Neutral Citation Number: [2009] EWCA 107 Civ

Case No: A2/2008/0038 & A2/2008/0951

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, QUEEN'S BENCH DIVISION A2/2008/0038
HIS HONOUR JUDGE SEYMOUR - A2/2008/0038 &
QUEEN'S BENCH DIVISION, BRISTOL DISTRICT REGISTRY – A2/2008/0951
HIS HONOUR JUDGE BURSELL QC – A2/2008/0951
HQ06X02114 & 7BZ90889 Respectively

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2009

Before :

LORD JUSTICE LAWS
LORD JUSTICE CARNWATH
and
LORD JUSTICE MAURICE KAY

- -

Between :

(1) FRANCIS ROY MORGAN **(2) CATHERINE MARGARET BAKER**	**Appellants**
- and -	
HINTON ORGANICS (WESSEX) LTD	**Respondent**
- and -	
CAJE	**Intervenor**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

David Hart QC and Jeremy Hyam (instructed by Richard Buxton Environmental & Public Law) for the Appellants
Stephen Tromans and Richard Wald (instructed by **Messrs Bond Pearce LLP**) for the Respondent
David Wolfe appearing for the intervening party **CAJE**
Hearing dates : Monday 2nd & Tuesday 3rd February, 2009

- -

Judgment

Carnwath LJ:

This is the judgment of the Court to which all members have contributed.

Introduction

1. The claimants are two residents of Publow, a rural hamlet not far from Bristol. The defendants, Hinton Organics (Wessex) Ltd, operate a composting site, about 300 and 500 metres (respectively) from the claimants' homes. In 1999 planning permission was granted by the Bath and North East Somerset Council ("the Council"), and in January 2001 a waste management licence by the Environment Agency ("the Agency"). The claimants have complained frequently of smells from the site. Some enforcement action has been taken by the authorities based on conditions in the licence, but this has not resolved the problem to the satisfaction of the claimants. In July 2006 they began their own proceedings in private nuisance for an injunction and damages.

2. On 9th November 2007, HH Judge Seymour QC granted an interim injunction pending trial, and reserved the costs of the interim application to the trial judge. There was no appeal. However, on 21st December 2007, following representations by the Council and the Agency, he discharged the interim injunction, and ordered the claimants to pay their costs and those of the defendant. The claimants sought permission to appeal against the costs order, on the grounds that it contravened the principle of "the Aarhus Convention" that costs in environmental proceedings should not be "prohibitively expensive". The application was refused by Pill LJ on the papers, but renewed before Carnwath LJ on 10th April 2008, by which time the trial was less than a month away. He adjourned the application for 28 days and stayed the costs order.

3. The trial began on 7th April 2008 before HH Judge Bursell QC. On the first day the claimants objected to the evidence of the defendant's odour expert, Mr Branchflower, on the grounds of apparent bias. On the following day, the judge ruled that this evidence was inadmissible. He adjourned the proceedings, and ordered the defendant to pay the claimants' costs thrown away.

4. On 28th July 2008, Carnwath LJ gave the defendant permission to appeal against that order and later directed that that appeal be heard at the same time as the claimants' adjourned application for permission to appeal against the interim costs order, with the hearing to follow directly if permission were granted. In the event, we granted permission without opposition from Mr Tromans for the defendant. The Council and the Agency are not directly concerned in the appeals, since an agreement has been made protecting their interests. We have also had helpful written submissions, given by permission of the court, by Mr Wolfe on behalf of the Coalition for Access to Justice for the Environment ("CAJE"), which comprises several leading UK Non-Governmental Organisations concerned with the environment. DEFRA declined Carnwath LJ's invitation to offer comments on the relevance of the Aarhus Convention, but their general position has been made known by a different route (see below).

5. Accordingly there are before us two appeals raising distinct issues:

i) The claimants' appeal against Judge Seymour's interim costs order of 21st December 2007 ("the interim costs issue");

ii) The defendant's appeal against Judge Bursell's order of 8th April 2008, relating to the evidence of their odour expert ("the expert witness issue").

(1) The Interim Costs Issue

The proceedings before the judge

6. Before turning to the arguments, it is necessary to say something about the form of the interim order, and the sequence of events leading to its discharge. The order as made on 7th November 2007 prohibited the defendant from "causing odours" in the vicinity of the claimants' properties –

> "…at levels that are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the boundary, as perceived by an authorised officer of [either the Agency or the Council]."

7. This formulation, including in particular the reference to the perception of an officer of the Agency, followed the wording of one of the conditions in the waste management licence for the Hinton site, granted in 2001. The validity of a condition in this form had been upheld by the Divisional Court in *Environment Agency v Biffa Waste Services Ltd* [2006] EWHC 3495(Admin). In that case, the Divisional Court rejected the argument that the reference to the perception of an authorised officer rendered the condition invalid, as breaching the principle of certainty required for a criminal offence, and usurping the adjudicative function of the court. It was held that, while the evidence of an authorised officer was a necessary ingredient of the offence, the condition did not limit the jurisdiction of the court to decide on all the evidence whether the odours offended the standards set by the condition.

8. As appears from a subsequent letter from the court (see below), it seems that the judge himself had raised the need for some objective criteria to support the order, and that his attention had been drawn to the terms of the licence condition as a possible precedent. In his judgment he described this form of order as being "substantially in the terms of paragraph 5.2.2 of the licence" while making it specific to the properties of the claimants, and adding an authorised officer of the Council (in addition to that of the Agency) as a potential monitor.

9. On the merits of the application the judge was satisfied that there was a "serious issue to be tried" as to whether odours from the defendant's premises were interfering with the claimants' enjoyment of their properties, and that damages would not be an adequate remedy. It was accepted by Mr Wald, for the defendants, that an injunction in the form now proposed would not damage the defendants' business. The judge decided that the balance of convenience favoured the grant of the injunction. He noted Mr Wald's submission that it would add nothing of substance to the Agency's existing powers, but he concluded that it would have benefits in that it would "focus attention" on the these particular properties, and add to the remedies otherwise available "the formidable powers of the court in relation to contempt of court".

10. The defendants themselves did not appeal against the order. However, having been notified of the order, the Agency and the Council wrote to the court expressing concerns about their role as monitors of the order. In a response written on behalf of the judge, the court explained the background to the adoption of this form of order, and continued:

> "The Judge made plain that, if an order was made in those terms, it was at the risk of the claimants as to whether either [the Agency] or [the Council] was prepared to co-operate. The judge did not envisage that either body would take any steps in relation to the monitoring of "odours" other than such as they, respectively, considered appropriate in the usual exercise of their respective functions…."

11. This did not satisfy the two authorities. They wrote to the parties reiterating their concern about the potential for conflict between their statutory functions, and their position as "*de facto* arbiters" of breaches of the injunction. They invited the parties to agree to amend the order by deleting the reference to them, and suggested that an alternative might be to substitute a reference to an agreed independent expert. The claimants accepted this proposal in principle and wrote to the defendants inviting them to propose names of three possible experts. The defendants replied that they did not see how such an appointment would "work in practice or assist the parties generally". They considered that the only "sensible and effective" way to resolve the issues was to proceed to trial as soon as possible.

12. Accordingly, in default of agreement between the parties to their proposed amendment, the authorities requested the judge to relist the case, so that they could apply to exclude the reference to their officers. At the hearing on 21st December 2007, having heard argument from the authorities, the defendants, and the claimants, the judge discharged the injunction.

13. In his judgment he commented critically on letters sent by both the claimants and the defendants to the authorities, which he thought had overstated the degree of active involvement required of the authorities by his order. However, he accepted the argument on behalf of the authority that the form of order was wrong in principle:

> "…it is inappropriate in principle to constitute an individual, who has other statutory functions to perform, the person to determine whether or not an order of the court has been infringed."

He remained of the view that the injunction would be unworkable without some objective means of assessment. He thought it right therefore to reconsider "on a balance of convenience basis" whether it had been appropriate to make any form of order. He noted the suggestion that there might be substituted a reference to an independent expert, but commented:

> "That in my view would be appropriate if, but only if, there was an agreement between the claimants and the defendant as to the identity of such a person. That is not the position…."

14. Having decided to discharge the injunction, he heard applications for costs by both the authorities and the defendants. Mr Hyam, for the claimant, submitted that the costs should be reserved to the trial judge, as had been done on the previous occasion. He did not at that stage base any argument on the Aarhus Convention. The judge allowed both applications. The authorities were "entirely innocent parties" whose attendance had been made necessary by the claimants' refusal to agree to a variation. Their costs were summarily assessed at £5,130 plus VAT. As to the defendant's costs, he held that their attendance on that day had been justified because "there was a suggestion of an alternative form of order, which would have still made the defendant subject to an injunction". He thought that they should also have the costs of the previous hearing, because that was the order he would have made if (with the benefit of the authorities' submissions) he had refused the injunction on that occasion. The order in their favour was subject to detailed assessment if not agreed.

The appeal

15. The claimants sought permission to appeal against the judge's orders in respect of costs. They noted that the costs awarded to the authorities (£5,132) and those claimed by the defendant (£19,190.25) resulted in a potential liability of almost £25,000, in circumstances where the court had found that there was a serious issue to be tried and that some form of injunctive relief was appropriate. Although the claimants had legal expenses insurance limited to £50,000, the costs award put at risk the prospect of their being able to pursue their claim to trial. The appropriate award would have been to reserve costs to the trial judge, as had been done on the first occasion. In the result the order was "unfair and prohibitively expensive and therefore contrary to Article 9(4) of the Aarhus Convention 1998".

16. As already noted, Carnwath LJ directed that the application be adjourned on notice with the appeal to follow if permission were granted. He said:

> "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)."

He added that the claimants faced a "serious hurdle" having failed to raise this issue before the judge.

17. Mr Hart has proposed three issues as arising under this part of the appeal:

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

ii) If yes, what is 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)?

iii) In the light of (a) and (b) above, was it outside the Court's proper discretion to order the Claimant to pay the costs of the Defendant and the authorities?

18. Before returning to these issues, it is necessary to give a brief account of the Aarhus Convention and its aftermath, and of related judicial activity in this country.

The Aarhus Convention

19. The "UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters", usually referred to as "the Aarhus Convention" (after the town in Denmark where it was agreed), was signed by the first parties (including the UK) in 1998, and came into force in October 2001. It was ratified by the UK in February 2005, at the same time as its ratification by the European Community.

20. The main provisions of the Convention relied on as 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." (emphasis added)

21. Reference must also be made to the definitions in Article 2:

> "4. 'The public' means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;
>
> 5. 'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-

> governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

22. For the purposes of domestic law, the Convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect (see Halsbury's Laws Vol 44(1) Statutes para 1439)). Ratification by the European Community itself gives 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 paras 25-31). Furthermore provisions of the Convention have been reproduced in two EC environmental Directives, dealing respectively with Environmental Assessment and Integrated Pollution Control (neither applicable in the present case).

23. There was a proposal for a more general European Directive on access to justice in environmental matters (COM(2003) 624), but it has not progressed beyond the draft stage. It would in any event have been confined to administrative or judicial review proceedings. This exclusion of private law proceedings was explained in the supporting text (p 12) on grounds of "subsidiarity":

> "Setting out provisions in relation to private persons would impinge upon the very core of member states systems since it means that a community law might address an issue as close to member states' competence as the possibility for private persons to challenge in courts acts by private persons."

European enforcement

24. In December 2005, WWF-UK (later to become one of the constituent bodies of CAJE) lodged a formal complaint with the European Commission regarding the UK's failure to comply with the Convention so far as applied by the Directives. This led in October 2007 to a notice by the Commission to the UK Government relating to alleged failure to comply with its obligations under Article 3(7) and 4(4) of Directive 2003/35/EC. In April 2008, in a letter to CAJE the Commission expressed their particular concern at –

> "the failure by the United Kingdom to provide details showing that review procedures provided for under Articles 3(7) and 4(4) of the Directive are 'fair, equitable, timely and *not prohibitively expensive*'" (their emphasis added).

They had also asked for clarification on the availability of injunctive relief in environmental cases. Following a meeting with Ministry of Justice officials it had been agreed to await the publication of the then imminent Sullivan report, and the comments on it of the United Kingdom authorities, before deciding what further steps needed to be taken.

25. Parallel with these exchanges there had been correspondence with the Aarhus Secretariat at UNECE in Geneva. In April 2008 the government had published a "UK Aarhus Convention Implementation Report". On the issue of costs, the report (pp 27-

9) explained the discretion available to the judge in UK court proceedings, and also referred to the different routes available in the UK system to seek redress in environmental matters. In the same month, in response to earlier representations by the claimants' solicitors and comments by CAJE, UNECE put a number of questions to the Department ("DEFRA"). The following reply in October 2008 helpfully indicates DEFRA's position on the relevance of the convention to a case such as the present:

> "*Question 1 – To which procedures and remedies in this kind of case do the provisions of article 9, paragraphs 3 and 4, of the Convention apply?*
>
> 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."

26. Finally, we were referred to Commission proceedings in the European Court of Justice against Ireland (*Commission v. Ireland* Case C-427/07), in which similar complaints were made against that government, including one in respect of litigation costs in the context of planning law. The opinion of Advocate General Kokott was delivered on 15th January 2009. Pending a decision of the court, paragraphs 89 to 96 provide valuable guidance as to the scope and effect of the rule against "prohibitively expensive" procedures. Her comments have to be understood in the context that it had been agreed that at this stage of the proceedings the question was whether Ireland had failed altogether to implement the requirements of the Directive, leaving issues as to the *quality* of implementation for subsequent consideration.

27. The Advocate-General rejected the argument that the rule was not concerned with orders against an unsuccessful party to pay the other side's costs. The second sentence

of Article 3(8) was not intended to have that effect, but simply to make clear that the award of costs was not to be regarded as a "penalty, persecution or harassment". In her view, the ban on prohibitively expensive procedures "extends to all legal costs incurred by the parties involved". She continued

> 95. The Commission founds its objection that there is insufficient protection against prohibitive costs in particular on the basis that the costs of successful parties can be very high in Ireland, stating that costs of hundreds of thousands of euro are possible.
>
> 96. In this regard, Ireland's submissions that rules providing for legal aid – the Attorney General's Scheme – exist and that, furthermore, potential applicants can make use of the Ombudsman procedure which is free of charge are hardly compelling. The Attorney General's Scheme is, according to its wording, inapplicable to the procedures covered by the directive. It cannot therefore be acknowledged to be an implementing measure. The Ombudsman may offer an unbureaucratic alternative to court proceedings but, according to Ireland's own submissions, he can only make recommendations and cannot make binding decisions.
>
> 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 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."

Public interest cases in domestic law

28. In England and Wales the principles governing the award of costs are found in CPR Part 44. The court has a general discretion, but this is subject to certain well established rules, including the ordinary rule that the unsuccessful party pays the costs of the successful party (CPR44.3). Recent years have seen a greater willingness of the

courts to depart from ordinary costs principles in cases raising issues of general public interest, in environmental cases as in other areas of the law. A recent example an environmental case (albeit in the Privy Council) was the *Bacongo* case of (*Belize Alliance of Conservation Non-Governmental Organisations v. Department of the Environment* [2004] UKPC 6) where, as we were told, no order for costs was made against the Association, in spite of losing the appeal, because of the public interest of the case.

29. The same trend has been reflected also in greater willingness to make "Protective Costs Orders", by which the risk of an adverse costs order can be limited in advance. The principles governing such orders in relation to public interest cases were restated by this court in *R (Corner House) v. Secretary of State for Trade and Industry* [2005] EWCA Civ 192. Certain aspects of those principles have proved controversial, particularly the requirement that the claimant should have no private interest in the outcome of the case (on which we shall comment further below).

30. There have been some specific references in judgments to the Aarhus principles. For example, in *R (Burkett) v Hammersmith and Fulham LBC* [2004] EWCA Civ 1342 paras 74-80, Brooke LJ referred to the Aarhus convention, and to concerns expressed in a recent study as to whether the current costs regime is compatible with the Convention. In the light of the costs figures revealed by that case, he thought that there were serious questions "of ever living up to the Aarhus ideals within our present legal system". He called for a broader study of the issues.

31. In 2006 there was published a report of an informal working group of representatives of different interests, (including private practitioners, NGO lawyers and private sector lawyers in a personal capacity) sponsored by Liberty and the Civil Liberties Trust, and chaired by Lord Justice Maurice Kay (*Litigating the Public Interest* – Report of the Working Group on Facilitating Public Interest Litigation July 2006). Its recommendations were directed principally to the principles for the granting of protective costs orders in public interest cases generally.

32. The 2008 Sullivan report, to which Carnwath LJ referred in granting permission in the present case, was a report of another informal working group representing a range of interested groups, this time under Sullivan J (*Ensuring Access to Environmental Justice in England and Wales* – Report of the Working Group on Access to Environmental Justice May 2008). The report expressed views on the application of the Aarhus principles, in the context of domestic procedures relevant to environmental proceedings, including protective costs orders. The present case was mentioned, without further discussion, as apparently the first which has reached this court raising issues under the Convention in relation to a costs order in private law proceedings. The following points from the report are possibly relevant in the present context:

    i) That the "not prohibitively expensive" obligation arising under the Convention extends to the full costs of the proceedings, not merely the court fees involved (in this respect differing from the Irish High Court in *Sweetman v An Bord Pleanala and the Attorney General* [2007] IEHC 153);

    ii) That the requirement for procedures not to be prohibitively expensive applies to all proceedings, including applications for injunctive relief, and not merely the overall application for final relief in the proceedings;

iii) That costs, actual or risked, should be regarded as "prohibitively expensive" if they would reasonably prevent an "ordinary" member of the public (that is, "one who is neither very rich nor very poor, and would not be entitled to legal aid") from embarking on the challenge falling within the terms of Aarhus (para 20).

iv) That there should be no general departure from the present "loser pays" principle, provided that the loser's potential liability does not make litigation prohibitively expensive in the way described above (para 38).

33. Since the grant of permission in this case, there have been two further judgments of this court dealing with the issue of protective costs orders in public interest cases: *Val Compton v Wiltshire Primary Care Trust* [2008] EWCA Civ 749; *R (Buglife) v Thurrock Gateway Development Corp and another* [2008] EWCA Civ 1209. In both, reference was made to the Kay and Sullivan reports, and to their comments on the Aarhus Convention. The latter, as an environmental case, is more directly relevant to the scope of the Convention. However, the Master of the Rolls (in the judgment of the court) agreed with Waller LJ in *Compton* that there should be –

> "…no difference in principle between the approach to PCOs in cases which raise environmental issues and the approach in cases which raise other serious issues and *vice versa*." (para 17)

He also indicated that the principles stated in *Corner House* were to be regarded as binding on the court, and were to be applied "as explained by Waller LJ and Smith LJ" (para 19). We take the last words to be a reference to the comments of Waller and Smith LJJ respectively that the *Corner House* guidelines were "not… to be read as statutory provisions, nor to be read in an over-restrictive way" (*Compton* para 23); and were "not part of the statute and… should not be read as if they were" (para 74). These comments reflect the familiar principle that:

> "As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule." (per Lord Lloyd of Berwick, *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176, 1178; cited in *Corner House* at para 27).

34. In November 2008 (in a press release issued by the Judicial Communications Office) it was announced that the Master of the Rolls had requested Jackson LJ to conduct a "fundamental review" into the costs of civil litigation. The objectives, as stated in the terms of reference are –

> "To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost."

The report is due to be presented in December 2009.

Protective Costs Orders and Private Interests

35. The possibility of a Protective Costs Order in relation to the present appeal was not raised until the actual hearing before us, by which time it was redundant. The costs had by then been incurred and their incidence will be determined in the light of our judgment on the appeals. It is unnecessary therefore to explore the issues which would arise on such an application, including the circumstances (if any) in which such an order could properly be made in a private nuisance action such as this (cf *Corner House* at para 45, citing *McDonald v Horn* [1995] ICR 685).

36. However, the authorities to which we have been referred reveal considerable uncertainty in relation to what we have already identified as a controversial element in the *Corner House* guidelines, that is the requirement (1)(iii), that "the applicant should have no private interest in the case". Although the court must be cautious in offering guidance on matters not directly in issue, we think that, pending further clarification by the Rules Committee, it would be helpful for us to give our view as to where the law now stands.

37. The private interest requirement was strictly applied by this court, when (unanimously) refusing a PCO in *Goodson v HM Coroner for Bedfordshire and Luton* [2005] EWCA 1172). The applicant was seeking judicial review of the Coroner's decision not to conduct a full inquiry into the circumstances of her father's death in hospital. It was held that her personal interest, albeit not a financial one, was sufficient to rule out a PCO. It had been argued that it should be sufficient if the "public interest in having the case decided transcends… or wholly outweighs the interest of the particular litigant." (para 26). The court disagreed, noting that such alternative formulations had been considered in *Corner House* itself, but nonetheless the guideline had been expressed "in unqualified terms" (para 27 per Moore-Bick LJ).

38. At first sight that judgment appears to represent a clear ruling on the issue at this level. However, it is necessary also to take account of how the issue has been addressed subsequently:

    i) In *Wilkinson v Kitzinger* [2006] EWHC835(Fam), the President (without specific reference to *Goodson*) commented on the difficulty of applying the private interest test in a case where the applicant "whether in private or public law proceedings" is pursuing a personal remedy, "albeit his or her purpose is essentially representative of a number of persons with a similar interest". He thought that in such cases the extent and nature of the private interest should be treated as "a flexible element in the court's consideration of whether it is fair and just to make the order" (para 54).

    ii) In July 2006 the Kay report was published. The authors (paras 77-85) discussed the difficulties they perceived in a strict application of the private interest test, particularly in cases under the Human Rights Act, in which it is a requirement that an applicant be "personally or directly affected" by the alleged violation. They recommended that the private interest if any should be regarded as a matter to be taken into account; "the weight to be attached to it should be a matter for the judge considering the application".

iii) In *R(England) v Tower Hamlets LBC* [2006] EWCA Civ 1742, the question of a PCO did not arise for decision, as permission to appeal was refused. However, Carnwath LJ (with the agreement of Neuberger LJ) noted the recent publication of the Kay Report, and its "valuable discussion" of the issues arising from *Corner House*. The court expressed doubts as to the "appropriateness or workability" of the private interest criterion, and suggested that different considerations might in any event apply where the interest of the applicant, as in the instant case, was "not a private law interest but simply one he shares with other members of his group in the protection of the environment", and suggested that the Aarhus Convention might be relevant in this respect. The court expressed the hope that the Civil Procedure Rules Committee would take the opportunity in the near future to review the questions in the light of the Kay Report.

iv) In *R (Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin), Lloyd Jones J, when refusing a PCO on other grounds, commented specifically on the "private interest" requirement, which he said had been "diluted in the later case law", citing *Wilkinson v Kitzinger*, and *England* (but not *Goodson*). He thought that a private interest should not be a disqualifying factor but "its weight or importance in the overall context" should be treated as "a flexible element" in the judge's consideration.

v) In May 2008, the Sullivan Report was published. The authors criticised the strict private interest requirement, as applied to environmental cases. They thought it inconsistent with the Aarhus principles which contain no corresponding limitation. They supported the approach recommended by the Kay Report (paras 41-55).

vi) *Compton*, decided in this court in July 2008, was not directly concerned with the private interest requirement. However, in discussing the definition of a "public interest case". Waller LJ quoted without criticism from the comments of the Kay and Sullivan Reports. Having referred (in the passage quoted above) to the need to avoid an "over-restrictive" approach to the *Corner House* guidelines, he also found "support for a non-rigorous approach" in the passage noted above from the decision of Lloyd Jones J in *R (Bullmore)*.

vii) In November 2008 came the judgment of this court in *Buglife*. Again it was not directly concerned with the private interest requirement. However, before generally endorsing Waller LJ's approach to the *Corner House* guidelines (as already noted), the Master of the Rolls specifically referred to his approval of "the flexible approach of Lloyd Jones J in *Bullmore*" (para 17).

39. On a strict view, it could be said, *Goodson* remains binding authority in this court as to the application of the private interest requirement. It has not been expressly overruled in this court. However, it is impossible in our view to ignore the criticisms of this narrow approach referred to above, and their implicit endorsement by this court in the last two cases. Although they were directly concerned with other aspects of the *Corner House* guidelines, the "flexible" approach which they approved seems to us intended to be of general application. Their specific adoption of Lloyd Jones J's treatment of the private interest element makes it impossible in our view to regard that element of the guidelines as an exception to their general approach.

40. The hope that the Rules Committee might be able to address these issues in the near future has not been realised. In the meantime, in our view, the "flexible" basis proposed by Waller LJ, and approved in *Buglife* should be applied to all aspects of the *Corner House* guidelines.

The Convention in private nuisance proceedings

41. Returning to the present case, we heard arguments about the scope of the Convention, its place in domestic law, and its relevance to private nuisance proceedings.

42. Mr Tromans sought to draw a distinction between actions to vindicate general public rights to a clean environment from actions for private nuisance designed to protect private property rights, the latter being outside the scope of the Convention altogether. However, a literal reading of the provisions does not appear to support that restriction. The "public" as defined may be a single natural person, and the proceedings may be in respect of acts or omissions of "private persons". We doubt in any event whether it is helpful in practice to draw such a clear distinction. In the present case, the claimants' action is no doubt primarily directed to the protection of their own private rights, but the nuisance if it exists affects the whole locality. The public aspect is underlined by the interest of the Agency and the Council.

43. He had an alternative argument that, whatever the intended scope of the Convention itself, in the context of Community law it should be regarded as more strictly confined. Although the Community has built Aarhus rights into Directives on public law matters of environmental assessment and pollution control, it has not ventured into the field of private law claims for environmental harm. He relies on the form of the EU Proposal, and its supporting commentary, to which we have already referred.

44. 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. The UK may be vulnerable to action by the Commission to enforce the Community's own obligations as a party to the treaty. However, from the point of view of a domestic judge, it seems to us (as the DEFRA statement suggests) that the principles of the Convention are at the most something to be taken into account in resolving ambiguities or exercising discretions (along with other discretionary factors including fairness to the defendant).

45. Mr Tromans also relies on the need to see the requirements of the Convention in the context of the full range of proceedings permitted by domestic law. The Convention gives a right to access to justice, but no right to any particular form of legal remedy. As Mr Tromans points out, there are other procedural routes which might have been chosen by the claimants. He mentions four:

    i) Seeking judicial review of failure by the Agency or the Council to enforce the relevant site licence conditions or serve a statutory nuisance abatement notice.

    ii) Making a complaint to the Parliamentary Ombudsman or Local Government Ombudsman in respect of such failure.

iii) Initiating a private prosecution for alleged breach of the relevant waste management licence conditions.

iv) Making a complaint of statutory nuisance under the summary procedure provided by section 82 of the Environmental Protection Act 1990.

Thus, he says, even if it were found that the private nuisance claim entailed "prohibitive cost", there would be no breach of the Convention unless it were established that the other possible routes were also defective in that or some other way.

46. We accept that the particular remedy sought in a particular case needs to be seen in the wider context of available remedies generally. However, the argument brings with it other questions. Reference to the Ombudsman raises the same issue of legal enforceability mentioned by the Advocate-General in respect of the Irish Ombudsman. The other remedies would need to be considered individually in terms not only of cost but of legal efficacy. The very diversity of jurisdictions leads to another question which has been the subject of lively debate but no resolution: that is the possible need for a separate environmental court or tribunal to further the Aarhus ideals by ensuring that remedies in the environmental field are both coherent and accessible (a "one-stop shop", as Lord Woolf and others have proposed: see Carnwath *Environmental Litigation – a way through the Maze?* (1999) JEL 3 13).

Drawing the threads together

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 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.

The present case

48. We turn now to consider the facts of the present appeal.

49. It is unnecessary, in our view, to consider the application of the Convention in further detail, because there is in our view an insuperable objection to the claimant's case in this respect. That is that the point was not mentioned before the judge. This is admitted by Mr Hart. His answer is that the requirement to comply with the Convention is "an obligation on the Court", which should have been considered by the judge of his own motion; or alternatively, it is a requirement on this court in reviewing the judge's decision in order to avoid contravention of the Convention.

50. We are unable to accept that argument. Mr Hart could not point to any legal principle which would enable us to treat a pure treaty obligation, even one adopted by the European Community, as converted into a rule of law directly binding on the English court. As we have said, it is at most a matter potentially relevant to the exercise of the judge's discretion. If the claimants wished him to take it into account, they needed not only to make the submission, but also to provide the factual basis to enable him to judge whether the effect of his order would indeed be "prohibitive". The defendant would also no doubt have wished to give evidence of its own position.

51. Not surprisingly, since the point was not raised, we have no finding as to practical effect of the order. All we have is assertion as to the potential risk. But, as Mr Tromans points out, subsequent events have shown that the claimants were not in fact deterred from proceeding to trial. Indeed, had it not been for their objection to part of the defendant's evidence, the trial would by now have been completed, and the significance of the interim costs order could have been judged in the context of the incidence of costs as a whole.

52. This does not dispose of the appeal, since Mr Hart submits that the judge's order was flawed, even on conventional principles. This has caused us some difficulty. On the one hand, the court is very reluctant to interfere with the judge's discretion on costs, particularly if to do so results in satellite litigation at the interlocutory stage. Furthermore, it is often difficult to consider the merits of a costs order, other than in

the context of the merits of the substantive order to which it is linked. In this case there is no appeal against the judge's decision to discharge the interim injunction, and so its merits are not in issue. For those reasons, we might have been reluctant to grant permission to appeal from the interim costs order, viewed in isolation from the other appeal, and apart from the issues of general principle which we have discussed. However, the appeal is now before us and we must consider it on its merits.

53. For reasons we have explained, the order in favour of the two authorities has not been the subject of argument, but in any event we would find it hard to see any objection to it. There being no appeal from the judge's decision that they were wrongly included in the order, they were entitled to their costs on ordinary principles. Since they would be no longer involved as parties to the case, it was obviously appropriate to deal with them then and there.

54. The position of the defendants was rather different. This was an interim skirmish in a much longer battle, in which the overall merits could only be determined at trial. The claimants had won the argument on 9th November 2007, and that decision had not been challenged by the defendants. The judge's reason for awarding the defendants their costs of the 21st December 2007 was that they needed to be there to meet the possibility of an injunction in a modified form. That we read as a reference to the suggestion of replacing the authorised officer of the authorities by an independent expert.

55. The judge did not dismiss that alternative because of any objection in principle, but simply because no agreed expert had been identified. That may have been a sufficient reason for abandoning the search for an alternative mechanism (as to which we express no view, having heard no argument). But as a basis for determining the incidence of costs, it called in our view for some investigation as to why that mechanism had not proved possible. As the correspondence shows, the claimants had been willing to agree to that suggestion, and had invited names from the defendants. They however had rejected it out of hand as unworkable.

56. In those circumstances, 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 application 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.

57. In fairness to the judge, so far as appears from the transcript, this aspect of the argument may not have been pressed by counsel before him, and we note that the exchanges to which we have referred were headed "without prejudice". However, Mr Tromans has not objected to Mr Hart's reference to them nor to the argument based on them. In those circumstances, we think we are entitled unusually to revisit the exercise of his discretion on this issue. We would hold that the correct order would have been to reserve the defendant's costs of the interim application (including the costs of the hearings on 9th November and 21st December 2007) to the trial judge.

58. On this issue, therefore, we will allow the appeal and substitute an order that the costs of the defendant be reserved to the trial judge.

(2) The expert witness issue

Background

59. We turn to the appeal against the order of HHJ Bursell QC dated 8 April 2008 by which he ruled that the expert evidence of Mr Philip Branchflower was inadmissible because Mr Branchflower lacked the independence required of an expert witness. It is important to keep in mind how this issue arose. By their claim form issued on 21 July 2006 the claimants alleged that the defendant had caused and was causing nuisances by way of air pollution, odour pollution and noise. On 13 December 2006 Master Rose made a number of directions including:

> "4(a) There be permission to each party to rely on the expert evidence of one witness in each of the fields of (i) odours (ii) noise (iii) bioaerosol emissions."

60. By the time of the trial the claimants had reduced the basis of their claim to odour pollution alone. At trial, the expert witness for the claimants was to be Mr Peter Danks and for the defendant Mr Branchflower. At no point prior to the trial did the claimants raise any issue as to the admissibility of the evidence of Mr Branchflower. In his opening note dated 1 April 2008, Mr Hyam, on behalf of the claimants referred to Mr Branchflower's conclusion as being "simply unsustainable on the underlying evidence". He also said:

> "The claimants doubt much reliance can be placed on Mr Branchflower as an independent expert for the reason that SLR Consulting were appointed by the Council to advise on waste planning matters as early as 29 August 2006, 'one urgent matter being three planning applications of the defendant' ".

61. It was clear from that that Mr Hyam intended to cross-examine Mr Branchflower about his independence in view of the fact that SLR Consulting (of which Mr Branchflower was at the time an employee) had advised the Council on waste planning matters including matters concerning the defendant. The person at SLR who had an involvement with the Council was Mr Chris Herbert. In September 2007 the defendant's solicitors approached Mr Matthew Stolling of SLR with a view to SLR being retained by the defendant. When Mr Stolling carried out an internal check he ascertained that Mr Herbert had previously worked as a minerals and waste planning specialist for the Council until 2005 when he moved to SLR. Whilst at SLR he had continued to provide the Council with planning advice. It seems that Mr Herbert was more concerned with planning matters than with the enforcement of waste control. Although he had made observations about odour emissions he had not provided the Council or anyone else with expert odour advice. Mr Stolling concluded that, in view of their different areas of specialism and the fact that the Council is not a party to the present proceedings, no conflict of interest arose or would be likely to arise.

62. The trial began on 7 April 2008. On the first morning there was some discussion about the fact that Mr Branchflower had not signed the appropriate declaration

required of an expert witness in one of his reports but he had in relation to two others. The trial proceeded. When Mr Wald was cross-examining Mr Morgan, a point came when he started to put to Mr Morgan material from Mr Branchflower's report. A short way into this passage, Mr Hyam objected to the material being put to Mr Morgan "on the grounds that it is not properly independent". The immediate response of the judge was to say:

> "Now one moment. Are you saying Mr Branchflower's evidence is not admissible? Well if so you should have made that application some time ago."

63. Mr Hyam then made it clear that he was challenging the admissibility of Mr Branchflower's report, at which point he made a formal application to exclude it. In the course of his application he explained to the judge his concern about the position of Mr Herbert.

64. In his detailed judgment on this issue the judge set out a passage from the judgment of Mr Justice Evans-Lombe in *Liverpool Roman Catholic Archdiocesan Trustees v Goldberg* (3) [2001] 1 WLR 2337, at paragraphs 12 to 13. Having considered a passage in the speech of Lord Wilberforce in *Whitehouse v Jordan* [1981] 1 WLR 246, at pages 256 to 257, and the well known summary of the role of an expert witness articulated by Mr Justice Cresswell in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)* [1993] 2 Lloyds Reports 68 at page 81, Mr Justice Evans-Lombe said:

> "However, in my judgment where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted, however unbiased the conclusion of the expert might probably be."

65. There can be no doubt that in the present case the judge applied that "reasonable observer" test. At a later passage in his judgment (paragraph 38), he said:

> "The real question in this case is whether an independent observer of this case, properly understanding the legal principles involved, might feel that the relationship within SLR is capable of affecting the views of Mr Branchflower so as to make them unduly favourable to the defendant. I put it in that way because of the quotation from the *Liverpool Roman Catholic Archdiocesan Trustees* case."

66. In the following paragraph he referred to his conclusion that

> "An independent observer, against the background of factors I have endeavoured to outline, might reasonably feel that Mr Branchflower was not sufficiently independent to give an unbiased and independent opinion to this court. I have to say

> that in reaching that conclusion I have found it a difficult exercise."

The issues on the appeal

67. The first submission made by Mr Wald on this appeal is that the judge applied the wrong test. He relies on *Regina (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No.8)* [2003] QB 381 [2002] EWCA Civ 932 in which, giving the judgment of the court, Lord Phillips of Worth Matravers MR said of the above passage from the judgment of Mr Justice Evans-Lombe (at paragraph 70):

> "This passage seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the Tribunal. We do not believe that this approach is correct. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence."

Factortame (No.8) was not drawn to the attention of the judge in the present case.

68. In our judgment the submission that the judge applied the wrong test is irresistible. Indeed, Mr Hart has offered no more than token resistance. His submission is that the reasoning which led to the judge being satisfied on the *Liverpool* test was of such a nature and quality that he would or at least might have come to the same conclusion if he had been properly cognisant of *Factortame (No.8)*.

69. We cannot accept Mr Hart's submission. We say this for three main reasons. First, to the extent that the judge seems to have found a kind of institutional bias, we do not consider that the material supported such a finding. It was not a case of a relationship between Mr Branchflower and the defendant. Such relationship as existed was between SLR, through Mr Herbert, and the Council, a non-party. Secondly, we do not consider that, in this case, there was a significant breach of the obligation to inform the Court of a potential conflict of interest. Whilst *Factortame (No.8)* itself is authority for the proposition that where an expert has an interest of one kind or another in the outcome of the case this fact should be made known to the Court as soon as possible (paragraph 70), it seems to us that, in the present case, conscientious consideration was given by Mr Stolling to the possibility of a conflict of interest but he came to the reasonable conclusion that no such issue arose.

70. We appreciate that, in the last resort, "it is for the Court and not the parties to decide whether a conflict of interest is material or not" (see *Toth v Jarman* [2006] EWCA Civ 1028, paragraph 112, per Sir Mark Potter P), but we do not regard this as a marginal case. The claimants' advisers had known for many months of the facts and matters upon which they came to rely when seeking to exclude the evidence of Mr Branchflower. However, they took no point about the admissibility of his evidence until the trial was well underway. It seems to us that the defendant was entitled to assume from the silence and from the manner in which Mr Branchflower's position

was criticised in the opening note that the issue about his evidence was as to weight rather than admissibility.

71. Thirdly, in *Factortame (No.8)*, the Court went on to state (paragraph 70):

> "The question of whether the proposed expert should be permitted to give evidence should … be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules."

In our judgment, this is a matter of considerable importance in the present case. Even if all the judge's concerns about the position of Mr Branchflower had been well-founded – and, as we have said, we do not think that they were – it seems to us that to rule the evidence inadmissible once the trial was well underway was simply wrong. The ruling gave rise to an inevitable application for an adjournment to which the judge predictably acceded.

72. In the context of the overriding objective and proportionality, the ruling achieved the worst of all worlds. Costs were thrown away. Some ten months have passed waiting for this appeal. The trial remains further from finality than it was in April last year. If the judge had identified the claimants' concern about Mr Branchflower as going to weight rather than to admissibility, as he should have done, Mr Branchflower would have been cross-examined about the claimants' concerns and, in due course, the judge could have formed his own conclusion, one way or another. That is what should have happened. The approach taken by the judge was, in the circumstances of this case, altogether too precious.

73. For all these reasons the defendant's appeal on this issue also succeeds, and the judge's order on admissibility must be set aside.

Conclusion

74. Both appeals are accordingly allowed. For the interim costs order there will be substituted an order reserving the costs of the defendant to the trial judge. The decision on admissibility will be set aside. We understand that Judge Bursell has now retired. Accordingly, it will be necessary for the trial to recommence before a different judge.