the problem.

1.3.6 Officers met with representatives of the EA, following their visit to Drytec to complete a Pollution Prevention inspection. It was a proactive visit and its purpose was to assess the potential impact on the local environment from the discharge or escape of polluting matter from the premises. Following the visit, the EA officer made several recommendations to Drytec, which it is understood have subsequently been addressed The conclusion of the EA, following the visit, was that there are no significant issues of concern at Drytec from a pollution viewpoint.

1.3.7 Additionally the EA informally reviewed the measures the EPT had taken to investigate this issue and provided very positive feedback to the Team. Their one suggestion was that we considered setting up a 'Liaison Group' to include representatives from Drytec, local residents, PHE, the EA, HSE and the Borough Council. There are ongoing discussions with Drytec about the practicalities of this suggestion and I return to this below.

1.3.8 As a consequence of the increasing questions being asked by local residents about the potential risk to health from the emissions at Drytec, officers arranged for a representative from PHE to visit the site in late October, to review all the chemicals being used in the process. As expected there are a multitude of chemical data sheets to review, so we are not expecting their report for a few weeks.

1.4 Legal Implications

1.4.1 In accordance with Section 79 of the Environmental Protection Act 1990, it is the duty of the Borough Council to take such steps as are reasonably practicable to investigate complaints of statutory nuisance made to it by persons living within the Borough.

1.4.2 Where the Borough Council is satisfied that a statutory nuisance exists, or is likely to occur or recur, it is obliged to serve a notice requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence. The 1990 Act does however provide a defence for businesses - where the nuisance to which the notice relates is an odour emitted from industrial, trade or business premises, it is a ground of appeal that the 'best practicable means were used to prevent, or to counteract the effects of the nuisance'.

1.4.3 It is important to emphasise that neither officers, nor specialist consultants have witnessed a level of odour which would amount to a statutory nuisance within the meaning of the Environmental Protection Act 1990, either in a complainants' properties or in the town centre and surrounding areas. We remain committed to pursuing formal action under our statutory responsibilities and will act accordingly should this situation change.

1.4.4 It is recognised that this issue is difficult for a number of residents and officers will continue to seek improvements from the Company through ongoing dialogue. Equally, it is important that the limitations of the Council's powers and responsibilities in this case (and those of other agencies) are clearly spelt out (again, I return to this aspect below).

1.5 Financial and Value for Money Considerations

1.5.1 The ongoing investigations and proactive monitoring have had a significant impact on the resources of a small team over the last two years.

1.5.2 To address some of the concerns from local residents about the perceived limitations of our monitoring programme we took the unprecedented step of commissioning consultants to carry out a period of intensive monitoring and evaluation of the abatement equipment, as detailed in paragraphs 1.3 above.

1.6 Risk Assessment

1.6.1 Residents are now raising a number of new concerns that are outside our statutory remit and which we have sought to resolve by involving other agencies as described above. Although our statutory role is relatively narrow here, this case remains a high priority for the EPT to deal with using informal means.

1.6.2 We are concerned, nevertheless, that a number of residents are dissatisfied with the Council's apparent inability to improve the odour emissions. This cannot be in any way due to lack of a professional approach and dedication of the EPT, which

has been very sound. It is more to do with the understandable uncertainty and consequential frustration amongst the public at large about the responsibilities and powers available to the Council in a difficult case such as this. Commonly, the perception is that the Council is all powerful in restricting and controlling what the company can do; that is not the case.

1.6.3 The intention is, therefore, to issue a statement of clarity following this Board meeting which will set out as clearly as possible the following:

- the findings of the consultants monitoring and their recommendations of the consultant's report in respect of statutory nuisance;
- the recommendations of the consultant's report and how we will approach Drytec to seek implementation of practical action at the premises;
- a clear explanation of the functions and powers of the Council in these matters and those of other agencies.
- an intent to establish a multi agency liaison group to assist with the overall understanding and approach to the problem.

1.7 Equality Impact Assessment

1.7.1 See 'Screening for equality impacts' table at end of report

1.8 Recommendations

1.8.1 It is **RECOMMENDED** that the Cabinet **ENDORSE:**

1) the investigation and actions initiated by officers in their ongoing investigations in endeavouring to address and ultimately resolve the odour complaints in Tonbridge; and

2) the establishment of a multi-agency liaison group.

The Director of Planning, Housing and Environmental Health confirms that the proposals contained in the recommendation(s), if approved, will fall within the Council's Budget and policy Framework.

Background papers:

Nil

contact: Jacqui Rands
Jane Heeley

Steve Humphrey
Director of Planning, Housing and Environmental Health

Screening for equality impacts:		
Question	**Answer**	**Explanation of impacts**
a. Does the decision being made or recommended through this paper have potential to cause adverse impact or discriminate against different groups in the community?	No	The work described does not have the potential to impact or discriminate against different groups.
b. Does the decision being made or recommended through this paper make a positive contribution to promoting equality?	No	The work described in the report is primarily concerned with a statutory duty on officers to investigate complaints of potential statutory nuisance received.
c. What steps are you taking to mitigate, reduce, avoid or minimise the impacts identified above?		

In submitting this report, the Chief Officer doing so is confirming that they have given due regard to the equality impacts of the decision being considered, as noted in the table above.

ANNEX 1

Record of complaints May- September 2013

Month	2012 Complaints		2013 Complaints	
May	10		17	
June	13		8	
July	16		58	
August	34		55	
September	9		37*	*excludes monitoring by consultant
TOTAL	**82**		**175**	

Adur & Worthing councils

Housing, Health and Community Safety

[redacted]
Shoreham-By-Sea
West Sussex
BN43 [redacted]

Date: 11th February 2014
Our Ref: WK/[redacted]

Dear Mr [redacted]

Environmental Protection Act 1990
Re: Noise from EMR, Kingston Wharf, Brighton Road, Shoreham-by-Sea

I write further to your complaint alleging a noise nuisance from the above business.

I have now reviewed the evidence and although I acknowledge the noise from the scrap metal activity is likely to cause disturbance, during their daytime operating hours, I am satisfied EMR are using Best Practicable Means to minimise noise from their operation.

Given EMR have a statutory defence against any nuisance action I must advise that the Council can not progress your complaint any further.

Yours sincerely

Michael Lavender
Senior Environmental Health Officer Environmental Protection

Tel: 01273 263343
e-mail: michael.lavender@adur-worthing.gov.uk