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Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with the provisions of the Convention in connection with costs associated with discharge of an interim injunction (Ref. ACCC/C/2008/23)

Further to our letter dated 7th July 2008 requesting an extension to the deadline for a response, and our subsequent letter dated 30th October 2008 providing the Compliance Committee with an initial response to their questions set out in your letter dated 17th April 2008, we write to provide the committee with our final submissions concerning case **Ref ACCC/C/2008/23**.

As you will recall, in our letter dated 7th July 2008, we requested an extension to the deadline for providing our submissions on the compliant concerning the above case, given that the matter was at that time also the subject of an appeal to the Court of Appeal. The Court of Appeal has now given judgment in that appeal and we write to inform you of the Court's ruling. We enclose a copy of the judgment with this letter.

The claimants in the case Morgan & Baker v Hinton Organics (Wessex) Ltd appealed Judge Seymour's interim costs order of 21st December 2007 on the grounds that it contravened the principle of the Convention that costs in environmental proceedings should not be "prohibitively expensive". The Court of Appeal gave judgment in that appeal on 2nd March 2009. The Court has allowed the appeal and has set aside the interim costs order complained of in the communication, substituting it with an order reserving the costs of the defendant to the trial judge. The appeal was allowed on conventional costs principles. Carnwath LJ held at paragraph 56 of his judgment:

"It was wrong in our view for the judge to award costs in favour of the defendants, simply because that is what he would have done if he had rejected the application in the first place. That ignored what had happened since, seen against the background of his own finding that the balance of convenience lay in favour of some form of interim protection, damages not being an adequate remedy. In a case of this kind, where the merits of the interim injunction were so closely tied up with the merits of the case overall, he should in our view have considered the desirability of leaving

issues of costs between the principal parties to be sorted out when the final result was known."

It is of note that the Court did not go on to consider the application of the Convention in detail because the point was not raised before the trial judge. The Court did however agree with Defra's response to the first question posed to the UK by the Compliance Committee (see our letter dated 30th October 2008) that is, "to which procedures and remedies in this kind of case do the provision of article 9, paragraphs 3 and 4, of the Convention apply?". In this respect, the Court agreed that the Civil Procedure Rules relating to the award of costs remain effective and that the principles of the Convention are a matter to which the court may have regard in exercising its discretion under those rules. However, in the Court's view, the claimants should have made submissions on the point to the trial judge at the time he considered the issue of costs, and should have provided the factual basis which would have enabled him to judge whether the effect of his order would indeed be "prohibitive". It is also of note that the Court agreed with the defendant's submission that the claimants were not in fact deterred from proceeding to trial. Carnwath LJ states at paragraph 51 of the judgment:

"indeed, had it not been for their objection to part of the defendants evidence, the trial would be now have been completed, and the significance of the interim costs order could have been judged in the connect of the incidence of costs as a whole".

We note that the Committee intends to address the issue of the timing of the discussions on this communication at its twenty-third meeting on 31st March-3rd April. As explained, the costs order has been quashed and substituted with one which reserves the question of costs until the end of the trial so cannot therefore form the basis of a complaint under the Convention. The matter of costs in the case is still *sub judicae* so it is not appropriate to comment further on this issue. In relation to the finding that the Claimants should pay the costs of the Environment Agency and the local Council, we draw the Committee's attention again to the Court's finding that the Claimant's have not in fact been deterred from proceeding to trial.

Furthermore, we do not believe it is appropriate for the Committee, *in the context of this complaint,* to opine on the Court of Appeals *obiter* statements which relate to the costs system as a whole. As the Committee will be aware, it has asked the UK how the implementation of article 9, paragraph 3 is ensured, and more specifically how is it ensured that in practice procedures are not "prohibitively expensive", within the context of complaint ref ACCC/C/2008/33. The UK will be addressing these questions in due course.

In light of this and our previous letter addressing the Compliance Committee's specific questions, we ask the Committee to close this case.

Yours sincerely,

Åsa Sjöström
UK focal point for the Aarhus Convention

This letter has been copied to Richard Buxton Environmental & Public Law.