In the matter of the Aarhus Convention **ACCC/2008/23**

BETWEEN:

(1) FRANCIS ROY MORGAN
(2) CATHERINE MARGARET BAKER

Communicants

and

UNITED KINGDOM

Party

COMMUNICANTS' NOTE of 10 April 2010

NB Any documents referred to are either: (a) contained in Annexes 1 and 2 to this Note; or (b) have previously been submitted to the Committee, including the High Court judgments of 9.11.07 and 21.12.07 and the Court of Appeal judgment of 2.3.09.

1. The Compliance Committee has asked for responses to questions in its letter of 9 March 2010. The Communicants consider it helpful to provide an introductory note to their responses.

Introduction

2. The Environment Agency or BANES were not asked to monitor the interim injunction. If odours had recurred they would have been asked for their perception of the odours and whether these were likely to cause pollution, harm to human health, or serious detriment to amenity. This was nothing beyond their regulatory roles.[1]

3. The Order of 9.11.07 prohibited the waste operator from causing odours 'at levels likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of [the Communicants'] properties until trial'. If odours were caused then whether the injunction had been breached would have been assisted by an assessment by an officer of the Agency or BANES as to the extent of the odours. It was

[1] The Agency was required to ensure compliance with the operator's waste licence which included condition 5.2.1 in broadly the same terms as the injunction order. BANES was under a duty to investigate a statutory nuisance (including odours) under section 79(1) of the Environmental Protection Act 1990.

quite possible that an officer would not attend the properties[2] or, if he/she did attend, that they may decide that any odour was not at a level likely to cause harm, pollution or serious detriment to the amenity.

4. The reasoning for the Order is found in §9-13 of the judgment of HHJ Seymour QC of 9.11.07:

> 9. However, Mr Wald submitted that if an injunction in the terms that Mr Hyam was seeking were made it would achieve nothing worthwhile because the Environment Agency already has abundant powers to enforce the compliance by the defendant with the conditions which are contained in the licence. Mr Wald also relied, in opposition to the grant of the injunction, upon the facts that the history of alleged offensive odours goes back certainly to 2004 and it is only now in November 2007 that an interim injunction is being sought. He also relied upon the fact that it is anticipated, as I have said, that the full trial of the action will take place in a matter of months, in the early part of 2008.
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> 10. I take all of these matters into account. However I am persuaded that the balance of convenience favours the claimants in relation to the form of order which Mr Hyam has sought before me this morning.
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> 11. The evidence on behalf of the defendant does not indicate that the defendant would be inconvenienced or inhibited in any way by the making of the order which Mr Hyam seeks. That is because, in effect, it is a site specific variation of the Environment Agency's existing conditions.
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> 12. While Mr Hyam accepted that it was appropriate that there should be some independent assessment of whether there had been any breach (if there is said to be a breach) following the making of the order, Mr Hyam recognised that the court has no power and the claimants have no power to require either the Environment Agency or Bath and North East Somerset District Council to make available authorised officers for the purpose of making the assessments which the injunction that Mr Hyam seeks postulates.
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> 13. That is a factor which I have taken into account. I have also taken into account the submission of Mr Wald as to the existing powers of the Environment Agency. However, it seems to me that making an injunction in the terms sought by Mr Hyam would have these benefits: (1) it would focus attention on the

[2] Failure to attend when odours arose was a continuing concern of the communicants and other residents, particularly of BANES.

> particular properties of the claimants; (2) it would add to the panoply of remedies available in the event of breach of the formidable powers of the court in relation to contempt of court. While it is to be hoped that the issue will not arise hereafter before the trial, of whether there has been any breach of the injunctions of which I am going to grant, nonetheless it does seem to me that is an appropriate step to take and potentially of value to the claimants to grant the injunctions sought. So that is what I am going to do.

5. The Order must also be seen against the backdrop of repeated requests/complaints to the Agency and BANES to resolve the odour problems and specific requests by the Communicants to take effective enforcement action, prior to the grant of the injunction order. The requests received an inadequate response from both regulators [pp 1-6, Annex 1]. This is despite the Agency later regarding the odour problems as criminal offences [pp 7-8, Annex 1].

6. Against this backdrop, the Communicant's pursued an interim injunction, on terms which would not require them to provide a cross-undertaking in damages if the injunction order was not ultimately required.[3]

1. Proposal to name the Environment Agency and BANES as monitor of the injunction

7. It was the Communicants, through their legal representatives, during the interim hearing on 9.11.07, who proposed naming the Agency and/or BANES in the Order. This arose out of reference by the Defendant's advocate to the case of *Environment Agency v Biffa Waste Services* [2006] EWHC 3495 (Admin) in which the High Court at §25-7 outlined how an assessment of odours for breach of licence conditions could be determined

[3] The requirement for an undertaking in damages by an applicant is a particular criticism and failure by the UK in its provision of access to justice see e.g. the Sullivan Report 2008. An example of the problem is provided at §12 of the interim injunction order of *Thornhill v SITA* [2009] EWHC 2452 (QB), in which the court refused an interim judgment for serious noise pollution primarily on the basis of the refusal of the Claimants to provide an cross-undertaking in damages to the Defendant to cover losses until trial [pp 1-6, Annex 2]. This in the Communicant's view is contrary to the provisions of Article 9 of the Aarhus Convention. The problem is being pursued by the European Commission. It served a Reasoned Opinion on the UK on 18 March 2010 [p 21-22, Annex 2].

by the Court.[4] HHJ Seymour QC appeared to accept this approach (§9-13 of the judgment set out above), as did the operator.

8. At the later hearing of 21.12.07 the waste operator sided with the Agency and BANES objecting to this approach when it appeared that the interim order may be discharged. The operator also objected to the joint instruction of an independent expert at the hearing (§15 of the judgment of 21.12.07) and so the injunction was discharged.

9. At the hearing of 9.11.07, the waste operator did not object to the terms for the order; but simply to the injunction order itself (see e.g. §9 above).

2. An alternative monitor of odours for the order

10. There was no discussion of an alternative odour monitor prior to the original hearing on 9.11.07. The *Biffa* case highlights that the Court has to determine whether there has been a breach on the evidence and this would have included evidence from the communicants as well as any other assessment including, in any event, any steps or assessment by the Environment Agency and BANES. However, after the 9.11.07 Order but before its discharge on 21.12.07, the Communicants proposed to jointly instruct an independent odour expert to replace of the Environment Agency and BANES. This proposal was rejected by the operator (see e.g. §55 of Court of Appeal judgment).

3. Article 3(2) obligations

11. As far as the Communicants are aware, the UK has taken no steps to assist them in seeking access to justice under Article 3(2). In fact, it was the failure of the UK authorities to resolve environmental problems that prompted the application for an injunction. That is, the Communicants did not wish to apply for an injunction but did so as a last resort and due to the failure to act by the Environment Agency and BANES. The Communicant's were fully aware of the difficulties of obtaining an

[4] pp 14-5, Annex 2.

injunction including e.g. the requirement to provide a cross-undertaking in damages (discussed above).

12. As explained above, the authorities were asked to intervene prior to the injunction. The Agency's response to a request as to whether it was taking any action was an e-mail two days before the injunction hearing (7.11.07) stating:

> Currently the Environment Agency is reviewing its enforcement position and what further action to take, if any. [p 6, Annex 1]

13. The Agency subsequently wrote to the waste operator on 14.2.08 recording eight offences for odour pollution, six of which related to the days and weeks leading up to the injunction application. It noted that:

> We do not intend to prosecute you for the above offences on this occasion, however, our decision could change if any further relevant information comes to light … [p 7, Annex 1]

14. In our view, this response was wholly inadequate. And, even if action were taken at a later date it would not prevent the pollution being experienced by the Communicants.

15. Further, it can be seen from the Agency letter of 14.2.08 that an injunction order was entirely justified; that is, two of the odour offences occurred after the injunction order of 9.11.07. It appears that the Agency was far more interested in pursuing litigation against the Communicants than in seeking to prevent pollution. This is consistent with its approach after the Court of Appeal judgment and its pursuit of the Communicants to pay its costs.

16. BANES also failed to take any action due to persistent procedural errors, as is explained in its letter of 31.10.07 [pp 3-4, Annex 1].

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