IN THE COURT OF APPEAL (CIVIL DIVISION) **Case No. A2/2008/0038**
ON APPEAL FROM HHJ SEYMOUR QC
QUEEN'S BENCH DIVISION HQ06X02114

BETWEEN

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

Appellants

and

(1) HINTON ORGANICS (WESSEX) LIMITED
(2) ENVIRONMENT AGENCY
(3) BATH AND NORTH EAST SOMERSET COUNTY COUNCIL

Respondents

CLAIMANTS' SKELETON ARGUMENT IN SUPPORT OF PERMISSION TO APPEAL AND SUBSTANTIVE APPEAL IF PERMISSION GRANTED

References to [AB1/45] are to the pages in the Appellants appeal bundles.

Introduction

1. On 27th May 2008 Carnwath LJ ordered that the Applicants' application for permission to appeal be adjourned to be relisted on notice to the other parties as an application for permission to appeal with appeal to follow if permission granted. [1/45-1]

2. It was further directed that subject to variation by the Presiding Lord Justice, the adjourned hearing be listed before a three judge court one of whom should be a judge from the Administrative Court, with a time estimate of one day. The constitution should include environmental and administrative law expertise.

3. What follows is the Claimants' skeleton argument on the application for permission to appeal and for the appeal itself.

PCO sought for permission application and substantive hearing if permission granted on question of costs.

4. For the reasons set out in the witness statement of Paul Stookes [to be attached] the Claimants seek a protective costs order in relation to the Appeal. The Claimants costs position in relation to the present appeal is that both solicitors, and leading and junior Counsel for the Claimants are acting pro bono.

5. The issue raised by this appeal, is, for the reasons given by Carnwath LJ when fixing the hearing, of significant general public importance such that a PCO should be granted. In relation to the applicable *Corner House*[1] criteria for the grant of a PCO the Claimants say that:

(1) ***The issues raised are of general public importance*** (the obligation on the Court under the Aarhus Convention 1998).

(2) ***The public interest requires that those issues should be resolved***; (see decision of Carnwath LJ adjourning application for permission to an oral hearing on notice, with invitation to Defra, and the intervention of CAJE).

(3) ***The Claimants do not have a private interest in the outcome***, not satisfied but this criterion should not be applicable to the present case because of the Aarhus Convention 1998– see Sullivan Report Appendix 3, para. 8.

(4) ***Having regard to the financial resources of the applicant and the respondent and to the amount of costs that are likely to be involved it is fair and just to make the order*** – (the Respondent is appealing a subsequent costs order made by HHJ Bursell QC and, to that extent, is already present in the Court of Appeal). The additional costs of responding to the Claimants costs application, are unlikely to be very substantial, but even if they are, the public interest requires that the issue be resolved. Such public interest justifies some

[1] If indeed the Corner House approach is applicable to a private environmental law appeal such as this.

form of costs protection for the Claimants, who seek a Type 1 PCO, viz. that their liability in respect of the appeal in relation to costs be nil. The quid pro quo is that the Defendant, because the Claimants lawyers are acting pro bono, will not be exposed to an adverse award of costs in relation to the appeal if the appeal is successful.

(5) ***If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing*** – the current adverse liability is in the sum of £25,000, if the appeal is unsuccessful, that costs bill could double. For the reasons set out in detail below, it would be prohibitively expensive to the Claimants to be exposed to such a liability, and the continuance of the proceedings would be jeopardised and/or may have to be abandoned.

Permission to appeal

6. Pursuant to CPR 52.3(6) permission may be granted for an appeal to the Court of Appeal where either:-

(a) the court considers the appeal would have a real prospect of success, or
(b) there is some other compelling reason for the Court of Appeal to hear it.

For the reasons set out below, both circumstances are relied on in this case.

7. In particular, as to the second limb of CPR 52.3(6), the Claimants note that Carnwath LJ in adjourning the permission application to the full court, noted that:

> "I am satisfied that the case raises an issue of some general importance relating to the relevance of the Aarhus Convention in the exercise of the Judge's discretion as to costs. This is given added significance by the recent publication of the report of the working party under Sullivan J on "*Ensuring access to environmental justice in England and Wales"* (in which this case is mentioned in paragraph 73".

Scope of appeal

8. The Applicants (hereafter 'the Claimants') seek permission to appeal that part of the Order of His Honour Judge Seymour QC [1/10] dated 21st December 2007 relating to costs whereby it was ordered that:

> "(ii) the Claimants do pay the costs of the added parties, … and
>
> (iv) the Defendant's costs of the Claimant's application for the interim injunction (including the costs of the hearing on 9th November 2007 and today) be paid by the Claimants on the standard basis if not agreed".

Relief sought on appeal

9. The Claimants contend that, in all the circumstances of the case and in particular the obligation on the Court under the Aarhus Convention 1998, those parts (viz. (ii) and (iv)) of the order were outwith the proper exercise of the Judge's discretion and should be set aside, and orders in the following terms be substituted therefore:

> (ii) the question of whether the Claimant or the Defendant (or both in proportions) do pay the costs of the added parties be reserved to the trial judge
>
> and
>
> iv) **EITHER** (a) there be no order as to the costs of the Claimants application for the interim injunction (including the costs of the hearing on 9th November 2007 and 21st December 2007) **OR** (b) the issue of the costs of the application for an interim injunction (including the costs of the hearing on 9th November 2007 and 21st December 2007) be reserved to the trial judge[2]

[2] The Claimants's primary submission is that "no order" is appropriate. While it is true that reserving the costs essentially defers the question of the liability to pay to the outcome of the trial (and by doing so does not act as a cap on costs), it has the manifest advantage of not requiring the Claimant to drawn on the limited funds he has available (by way of legal costs and expenses insurance) to continue with the claim. If, at the end of the trial, the Defendant is successful, a costs order against the Claimants may be made by the Judge, but (i) such order would have to be "reasonable" – Article 3(8) of the Aarhus Convention, and not

Summary of issues on appeal

10. The appeal raises the following issues:

(a) Was the application for an injunction against the Defendant within the scope of Article 9(4) of the Aarhus Convention[3]?

(b) If yes, what is/was the nature of the Aarhus obligation on the Court when exercising its discretion on costs (regardless of whether or not the Convention is raised by one of the parties)?

(c) In the light of (a) and (b) above, was it outwith the Court's proper discretion to order the Claimant to pay the costs of the Defendant and the added parties the Environment Agency ("EA") and Bath and North East Somerset Council ("BANES") in circumstances where:

(i) the Judge had found (at an earlier hearing on 9th November 2007) that the Claimants had raised a "*serious issue to be tried*" [1/8] §7; and

(ii) that "*damages would not be an adequate remedy in the event that [the Claimants] continued to be subjected to offensive odours*"; [1/8] §8 and

(iii)"*the balance of convenience lay in favour of granting an injunction* [in the terms of 9th November 2007]" [1/8] §10; and

(iv)the Judge had reserved the costs of the application (despite granting the injunction) to the trial judge [1/9] §14 and 15.

Claimants' suggested outcome of the appeal if permission granted

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"prohibitively expensive"; and (ii) the Claimants would be able to mitigate the effect of such risk by means of the ATE insurance they obtained in March 2008.

[3] The full title is the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – hereafter "the Aarhus Convention".

11. The Claimants suggest that this Court should answer the questions raised as issues (a), (b) and (c) in paragraph 10 above, in the affirmative and substitute the draft order above for those parts of the order ((ii) and (iv)) made by HHJ Seymour Q.C. on 21st December 2007.

Background facts to the appeal

12. The background facts to the appeal are set out in the judgments of His Honour Judge Seymour QC – see [1/7] and [1/13]. Essentially the Defendant is the owner and operator of a waste recycling facility at Charlton Field Lane, near Keynsham, Bristol. The 1st Claimant is the joint owner and occupier of a property known as Rosewood Lodge, Woollard Lane, Publow, Bristol situated around 300 metres from the site. The 2nd Claimant is the owner and occupier of the Cleracres, Woollard Lane, Publow, which is around 500 metres from the site.

13. The injunction sought concerned complaints of odours being released from the waste site which adversely affected the Claimants' homes and which were causing them a nuisance. The Particulars of Claim [1/73] set out a series of regulatory breaches by the Defendants as supporting their claim in nuisance – see in particular §7. Despite such breaches and complaints by the Claimants and other local residents to the Defendant, and to the 2nd and 3rd Respondents, the Claimants considered that no effective remedial action had been taken by the Defendant, and no effective enforcement action (to prevent further breaches) by the 2nd or 3rd Respondents.

14. They therefore sought injunctive relief against the Defendant on an interim basis until trial to prevent the Defendant from causing odours to emanate from the site [1/87].

15. In the witness statement in support of the injunction [1/102] the Claimants made plain they considered an undertaking in damages inappropriate for the reason that

the Claimants were simply asking the Defendant to comply with its own waste management licence conditions [w/s Frank Morgan §18 [1/102].

16. The Defendant objected to the absence of an undertaking [2/157], and the Claimants replied by suggesting the proceedings might be avoided altogether by an undertaking in the terms at [2/160]. It is to be noted that the terms of that undertaking mirror closely the requirements of the Waste Management Licence paragraphs 5.2.1 to 5.2.3 [1/177-178] and in relation to capacity the condition at 1.2.2 which had been varied to 800 tonnes of waste.

17. No such undertaking was agreed and the matter came before HHJ Seymour QC on 9th November 2007 who granted an injunction in the terms set out at [1/4] having been satisfied that: (i) there was a serious issue to be tried as to whether offensive odours affecting the enjoyment of the claimant's properties are generated by the Defendant or not (§7 [1/8]; (ii) that damages would not be an adequate remedy §8 [1/7] and that the balance of convenience favoured the Claimants in relation to the form of order put forward by them §10 [1/8].

18. The crafting of the order in the terms approved by the judged was influenced, among other things, by decision of the Divisional Court in *Environment Agency v Biffa Waste Services* [2007] Env LR 16, 330 that an odour condition in terms: '*There shall be no odours emitted from the permitted installation at levels as are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the permitted installation officer, as perceived by an authorised officer of the defendant[the EA]'*; did not offend against either the principles of certainty (clarity and forseeability), nor did it have the effect of usurping the fact-finding and adjudicative roles of the court by bestowing on an authorised officer the functions of establishing relevant facts and obliging the court to convict whenever it was satisfied that the officer honestly perceived those facts. As Ouseley J. held in that case, at §25:

> "I construe the closing words of the condition as requiring evidence relevant to the requirements of the condition from an authorised officer of the agency as a necessary ingredient in the case. It is a requirement that is likely to be a safeguard from officers against irresponsible prosecutions. It does not limit the jurisdiction of the court to decide, on the basis of all the evidence presented to it, whether odours had been emitted at levels which offend against standards and conditions."

19. For the reasons set out by the Judge at §3-9 [1/15-16] the matter came back before the Judge on 21st December 2007. Significantly (from the point of view of costs), that re-listing had been preceded by the following correspondence:

(i) 23.11.07 letter from the Court [2/236]

(ii) 26.11.07 letter from the Agency [2/176] and BANES [2/180] in almost identical terms, which amongst other things suggested the possibility of making amendments to the order to make it enforceable (e.g. the substitution of an independent expert in place of the EA);

(iii) 29.11.07 – without prejudice letter from Claimants to Defendant in the light of the above correspondence [2/234]:

> "We are in principle agreeable to the suggestion of the instruction of an independent expert appointed jointly by the parties to determine the issue of whether or not there is nuisance odour arising at the homes of our clients. Please confirm whether or not you agree to a variation of the order in those terms."

(iv) 03.12.07 – without prejudice reply from Defendant rejecting such a proposal [2/234a]

(v) 04.12.07 – letter from Agency to Court [2/184] which in its final paragraph reads [2/185] reads: "Unfortunately, the parties have not been able to agree to amend the order in the manner requested by the Agency (and, we are aware BANES). We therefore request that the matter be re-listed before you as a matter of urgency"

(vi) 07.12.2007 letter from Claimants to all parties, stating that they had attempted to meet the Council's concerns through agreement, and suggesting the matter did not need to come back before the Court.

20. The Judge's reasons for discharging the injunction are set out in his judgment at §§11-14 [1/17-19]. Significantly, (again from the point of view of costs) at §15 [1/19] he said this:

> "It has been suggested that it might be possible to substitute, for the references to "an authorised officer of the Environment Agency or an authorised officer of the Council," some independent expert. That in my judgment would be appropriate if, but only if, there was agreement between the claimants and the defendant as to the identity of such a person. That is not the position."

21. The reason there had been no such agreement, as can be seen from the correspondence above, was because the Defendant refused what that the Claimants' say was a reasonable, and the Judge thought an appropriate, solution to the problem, namely the instruction of a joint expert. If, as the Claimants contend, that refusal was unreasonable, then the award of costs against them plainly wrong/perverse.

22. Before the Judge on 21st December 2007 the Claimants, in the light of the history of the without prejudice correspondence, sought an order that there be no order in relation to 2nd or 3rd Respondents because the Claimants had endeavoured to seek agreement to an appropriate amendment to the order and no agreement had been reached (because of the Defendant's refusal). In relation to the costs of the Defendant, the Claimants sought an order that the costs of the injunction application should be reserved to the trial judge because:

(i) when the injunction had been granted on 9th November 2007, the costs of that hearing had been reserved, not least because there had been a background of without prejudice correspondence, offers of undertakings etc. which meant that the proper responsibility for the determination of costs would be better

dealt with at the conclusion of the trial on liability, it was argued the same reasoning should apply now the injunction was discharged; and

(ii) the costs of the Defendant's "support" of the EA/BANES application should also be reserved to the trial judge it would be the fair way of proceeding in the circumstances.

23. The judge rejected those submissions for the reasons he gave at p.22 of the transcript [1/].

24. Permission to appeal was not sought before the trial judge but was renewed for the Court of Appeal. The reasons for this are set out in the affidavit of Paul Stookes at [1/236-7] §3-8.

25. It is, of course, accepted by the Claimants that the issue of the applicability of the Aarhus Convention was not raised with the Judge and it could have been (albeit that the end-point of the submission would have been the same – an application for no order or costs reserved).

26. However, for reasons set out in that Affidavit at §13-17 [1/239-1/240], the requirement to comply with the Aarhus Convention 1998, is an obligation on the Court, which should apply regardless of whether the issue being raised with the Judge. In the alternative, the Claimants contend that this Court, (which is under the same obligation) is obliged to review the correctness of the Judge's decision in the light of the Aarhus Convention notwithstanding the failure to raise the issue before the judge, in order to avoid injustice and contravention of the Convention obligation under Article 9(4) (see below). The circumstances of this case – being the first case of which the Claimants are aware, which is to consider the question to what extent a judge in exercising his discretion on costs is required to take the Aarhus Convention into account, in particular having regard to the issues raised in the Sullivan Report – are, it is submitted, sufficiently exceptional to allow this new point to be raised on appeal – see *Islington LBC v UCKJAC* [2006] EWCA Civ 340 at 36-41 (re. amendment of Particulars of Claim to take new point on

appeal). Although in the present case, the issue being one of discretion as to costs, costs, raising the new point does not require amendment to the Particulars of Claim.

Aarhus - background

27. As to the background to the Aarhus Convention the Court is respectfully referred to the following key documents:

(i) Articles 3(8), 9(2); 9(3) and 9(4) of the Aarhus Convention [ ] relevant parts reproduced below
(ii) Handbook on Access to Justice (UNECE) under the Aarhus Convention – relevant extracts [ ]
(iii) The Aarhus Convention – An implementation Guide (UNECE) – relevant extracts
(iv) Aarhus Convention Implementation Report (DEFRA) – relevant extracts [ ]
(v) Ensuring Access to Environmental Justice in England and Wales ("the Sullivan Report") – [ ]

28. The Aarhus Convention came into force in October 2001 and was ratified by the UK in February 2005. In line with the Convention procedures the UK became a full party to the Convention in May 2005, 90 days after the date of ratification.

29. The key provisions of the Aarhus Convention relevant to the present appeal are:

> **Article 3(8):** Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.
>
> **Article 9(3):** In addition and without prejudice to the review procedures referred to in paragraph 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge

acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Article 9(4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

30. As is explained in the Sullivan Report, at §10, Aarhus is an international convention, and the parties to the convention have established a Compliance Committee that can investigate alleged instances of non-compliance. But the European Community has also ratified Aarhus, giving the European Commission the right to ensure that Member States comply with the Aarhus obligations in areas within Community competence – see *Commission v France* Case C-239/03 (2004) ECR I-09325, and the opinion of Advocate General Kokott delivered on 15th January 2009, in *Commission v. Ireland* Case C-427/07. Further, and as explained in the Sullivan Report at §11 the Convention has been inserted into two key EC environmental directives:

(i) Art. 10A of the EIA Directive 85/337/EC; and
(ii) Article 15a of the IPPC Directive 2008/1/EC.

In both directives there are now provisions that procedures for legal challenges must be "fair, equitable, timely and not prohibitively expensive" – in other words, directly transposing the wording of Article 9(4) of the Aarhus Convention into Community law[4].

31. Such judicial consideration of the Aarhus Convention as there has been by the domestic courts has been limited, and has focussed largely on Aarhus obligations in relation to consultation and PCO's in the context of judicial review:

[4] See for example implementing directive 2003/35 referred to in the *Commission v. Ireland* case supra.

(i) *R (Burkett) v LB Hammersmith and Fulham* [2004] EWCA Civ 1342; para's 74-80

(ii) *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 at para 49: "…Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to…[the Aarhus Convention].

(iii) *Val Compton v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 – at §20 in particular;

(iv) *R(McCaw) v. Westminster City Magistrates Court* 19th June 2008 *(unreported)* Divisional Court[5]

(v) *R (Buglife) v Thurrock Gateway Development Corp and another* [2008] EWCA Civ 1209, in particular at §17.

32. No case (to the Claimants' knowledge) has directly considered the question of the extent of the Aarhus obligation on the Court (i.e. the obligation derived from Articles 9(3) and 9(4)) the Aarhus convention) in relation to injunctive proceedings (whether in the context of private or public law).

Issues for determination

(1) Was the application for an injunction against the Defendant within the scope of Article 9(4) of the Aarhus Convention.

33. The first question is whether or not the provisions of the Aarhus Convention apply to the facts under consideration, namely a private law application for an interim injunction in nuisance proceedings.

[5] In this case the Divisional Court (Latham LJ and Nelson J.) held that the application under consideration (a procedural argument as to whether multiple applicants could be named on a single information charging statutory noise nuisance) did not fall within the Aarhus Convention and declined to grant a PCO. Although certifying the point of law as one of public importance the Divisional Court refused permission to appeal to the House of Lords.

34. Before considering the Convention itself it is necessary to consider the nature and context of the application made, which was to enforce or police the terms of a waste management licence – see [1/160]. The licence was granted by the EA in pursuance of Part II of the Environmental Protection Act 1990 (EPA 1990). Breaches of that licence are liable to (and have) given rise to enforcement proceedings or, more accurately, an enforcement stance. For it is the Claimants contention that any enforcement to date has not provided the Claimants and other local residents with effective relief from odours and other environmental problems – (for a history of action by the 2nd Respondent see the letter from Defra to the UNECE of 30th October 2008 at [2/294].)

35. This is against the background of the possibility of action being taken by taken by the BANES under s. 80 EPA 1990, and the possibility of a private prosecution before the magistrates under s. 82 EPA 1990. Neither of these processes however allow for an interim injunction.

36. The Claimants' simple submission in relation to the applicability of the Aarhus Convention to the facts in issue is that the application for the interim injunction was a challenge to an act or omission by a private person [the Defendant] which contravened provisions of national law relating to the environment – see Article 9(3).

37. If, as here, the Claimants at trial were to prove their factual case then:

    (i) they would have established a tort;

    (ii) they would have established contravention of the terms of the Waste Management Licence made under the EPA 1990;

    (iii) and potentially would have established a statutory nuisance under s.79 EPA 1990; –

> The consequence is that an interim injunction pending determination of those facts, must also be covered by the Convention. The specific reference in Article 9(4) of the Aarhus Convention to "*injunctive relief if appropriate*" reinforces this. The reference to "injunctive relief" cannot, on a proper interpretation, be limited to final relief at trial.

38. There are no criteria laid down by national law which prohibit the Claimants making the application for interim relief, and the logical interpretation of the Convention is that the Claimants, as members of the public, should be deemed to have the right to seek such a judicial remedy.

39. Therefore, as a matter of fact, and law, the claim for interim injunctive relief plainly fell within the scope of the Convention[6].

(2) If yes to (1) above, what is/was the nature of the Aarhus obligation on the Court when exercising its discretion on costs (regardless of whether or not the Convention is raised by one of the parties);

40. It has already been noted that provisions of the Aarhus Convention have already been incorporated into two key EC Directives. Thus, the Sullivan Report rightly records at §12:

> "The Aarhus requirements concerning access to justice are therefore not simply a matter of obligation under international public law, but are requirements under European Community Law. As a matter of Community Law, Member States have a duty to ensure that they are given effect, and in line with the developing jurisprudence of the European Court of Justice, this would include the national courts where they have power to do so"

[6] The Claimants endorse the footnote to paragraph 51 of the Sullivan Report that the question of whether or not a particular case falls within the scope of the Aarhus Convention is a matter for judicial determination.

41. The nature of the obligation is in part explained in a passage in the opinion of Advocate General Kokott in the *Commission v. Ireland* case supra, at paragraphs 97-99:

> 97. As the Commission acknowledges and Ireland emphasises, Irish courts can though, in the exercise of their discretion, refrain from awarding costs against the unsuccessful party and even order the successful party to pay his costs. Therefore, a possibility of limiting the risk of prohibitive costs exists.
>
> 98. This possibility of limiting the risk of costs is, in my view, sufficient to prove that implementing measures exist. The Commission's action is therefore unfounded[7] in relation to this point too.
>
> 99. I wish to make the supplementary observation that the Commission's wider objection that Irish law does not oblige Irish courts to comply with the requirements of the directive when exercising their discretion as to costs is correct. In accordance with settled case-law, a discretion which may be exercised in accordance with a directive is not sufficient to implement provisions of a directive since such a practice can be changed at any time. However, this objection already concerns the quality of the implementing measure and is therefore inadmissible.

42. Paragraph 99 here suggests that the obligation will not be discharged if the implementation of the Directive in a particular case depends purely on the Court exercising its general discretion as to costs. At the very least, it is clear that the Court, when exercising its discretion on costs must act compatibly with the provisions of the Aarhus convention.

43. Further, as is noted by the UNECE Handbook at p. 32 Col.1 para 3:

> Judicial interpretation can play a significant role in implementing the Aarhus Convention. Although article 9 of the Convention can be read as being of little direct help to a prospective litigant, it can also be read as modifying or overriding pre-existing national law and thereby having direct effect.

[7] Unfounded only for the procedural reasons explained at §44-45.

44. This same point is amplified by the footnote to that section which records that:

> Article 3(1) of the Convention commits each party to take "necessary…other measures" and not merely legislative and regulatory measures, as well as proper enforcement measures. The purpose of such "measures" is to establish a clear and consistent framework to implement the provisions of the Convention. Furthermore, Article 3(4) requires each party to ensure that its national legal system is consistent with the obligation to provide "appropriate support" to groups promoting environmental protection. Taken together, these provisions could be applied by a court to allow direct enforcement, where constitutions allow the direct application of international law.

45. Further, as Sullivan J. accepted in *Greenpeace* (supra) since the UK has ratified the Convention the State's obligation (through its various emanations) is non-discretionary with regard to the provisions of the Convention.

46. What then does Article 9(3) and (4) require of a Court when exercising its discretion in relation to a case which falls within its scope?

47. First, the Claimants say it requires the Court to ensure that the costs in relation to the proceedings, and any costs order made are "*not prohibitively expensive*".

48. *Prohibitively expensive*, here, the Claimants say, has the meaning given to it in the Implementation Guide at p.134, viz.:

> … the cost of bringing a challenge under the Convention, or to enforce national environmental law may [must] not be so expensive that it prevents the public, whether individuals or NGO's, from seeking [judicial determination] in appropriate cases.

49. In other words, no costs order (whether pre-emptive or consequential) should be framed in such a way as effectively to prohibit the maintenance or continuation of the litigation by the person challenging, or seeking to enforce, provisions of national law.

50. The "costs" referred to here are not simply the costs of issuing the application. The Claimants endorse the view of the Sullivan report, and the Court of Appeal at §20(2) and in *Burkett*, that the "not prohibitively expensive" obligation arising under the Convention is not limited to the Court fees involved, but is to be seen in relation to the actual costs of funding and more particularly of losing a challenge brought under the Aarhus Convention. To the extent that the decision of *Sweetman v An Bord Pleanala and the Attorney General* [2007] IEHC 153, implies that the Convention relates only to court fees, the Claimants contend that case is wrongly decided.[8] Advocate Kokkott in *Commission v. Ireland* at para.93 supports such a conclusion:

> "the ban on prohibitively expensive procedures therefore extends to all legal costs incurred by the parties involved."

51. Further, the question of whether the "costs are prohibitively expensive" is really one of fact. This would tend to suggest a subjective, rather than objective test (see Sullivan report footnote 44 p.21 for an interpretation that it is more an objective test). In practice it is unlikely to make that much difference. An adverse award of costs of £25,000 against a private persons seeking to enforce the terms of a Waste Management Licence in circumstances where, on their case, there has been ineffectual enforcement action by the relevant state bodies despite continuing breaches (the 2nd and 3rd Respondents) is "prohibitively expensive".

52. On the facts of the present case the adverse costs order certainly did have that effect, rendering it financially impossible to proceed with the claim. (As at the date of the injunction, the Claimants had the benefit of insurance policy covering liability for legal expenses and costs up to £50,000 each, total £100,000). At the time of the application expenses at or near that sum had already been incurred in

[8] There is academic support for this approach. For instance Macrory, R in *Environmental Public Law and Judicial Review* in Judicial Review Vol 13, Issue 2 (June 2008, Hart) notes at p 117 and with reference to *Sweetman* that: 'the point has yet to be directly litigated in this country, but given the overall context and goals of Aarhus, a better view is that the concept of what is 'reasonable costs' should be interpreted in the light of the overall requirement that procedures be not prohibitively expensive. In this light, it is the totality of the costs involved, including any risk of exposure to costs, that must be judged.

relation to the instruction of experts, and preparation for a trial which was due to take place the following April (later listed for 7th April 2008). The adverse award of costs (immediately payable) had the effect of exposing the Claimants to a very substantial costs liability, and an increased risk as to costs were the case to proceed. The trial was, in the event, only able to proceed (to the extent that it did) by virtue of a CFA arrangement backed by ATE insurance entered into at the end of March 2008, in respect of which there was an excess of £100,000, i.e, in the event of the claim failing at trial, the Claimants would be obliged to meet the first £100,000 out of their insurance policy in respect of legal expenses and costs.

53. The Claimants do not say that the wide discretion which exists in relation to costs under the Supreme Court Act 1981 and Part 44 of the CPR is not sufficiently flexible to allow any decision in relation to be costs be made in compliance with the obligations under the Aarhus Convention. Defra, it appears, take a similar view – see p.28 of the Aarhus Convention Implementation Report, January 2008 which reads:

> The Civil Procedure Rules in England and Wales provide considerable flexibility to enable the Court to give balanced consideration to all the circumstances; to reach decisions on costs in individual cases which are fair; and to meet the overriding objective of the CPR of dealing with cases justly… There are a variety of ways in which the court can take action to ensure that costs are proportionate and fairly allocated…the courts also have extensive powers to control costs at different stages of proceedings…

54. What the Claimants do say is that the Court is obliged to ensure that any order it does make with regard to costs is, (i) fair; and (ii) does not prohibit the continuance of the proceedings and ventilation of the "serious issue to be tried" by reason of expense.

(3) Was it outwith the Court's proper discretion to order the Claimant to pay the costs of the Defendant and the added parties?

55. In the light of the above, the Claimants say, plainly yes. The order was not fair (in the light of the terms of the 9th November 2007 ordering that costs were reserved) and (ii) it rendered the proceedings (objectively or subjectively considered) prohibitively expensive.

56. The Claimants submit that, in the light of the Aarhus obligation, the only orders which were properly open to the Judge in respect of the Defendant's costs were:

(i) to make no order as to the costs of the injunction application as between the Claimant and the Defendant; or
(ii) to reserve the costs.

57. The reason why reserving the costs was (i) fair; and (ii) compliant with Aarhus, is that an order reserving the costs has the effect that the decision on costs is deferred to the trial judge who can properly (after hearing all the relevant evidence) determine the merits or demerits of the Claimants' earlier interim application for injunctive relief to prevent contravention of national laws relating to the environment. Moreover, if no later order is made then the costs would be costs in the case, which, in the circumstances of this case, would be a fair order.

58. The clear advantage of a "reserved costs" or "costs in the case" order is that the party in whose favour the court makes an order for costs at the end of the proceedings is entitled to his costs of that part of the proceedings to which the order relates. The problem with adverse interim order for costs – in an Aarhus case, and where the Claimants conduct has not been unreasonable, is that it confronts the environmental litigant with a liability in costs to the Defendant before the main issue has been tried that has (and had in this case the effect) of the making the continuance of proceedings prohibitively expensive.

59. The Claimants do not argue that (in line with the logic of the regime of summary assessment of costs) that they should not be aware, or have brought home to them, the costs and risks of litigation "at an early stage", but do say, that those costs and

risks, must not be such that they are effectively disabled from continuing a legitimate challenge under the Convention. Whether in a particular case this is achieved by deferring the costs to the outcome of the trial, in respect of which (as here) the Claimants have (ultimately) been able to secure ATE, or whether a Claimant will seek a costs cap/PCO (by way of an aside, an application for a costs cap was refused by HHJ Bursell QC), or there is some form of one-way fee shifting (e.g. legal aid) may not matter, provided there is a sufficiently clear and accessible procedure for making such an application, and the litigant is not prohibited from continuing the litigation by reason of the undue expense of that litigation.

60. If the case were plainly hopeless, or the claim for the injunction had no merit, it may well be that such an order as the judge made here, would be just and would be compliant with Article 3(8) of the Convention. But we submit that would only be the case where the rules governing the exercise of the Aarhus compliant costs discretion were sufficiently accessible and known in advance.

61. But in this case where, but for practical reasons, the refusal of the Defendant to agree the substitution of an independent expert in substitution for BANES or the EA's authorised officer, the injunction would have remained in force until trial (with costs reserved) it cannot have been within the proper (Aarhus compliant) discretion of the Judge to (effectively) penalise the Claimants for seeking interim relief in circumstances where damages would not be an adequate remedy, and where the Claimants had made a reasonable suggested alteration to the order to make the injunction effective which the Defendant had rejected.

62. For these reasons the Claimants contend that having regard to the Aarhus obligation, the Judge was plainly wrong to order that they pay the Defendants and the added parties' costs, and instead should have made an order reserving the question of who paid the added parties costs to the trial judge, and either making no order as to costs in respect of the injunction application between the Claimant and Defendant, or reserving those costs also to the trial judge.

DAVID HART Q.C.

JEREMY HYAM

15th January 2008