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

BETWEEN:

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

Communicants

and

UNITED KINGDOM

Party

SUBMISSIONS OF THE COMMUNICANT TO THE 23RD MEETING, 1 JULY 2009

Note: References in this document e.g. [1] refer to supporting bundle.

A INTRODUCTION

1. This is a Communication by Mr Francis Morgan and Mrs Catherine Baker (the Communicant) received by the Aarhus Convention Compliance Committee on 21 February 2008. The Communicant alleges that by an interim order of the High Court of 21 December 2007 and by actions of its public bodies both before and after this date the United Kingdom (UK) has caused legal proceedings to be unfair, inequitable and prohibitively expensive in contravention of Article 9(4) of the Aarhus Convention 1998.

2. Matters have moved on since 21 December 2007 such that the substantive trial of the primary dispute can proceed to final hearing.[1] However, the Communicant has been left without an effective interim remedy and

[1] The Communicant's legal representatives, Richard Buxton Environmental & Public Law have agreed to work on a conditional fee agreement (no win, no fee), they represented the communicant in Court of Appeal proceedings on a *pro bono* basis, and they have secured After the Event (ATE) insurance to protect against adverse costs. This, however, does not cover interim relief, expenses such as court fees, expert fees, other costs such as travel, accommodation etc, administration (the trial bundle alone now runs to six volumes and the copying costs for this is estimated to be £2,000). Nor would ATE insurance cover any proceedings with less than 60% prospects.

continuing pollution problems. The Court of Appeal judgment of 2 March 2009 will hopefully help to inform the Compliance Committee's consideration by ruling on certain aspects of the communication, albeit that the judgment is not binding on the Compliance Committee. The outcome of the various developments in the substantive proceedings has meant that the Communicant's allegations against the UK still stand and the Communicant invites the Compliance Committee to consider the following matters:

(1) Whether private nuisance proceedings are covered by the Convention?

(2) The Court of Appeal judgment in *Morgan & Baker v Hinton Organics* [2009] EWCA Civ 107, summarised at paragraph 47 on the question of: (i) costs, (ii) application of the Convention, (iii) discretion, (iv) the non-distinction of environmental cases, and … (vi) obstacles to complying with the Convention.

(3) Whether the approach of the regulators (the Environment Agency (the Agency) and the local authority, Bath & North East Somerset Council (BANES)) is consistent with the objectives of the Aarhus Convention when they have failed to protect local residents and properly regulate a site with extensive evidence of pollution problems and regulatory offences being caused.

(4) Whether it was unfair and inequitable for the regulators to pursue the Communicant for their costs of the interim order of 21 December 2007 rather than to leave the question of liability to pay those costs to be determined at the conclusion of trial?

3. The UK sought to have the Communication closed on the basis that the Court of Appeal has determined the matter. However, the Communication is not limited to the question of costs. For instance, the Compliance Committee sought clarification it is letter of 17 April 2008 on a series of points including 'why did the relevant authorities take no action?'

4. Moreover, the Communicant considers that any report on the 4 points raised above would be particularly helpful to the UK, its residents and the public concerned in environmental matters in helping to ensure access to environmental justice. It would be helpful in the light of the continuing concern about prohibitive expense in the legal justice system; such matters being considered by the UK's Civil Costs Review which is due to conclude by the end of 2009.[2]

B FACTUAL BACKGROUND

5. The factual background to the communication is as follows.

6. Hinton Organics (Wessex) Ltd (the waste operator) operates a waste composting site at Charlton Field Lane, near Keynsham, Bristol, England. Mr Morgan is the joint owner of a property known as Rosewood Lodge, Woollard Lane situated 300 metres from the waste site (marked C1 on Map 1 [1]). Mrs Baker is the owner of Cleracres, Publow, which is 500 metres from the site (marked C2 on Map 1).

7. The Environment Agency (the Agency) is one of two primary environmental regulators for the site. It granted a waste management licence to the waste operator in 2001. Bath & North East Somerset Council (BANES) is the local planning authority and other environmental regulator. It is also the municipal waste collection authority for the area and disposes of the majority of its green (organic) waste at the site.[3]

8. Odours, noise and other pollution problems began in 2003 when the site expanded operations (with the knowledge of the regulators). Pollution problems have continued ever since. The most recent occurrence was odour events on 2-6 and 8 June 2009 [2-3]. There have been numerous

[2] Civil Costs Review, chaired by Lord Justice Jackson.
[3] In its summary notes for 2008-09, BANES stated that it disposed of nearly 53% of its green waste at the Charlton Field site, a total of11,906 tonnes.

regulatory breaches for which, primarily, the Agency has issued non-compliance notices (27 in total) [4-5]. However, none of these has effectively resolved the polluting activities and problems persist.

9. The Court of Appeal on 2 March 2009 ordered that the interim costs order, the original subject of the complaint was unfair, under general principles of law rather than because of the application of the Aarhus Convention.[4] The Communicant contends that matters still remain at issue.

10. A summary chronology of events is set out below. Those matters particularly relevant to this Communication are in bold.

Date	***Event***
19.01.01	Waste Management Licence issued. Immediate problems due to lack of required infrastructure.
17.12.02	Mr Morgan's first complaint re. height of windrows. "Furthermore when the wind is blowing in our direction there is a prominent smell in the air and we do not know if this is connected…."
27.05.04	Notice to waste operator to take specified steps in order to comply with Licence conditions – condition breached 5.2.1 -5.2.3 – odour control.
27.05.04	Alan Bratt Senior EHO for BANES encloses odour log sheets for completion.
29.07.04	Monitoring between 11th June and 2nd July 2004. No statutory nuisance.
20.07.04	Alan Bratt – "*I have no confidence that any practical steps that the applicant says they intend to take on the development site will be effective to control noise and dust nuisance to local residents*."
30.07.04	EA site visit – "*Condition 1.1.1 permits no more than 800 tonnes on site at any time. Our measurements indicate that there is in excess of twice this tonnage on site… The above breaches indicate a lack of understanding of the licence/working plan*"
08.09.04	Pockets of smell in Woollard Lane likely to give rise to complaints
16.09.04	Notice to take specified steps in order to comply with licence. Conditions breached: 1.2.2 waste quantity, and 5.2.1 odour control
04.10.04 –	Spontaneous combustion due to anaerobic activity in waste caused

[4] paragraphs 56-8 of the judgment in *Morgan & Baker v Hinton Organics.*

11.10.04	a fire. Case file compiled as a result
29.10.04	Suspension of Licence following failure to comply with notice dated 16.09.04
04.11.04	Strong odours observed - BANES.
16.11.04	EA site inspection: Waste not being stored on impermeable layer and waste not being stored in designated areas also height of waste pile 6m – breach of WML conditions.
2004/2005	Hinton Organics win contracts from local authorities, Bristol, BANES and South Glos. to take green waste. Now take from Bristol, N. Som. Also. Massive increase in waste accepted on site. Odour problems and operations off the concrete pad.
18.01.05	Site prosecuted by EA for odour, quantity of waste, operations off concrete pad and convicted. Post conviction plan accepted by EA. Charges: 6th February, 20th May, and 26th May 2004 breached 33(6) of Environmental Protection Act 1990.
21.04.05	Strong odour on arrival – EA.
May 2005	"*Another serious odour problem*" Formal caution for storing waste in excess of the quantities in the licence and not on the pad, was accepted. Odour offence dropped because of Biffa appeal
10.05.05	EA complaints log: "*Says she cannot open a window as the smell is very strong in her garden – smell is of mouldy cheese. Caller is distressed. – EA comment – "seriously detrimental to amenity of locality at time of visit. ?says they are not operating?"*
17.05.05	"*Unbearable smells coming from Hinton Organics*". EA comment – Smell leaving site from operations. Waste off pad & 5-6m high.
18.05.05	Strong odour apparent on highway c.300m distant from site in breach of 5.2.1 and 5.2.2 and 5.2.3.
19.05.05	Waste not being stored on impermeable pavement, amount of waste on site in excess of permitted quantity, height in piles in excess of 3m. Above breaches indicate a lack of understanding of licence conditions/working plan. [n.b. this is the second time this conclusion has been reached c.f. 30.07.04]. Strong odour apparent on highway approaching site approx. 0.3 mile distant. See WML conditions 5.2.1. 5.2.2 and 5.2.3.
20.05.05	Notice to Defendant to take specified steps – conditions breached 1.1.1. waste storage, 1.2.2. waste quantity, 1.3.3 understanding of the licence, 4.4.2 storage of non-permitted waste, 5.21-5.2.3, odour control, and 6.1.2 record keeping
25.05.05	Hinton Organics is smelling terribly this afternoon. EA comment - odours noted along Charlton Road from Keynsham direction up to the site.
03.06.05	Follow up visit to Notice issued on 20.05.05. All now compliant.

28.06.05	Strong odour apparent on site boundary. Very strong on site…. see WML conditions 5.2.1 5.2.2 and 5.2.3).
01.07.05	Abatement notice issued by BANES being satisfied of the existence and likely recurrence of a statutory nuisance under s.79(1)(b) … "*emissions of foul and offensive odour from partly rotted compost materials.*"
08.07.05	Alan Bratt to Carol Tunnard at Council: "*You may consider it appropriate at this stage to consider how much longer the Council continues to utilize a contractor to receive a substantial proportion of its green waste, who in my opinion singularly fails to manage their site to ensure that smell problems such as this do not arise*."
12.07.05	EA site visit. Offensive odour at site boundary – see conditions 5.2.1; 5.2.2; 5.2.3.
26.07.05	Dreadful smell coming from Hinton Organics Site. Also putting up metal fencing on top of bunding. EA comment – BANES EHO's are about to serve an odour abatement notice.
11.01.06	Meeting with EA re prosecution re. 19th May 2005; 28th June 2005 and 12th July 2005.
24.01.06	EA site visit. No odour detected off-site. 2 odour complaints today. 5 odour complaints received yesterday regarding site. Alan Bratt EHO confirmed an odour off site yesterday afternoon. Turning and screening of compost had taken place. Operations must not take place during adverse weather conditions. Site warning issued in respect of non-compliance
02.03.06	Excess volume of waste on site (exceeding 800 tonnes).
10.05.06	Summons issued by EA re. 19th May, 28th June, and 12th July 2005.
11.06.07	Statement from Catherine Baker obtained by BANES re. intended prosecution.
12.06.07	Statement obtained from Lisa Morgan by BANES for intended prosecution. "A foul sileage and cheesy type smell…For the next four days the pattern of bad smells was repeated and we were unable to either open windows to cool the house or use the garden for relaxation."
19.06.06	Letter before action re. nuisance from Richard Buxton
10.07.06	EA response to D's application to increase storage capacity.
July 2006	Outstanding issue of excessive waste on site and final product stored off the pad. Deadline of 27 October extended as operator now has enough paragraph 7a exemptions registered for spreading.
21.07.06	**Communicant issues legal proceedings**
25.07.06	EA compliance report: "The most concerning issue was the

	tonnage of waste on site. This was calculated by our surveyor…The weight of waste on the pad was calculated to be 1180 tonnes. The site licence permits a maximum of 800 tonnes of waste. Excess waste on site was also noted on the previous routine inspection.
27.07.06	EA to Mr Osbourne (Home Farm, Charlton Road)): "*We were looking to bring a number of charges against the company, the principal charge relating to odour. However, we have recently lost a case we brought against a company accused of creating an odour problem. This was due to the interpretation of the law regarding the judgment of whether and odour problem existed and who should make that decision, namely whether this should be the court or the officer on the site. We are appealing against this judgment, but this will take at least four months. We therefore cannot progress with the current odour charges against Hinton Organics given the current position.*"
15.08.06	D accepts formal caution re. 19th May and 12th July 2005. Failure to comply with conditions 5.2.1 and 1.1.1 oversize waste.
21.09.06	Volumes of compost on site in excess of 800 tonnes permitted. CCS score 3 against general management and related to operating site compost quantities within 800 tonnes.
28.09.06	EA to Mr Osbourne: "I appreciate the concerns you have raised over odour problems. Unfortunately we are unable to enforce the odour conditions in the site's licence due to a legal challenge in another part of the country"
Oct 2006	Statement Frank Morgan. Retrospective permission for the operations at the site to increase
27.10.06	Letter from Chairman of Compton Dando Parish Council "*The Parish Council wish to support the complaint they are presenting to you regarding the Hinton Organics Composting Site at Queen Charlton Quarry….We have raised a series of concerns with the Local Authority and we do not feel these have received a satisfactory response. They are…. (3) the smell coming from the site when the compost is turned forcing the residents to stay inside and close all doors and windows even on hot summer days*."
31.10.06	BANES to Mr and Mrs Bond: "… I can confirm that Phillip Seabrook and I visited you on 23rd October 2006 when we witnessed a particularly offensive odour in their garden for a period of approximately 10 minutes. I can also confirm that I advised you that the smell had not persisted for sufficient time for me to confirm that a statutory nuisance had recurred and that the notice had been contravened. Mr Seabrook did advise that he "would not like to live with a smell as nasty as that for very long"..... "I can confirm that following visits to the site it is not uncommon to find that smell does linger on clothing."… "I have advised you previously that the standard of proof required to prove an offence under the Act and Section is "beyond reasonable doubt".
08.11.06	Planning permission approved to allow permanent recycling of cardboard waste and increase in truck movements

13.11.06	Letter from Defendant to EA: "We believe that Hinton Organics is being subjected to an organised campaign of harassment by a small and disproportionately vocal group of local residents…"
28.11.06	EA issue formal warning letter. Tonnage in excess of limit provide in site licence.
12.04.07	Odour Suppression Plan. Comments from EA: "The plan is very reactive and aims to deal with any odour nuisance once it has arisen. Detail needs to be provided on how you intend to prevent odours in the first place. This detail needs to be explicit an clearly explain what steps will be taken and when"
04.05.07	BANES 'have an abatement notice … meaning no turning or shredding when the wind is blowing towards residential properties (i.e. no activity on site during inspection).
06.06.07	CAR report form. Incident response visit detect malodours off-site
21.06.07	Notice of non-compliance: "Officers estimate that a total of 1489 tonnes is present. This is made up of 867 tonnes in windrows, 264 tonnes in oversize and 358 tonnes of product. This indicates a failure to understand licence condition 1.2.2 which limits total waste on site to 800 tonnes. Notice issued partially suspending licence. [n.b. this is the third time the EA have said that the Defendant does not understand licence condition 1.2.2 which limits the total waste to 800 tonnes. See 19.05.04 and 30.07.05]. Notice of suspension of licence.
19.07.07	Notice issued partially suspending licence. Suspension covers the receipt of controlled waste until amount on site is within 800t.
24.07.07	Notice to take specified steps issued by EA: "On 19th June 2007 and 19th July 2007, the EA received numerous complaints from local residents about odour from your site. Environment officers attended and detected odour outside the site boundary at a level likely to cause serious detriment to the amenity in the locality". Breaches – 5.2.1 and 5.2.2.
02.10.07	Second abatement notice issued by BANES: "being satisfied of the existence and likely recurrence of a statutory nuisance under section 79(1)(d) at the premises …arising from the processing of waste giving rise to emissions of foul and offensive odour from such partly rotted compost materials.
05.10.07	Site assessment report by EA: Breach of 5.22
08.10.07	Odour detectable on boundary of site. Odour persisted up to 100m north of site along Charlton Road.
10.10.07	Detailed letter of complaint by Cathy Baker to Alan Bratt: We have been suffering horrendous levels of odours from Hinton Organics over the last two and a half weeks and are continuing to do so…."
23.10.07	EA Compliance Assessment report: "8 odour complaints received on 23rd October 2007. Substantiated compost odour by

	Environment Officer at 1630 outside properties on Woollard Lane and again at 1800. A breach of condition 5.2.1 and 5.2.2 with a CCS score of 3….”
31.10.07	Response to Mrs Baker’s letter of 10th October 2007. Officer visited on 5th October 2007 between 13.40 and 14.15 (35 mins) and reported slight odour. He did not determine odour was offensive or a nuisance…. In respect of enforcement action, I took written statements from you and other residents after observing foul and offensive odour myself on 6th June 2007. In my view a statutory nuisance had recurred, in contravention of the abatement notice dated 1st July 2005. I visited again with EA officers on 19th June 2007 when very strong offensive odour was observed at another resident’s house and at the head of the by way… the papers were passed to the Council’s solicitor with a request that the evidence should be reviewed and informations laid…after studying the papers the Council’s solicitor advised that there was a defect in the notice which in their opinion would upset any realistic chance of conviction notwithstanding the notice had not been appealed. After discussing the matter in some depth it was decided we would not proceed with the case… the abatement notice had been reserved but solicitors for Hinton Organics have pointed out an ambiguity in the notice which is being addressed”
09.11.07	**High Court grants interim injunction against waste operator**
12.12.07	Site waste volumes on the concrete pad were measured and found to be in excess of the permitted 800 tonnes. The waste volumes surveyed did not include a significant amount of final compost that is stored off the concrete pad.
21.12.07	**Interim injunction discharged because EA/BANES unwilling to make independent determination as to existence of odour**
03.01.08	EA “*I substantiated a compost odour on Woollard Lane at 1150, 12.02 and 12.17 hrs which was localised but persistent. A breach of condition 5.2.1 and 5.2.2 with a CCS score 3. I noted a significant amount of end compost off the concrete pad which was being dug into and loaded onto a trailer to be removed to exempt spreading operation. I believe the disturbance of this stockpile and the turning of windrows started on 02.091.08 were the source of the odours off the site boundary*.”
14.02.08	Warning letter issued by EA: “We believe that you have committed the following offences on the following dates: 19th June 2007; 19th July 2007; 5th October 2007; 7th October 2007; 8th October 2007; 23rd October 2007; 12th December 2007; 3rd January 2008. … **We do not intend to prosecute you on this occasion.**”
20.02.08	EA to Defendant: “You have been sent a warning letter for the breaches of odour conditions that were noted on the CAR forms since 19th June 2007. We believe that this is a fair response in line with our enforcement and prosecution policy.”….”I am pleased you are progressing your PAS 100 accreditation. However you should be aware that producing compost to PAS 100 standard is just one of three elements you need to demonstrate in order to

	comply with the Compost Quality Protocol.
04.03.08	Notice to take specified steps. Breach of condition 1.1.1 and 1.2.2 in that not all waste storage is taking place within the areas of impermeable pavement and waste quantities have exceeded 800 tonnes on the site. [Again, evidence of an inability to keep to the mandatory limits of the WML].
7-8.4.08	Trial of substantive nuisance proceedings starts. The trial judge rules that evidence of waste operator's consultant is inadmissible due to the apparent bias arising from the operators consultant: SLR Consulting Ltd is working for both the waste operator and the regulator BANES.
16.04.08	EA serves s 42(6)(c), EPA 1990 partial suspension notice due to excess waste on site.
03.07.08	**Communicant issues proceedings against the EA for a failure to protect against harm to human health contrary to Art 4 of the Waste Framework Directive 2006/12/EC and to unlawfully grant a waste exemption licence to the waste operator.**
14.01.09	**Court of Appeal grants permission to proceed with judicial review against EA for failure to regulate the waste operator**
19.02.09	High Court rules that BANES acted unlawfully when granting planning permission for intensification at the waste site. BANES had failed to comply with the EIA Directive 85/337/EEC by failing to take into account the cumulative effect and significance of existing odour problems.
02.03.09	**Court of Appeal upholds unfairness allegation in High Court discharging interim injunction order.** It allows an appeal against the ruling on bias, holding that the matter was one of weight of evidence rather than admissibility.
05.03.09	Prosecution for exceeding waste quantities on 4.3.08 fined £3,000 and £2,960 costs.
05.03.09	**EA writes to Court of Appeal seeking to revise the Court Order to ensure Communicant pays EA/BANES costs of the injunction proceedings**
10.03.09	**Communicant objects proposal to revise order on grounds of unfairness.**
13.03.09	**Court of Appeal revises Court Order to reflect EA/BANES submissions on costs.**
Mar 09	**Proceedings against EA stayed after revoking the unlawful waste exemption licence and agreeing to review licence conditions relating to bioaerosols assessment (stay to be reviewed by the Court in August 2009).**
10.06.09	**Communicant issues legal proceedings against BANES for failing to take planning enforcement proceedings against the**

	waste operator following the High Court judgment of 19.2.09
12.06.09	Enforcement notice served for odour offences.

C SUBMISSIONS

1 Are private nuisance proceedings covered by the Convention?

11. The proceedings issued by the Communicant are private nuisance proceedings, the claim being a private civil dispute between two persons and, since June 2009, two limited companies. Private nuisance is a tort (civil wrong) under the UK common law system. It is essentially a dispute between two private persons although the legal definition of person is wide and can include a corporate person and any other association e.g. non-governmental organisation.[5] It is distinct from the regulatory systems of environmental protection established by legislation such as the Environmental Permitting Regulations 2007 which, *inter alia*, transposes EU legislation on IPPC or the land use planning regime under the Town and Country Planning Act 1990, which includes transposition, where relevant, of the EIA Directive 85/337/EC.

12. The Communicant's view is that the starting point should be the Convention itself which appears on its face to expressly cover these types of private civil proceedings. In particular Article 9 provides that:

> 3. … 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.

[5] see e.g. *Watson v Croft Promosport Ltd* [2009] EWCA Civ 15, *Bontoft v East Lindsey District Council* [2008] EWHC 2923 (QB)

13. The Court of Appeal, however, left the question open following submissions from the waste operator.[6] UN Aarhus Implementation Guide (2000, UN), the REC Handbook (2003, REC) and the recent Milieu reports (2007, EC) prepared on behalf of the European Commission all appear to be silent on the point.

14. In correspondence with the UNECE,[7] the UK has strongly indicated that the Aarhus Convention should apply to private proceedings stating that:

> "The rights and obligations created by international treaties have no effect in UK domestic law unless legislation is in force to give effect to them, i.e. they have been "incorporated". The provisions of the Aarhus Convention cannot therefore be said to apply directly in English law to any particular procedure or remedy. There is, however, in English law a presumption that legislation is to be construed so as to avoid a conflict with international law, which operates where legislation which is intended to bring the treaty into effect is ambiguous. The presumption must be that Parliament would not have intended to act in breach of international obligations.
>
> In the kind of case in question, i.e. a claim by one private party against another in nuisance, the rules which govern civil court procedure in England and Wales (the Civil Procedure Rules 1998 or "CPR"), as laid down in secondary legislation under powers in the Civil Procedure Act 1997, are therefore, insofar as they are ambiguous/discretionary rather than clearly prescriptive, to be construed so as to be consistent with article 9(3) and (4) of the Convention.
>
> The procedure to challenge acts or omissions by public authorities for contravention of provisions of national law relating to the environment is also prescribed in the CPR and the same therefore applies."

15. The Communicant submits that providing there is an environmental element to the nuisance proceedings then the Aarhus Convention should

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[6] the Court of Appeal held at para 44 that: "These arguments raise potentially important and difficult issues which may need to be decided at the European level. For the present we are content to proceed on the basis that the Convention is capable of applying to private nuisance proceedings such as in this case. However, in the absence of a Directive specifically relating to this type of action, there is no directly applicable rule of Community law.

[7] Defra letter of 30.10.08 (amended on 22 May 2009).

apply. There should not, subject to *de minimus*, be any threshold or exclusion of certain categories of private nuisance proceedings. Similarly, there will be other private proceedings such as personal injury (e.g. litigation for poisoning or asbestos inhalation) or trespass which have a significant environmental component that should similarly be covered by the Convention.[8] Above all, if private proceedings fell outside the Convention, it would be contrary to its objectives including that:

> ' … every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,..
>
> ' … the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

16. In concluding this point, the Communicant invites the Committee to confirm that the Aarhus Convention applies to private proceedings under the common law.

2 The judgment of *Morgan & Baker v Hinton Organics* [2009]

17. The Communicant invites the Committee to consider the Court of Appeal judgment in *Morgan & Baker v Hinton Organics* [2009]. Its findings were summarised by Lord Justice Carnwath at paragraph 47:

> It may be helpful at this point to draw together some of the threads of the discussion, without attempting definitive conclusions:
>
> i) The requirement of the Convention that costs should not be "prohibitively expensive" should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.
>
> ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct

[8] e.g. *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 in which the widow of an asbestos worker claimed compensation from two defendants for her late husband's death from mesothelioma.

effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.

iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary "loser pays" rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion.

iv) This court has not encouraged the development of separate principles for "environmental" cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The *Corner House* statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied "flexibly". Further development or refinement is a matter for legislation or the Rules Committee.

v) The Jackson review provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee. Even if we were otherwise attracted by Mr Wolfe's invitation (on behalf of CAJE) to provide guidelines on the operation of the Aarhus convention, this would not be the right time to do so.

vi) Apart from the issues of costs, the Convention requires remedies to be "adequate and effective" and "fair, equitable, timely". The variety and lack of coherence of jurisdictional routes currently available to potential litigants may arguably be seen as additional obstacles in the way of achieving these objectives.

18. The Court of Appeal comments are *obiter* to the main determination. However, the Court of Appeal was made aware of the Communication and, in the Communicant's view, an exchange of views could only assist the development and further implementation of the Convention.

3 Why did the relevant authorities take no action?

19. In its letter of 17 April 2008, the Compliance Committee asked 'Why did the relevant authorities take no action?' For the Communicant this is a critical question and the most fundamental and vital aspect of the Communication.

20. Pollution control and environmental protection in the UK is primarily the responsibility of government bodies such as the Agency and BANES. They have, or should have, the expertise and resources to do so. When they fail to do this, local residents and those directly affected by pollution problems are left with two options: continue to suffer pollution or environmental harm or take legitimate action themselves. In the present case, the Communicant sought assistance from the Agency and BANES from as early as 2002. By 2006, problems had got worse and they pursued a solution themselves. But for the failure of the Agency and BANES to act, the Communicant would not have issued legal proceedings.

21. Thus, it is correct for the UK to state that the Communicant has repeatedly alleged that the Agency/BANES have failed to effectively regulate the site. However, this has not only been an aspect of this Communication but judicial review proceedings have been issued against both the Agency and BANES to try and prompt effective regulation from them by court determination. In terms of the Agency, the grounds of judicial review state, in express terms, that the Agency has failed to regulate the site and protect the local community from harm to human health.[9] For BANES, legal proceedings have just been issued alleging a failure to take enforcement proceedings.[10]

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[9] In *R (Baker) v Environment Agency*, CO/6318/2008, the Court of Appeal's reasons in granting permission were 'the grounds are arguable, not least having regard to the possible impact of EU law and the precautionary principle and (in the case of Ground 2) the previous correspondence.

[10] In *R (Baker) v BANES*, CO/5787/2008, proceedings have been issued following a failure to take planning enforcement proceedings after planning permissions allowing an expansion and intensification of operations were quashed by the High Court.

22. For the interim injunction proceedings, the relevant authorities (i.e. the Agency and BANES) failed to take action when local residents were being subjected to offensive odours over a prolonged period leading up to the injunction order of 9 November 2007. They have continued to take ineffective enforcement action ever since. This is clear from the extensive list of events set out in paragraph 9 above.

23. It is inadequate for the Agency and BANES to point to non-effective enforcement measures such as issuing defective abatement notices (see entry 31.10.07 and withdrawing from prosecution proceedings (entry 27.07.06) to conclude that the relevant authorities are taking action. They are not and the problems persist. Most recently, there have been prolonged odour problems in June 2009 and still no effective action is being taken.

24. It is wholly unacceptable for the UK to rely upon a series of ineffectual enforcement measures, when the regulators are well aware that they are not helping to protect the local community.

25. The Committee is therefore invited to consider this aspect of the Communication and to comment on this.

4 The regulators costs of the injunction proceedings

26. Finally, in the domestic proceedings the question of unfairness from the interim costs order of 21 December 2007 did not conclude following judgment by the Court of Appeal. The initial Order made at the conclusion of Court of Appeal proceedings was that:

> "3. The interim costs order made by His Honour Judge Seymour QC on 21st December 2007 is set aside and replaced by an order that costs be reserved to the trial judge." [_]

27. This was entirely acceptable, and following a commitment by the Communicant to the regulators, their costs position was preserved. The Communicant had agreed to hold any sums due in an interest bearing account and in the event that either there was a final order that (i) the

Communicant pay the interim order costs or, (ii) the waste operator pay the costs, or even (iii) that the waste operator was unable to pay those costs, the regulators costs would be preserved. This was the correct understanding of the Communicant and, it is submitted, the fair approach to the conclusion of the interim costs order.

28. However, the Agency and BANES made representations to the Court of Appeal that this was not the conclusion of the Court of Appeal findings and sought to ensure that the regulators costs be paid immediately by the Communicant, regardless of the outcome of the final trial. In this instance, the polluter has avoided liability altogether for the regulator's costs.

29. The Communicant's letter of 10 March 2009 set out the fair and correct approach to the costs issue [11-2]. Yet the Agency and BANES pursued the point. The letter of 13 March 2009 on behalf of the Communicant further clarifies the equitable approach and explains that if the order were amended it would unfairly prejudice the Communicant [15]. Nevertheless, the Order was amended and subsequently read:

> "3. Paragraph 3 of the interim costs order made by His Honour Judge Seymour QC on 21st December 2007 is set aside and replaced by an order that the costs of the Defendant be reserved to the trial judge." [7]

30. The consequence of this is that the costs order of 21 December 2007 in relation to the Agency/BANES costs remains. It is the Communicant's view that in pressing the point the Agency and BANES have favoured the polluter over the Communicant on this issue when they had no reason to do so. It is unclear why they did this. However, the consequence is that the Communicant has, contrary to Article 3(8) of the Convention, been penalised for seeking to protect the local environment.

31. In its letter of 17 June 2009, the UK states that the Communicant should not raise this matter with the Committee as the point was deliberately not taken before the Court of Appeal. This is incorrect. The Communicant sought to ensure that the costs of the interim injunction, including those of

the Agency/BANES, were determined at the close of the trial. It did not dispute the fact that the Agency/BANES should be paid; the dispute was which party to the nuisance proceedings should pay those costs.

32. It is accepted that the Communicant agreed it would ensure that the Agency and BANES costs would be covered. This was to provide the regulators with the assurance that they need not attend the Court of Appeal hearing. However, it was made clear in submissions that the Communicant disputed *who* should pay those costs.

33. The Committee is invited to consider this aspect of the costs order.

D CONCLUSION

34. In all the circumstances above the Communicant respectfully asks the Committee to consider and report on the points raised above.

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23 June 2009