IN THE COURT OF APPEAL (CIVIL DIVISION) **A2/2008/0038**
(On appeal from the Queen's Bench Division **Claim No. HQO6X02114**
His Honour Judge Seymour) **Applic no. IHQ/07/0969**

BETWEEN:

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

Appellants

and

(1) HINTON ORGANICS (WESSEX) LTD
(2) ENVIRONMENT AGENCY
(3) BATH & NORTH EAST SOMERSET COUNCIL

Respondents

SKELETON ARGUMENT OF THE APPELLANTS

INTRODUCTION

1. The Appellants are seeking permission to appeal the order of His Honour Judge Seymour of the 21st December 2007 [AB 3-4]. The order discharged an interim injunction and made an award of costs against the Appellants. The substantive proceedings are for an injunction and damages to prevent nuisance odours arising from the 1st Respondent's premises.

2. There are two grounds of appeal:

   (1) That the practical effect of the Order of the 21st December 2007 has left the Appellants without any form of redress or effective remedy against the 1st Respondent when odour nuisance recurs. This is in circumstances where:

      a) the Judge found on the 9th November 2007 that there was a serious issue to be tried and that the Appellants should

be afforded some form of interim relief but, on discharge of the injunction, has failed to afford the Appellants such relief; and

b) neither the Environment Agency nor Bath & North East Somerset Council (the Council) appear willing or able to exercise their statutory powers to take effective action against the Defendant to control or protect the Appellants or others residents in the locality from nuisance odours.

(2) The award of costs has placed an undue burden on the Appellants in circumstances where the Court has made a finding that there is a serious issue to be tried and that the Appellants should have some form of relief. The consequence of the Order is that there is a real risk that the Appellants will be unable to afford to proceed to trial.

3. The Appellants case is that the order of the 21st December 2007 is contrary to Art. 9(3) of the Aarhus Convention 1998 which provides that the Government shall ensure that members of the public have access to judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. Further, Art. 9(4) provides that the procedures in 9(3) shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

FACTUAL BACKGROUND

4. A detailed chronology is provided in the Appeal Bundle [AB]. The 1st Respondent, Hinton Organics (Wessex) Ltd, operates a waste composting site between 300 and 600 metres from the Appellants' homes. The Council granted temporary planning permission for the operation in 1998. The permission expires in April 2010. The Environment Agency granted the 1st Respondent a waste

management licence on the 19th January 2001. The planning permission has been subject to further applications to expand the site and increase capacity. The 2nd Appellant and her daughter, Louisa Baker, are challenging recent planning decisions by the Council by way of judicial review. This is on the ground that the Council failed to comply with the EIA Regulations 1999 when considering the applications. Permission to proceed with judicial review was granted on the 20th June 2007. The matter has entered the warned list.

5. There is also concern that the Environment Agency has failed to properly assess the waste site for bio-aerosol emissions. It has had the opportunity to request a site-specific bio-aerosol assessment on a number of occasions but has failed to require this. The Agency understands the concerns expressed by local residents that the site is operating contrary to its own guidance on bio-aerosols emissions [AB 388-9] (i.e. that compost waste sites should not operate within 250 metres of properties without providing an independent site specific bio-aerosol assessment) but has failed, to date, to take any action to resolve those concerns.

6. The 1st respondent has breached its waste management licence on numerous occasions since 2003. It has been served with at least 8 formal notices by the Agency. It has been served with at least 3 abatement notices by the Council. It has been cautioned twice and prosecuted at least once. Despite this, the 1st Respondent continues to operate in a manner that causes odour pollution to the Appellants and others in the locality. Without any genuine control of the operations, the Appellants as a last resort issued nuisance proceedings against the 1st Respondent on the 21st July 2006.

7. In June 2007, odour problems became serious. The Council recognised this and purported to take steps to enforce a breach of an abatement notice issued on the 1st July 2005. The Agency took

steps to enforce breach of the waste management licence and issued a breach of condition notice on the 24th July 2007.

8. By September 2007, serious odour problems occurred once again by the end of October 2007. For the Appellants, the position had deteriorated further. The Council had explained that it was unable to take prosecution proceedings against the 1st Respondent due to defects in more than one abatement notice. The Agency did not confirm one way or another whether it was going to take any action. Both the Council and the Agency agreed that there were odour problems emanating from the 1st Respondent's site. The Appellants considered that they had no other option than seek to interim relief from Court and an application for an injunction was issued on the 25th October 2007.

9. Various steps were taken to avoid an injunction hearing, including seeking an undertaking from the 1st Respondent on more than one occasion [AB 354-5]. The Appellants made it clear to the 1st Respondent that it was not in a position to providing a undertaking in damages in the event that an interim injunction was granted.

10. An interim injunction was granted on the 9th November 2007 by His Honour Judge Seymour QC to prohibit the 1st Respondent from causing odours at or in the immediate vicinity of the Claimants' respective properties situated at the Claimants' homes at levels that are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of those properties as perceived by either (a) an authorised officer of the Environment Agency; or (b) an authorised officer of Bath and North East Somerset County Council. [AB 13-5]

11. The Agency and the Council were advised of the order of the 9th November 2007 and both objected to the terms of the order in that they may become a party to civil proceedings. There was

correspondence between the parties including clarification from the Judge as to his understanding of the position. [AB 369-70]. The Agency and the Council nevertheless pursued the application to discharge the injunction. This application was supported by the 1st Respondent. The injunction was discharged on the 21st December 2007. [AB 3-4]

12. A trial has been fixed at Bristol District Registry between the 7th and 11th April 2008. A pre-trial review has been listed for the 26th February 2008.

LEGAL FRAMEWORK

13. The Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters 1998 (the Aarhus Convention 1998) was ratified by the UK on the 28th February 2005. It was also ratified by the EU on the same date and for certain regulatory regimes, such as land use planning and pollution prevention control, the UK Government has had to formally transpose the Convention due to its incorporation into EU Directives e.g. the EIA Directive 85/337/EC. Further, the Government introduced the Environmental Information Regulations 2004 to ensure that it complied with the information provisions of the Convention.

14. The Courts have also recognised the Convention. See, for example, *R v LB Hammersmith & Fulham ex p Burkett* [2004] EWCA (Civ) 1342 at para 74, *R (oao England) v LB Tower Hamlets & others* [2006] EWCA Civ 1742 and *Davey v Aylesbury Vale DC* [2007] EWCA Civ 1166.

15. The relevant provisions of the Convention are contained in Article 9 which provides:

> 3. In addition and without prejudice to the review procedures referred to in paragraphs 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.
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> 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.
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> [AB 440-1]

16. The Appellants contend that the judgment of the 21st December 2007 does not satisfy the criteria set out in the Convention of ensuring adequate and effective remedies that are fair, equitable, timely and not prohibitively expensive.

GROUNDS OF APPEAL

Ground 1: Appellants without a remedy

17. The practical effect of the Order of the 21st December 2007 has left the Appellants without any form of redress or effective remedy against the 1st Respondent if there are recurring nuisances before trial. Odours problems occurred on the 3rd January 2008, the Council has recognised these. No regulatory action to resolve this and to stop a further recurrence has been taken to date.

18. On the 9th November 2007 the Judge held that there was a serious issue to be tried and that the Appellants should be afforded some form of interim relief. The terms of the injunction of the 9th November 2007 were limited but were framed in such a way as to afford some meaningful protection. There was some discussion during the proceedings of the practicality of reliance on Agency or the Council's officers. However, the Appellants considered that any officers would not be asked to perform any function over and above

the existing roles. Their contention of being drawn into civil proceedings exists in any event. Obtaining injunctive relief in such terms provided some form of interim protection against further odours. The Court order also providing support for any regulatory controls.

19. The objections of reference to the Agency and the Council in the order were all the more surprising given their own reluctance to control the 1st Respondent's operations. By the time of the hearing of the 21st December 2007, the Council had issued a third abatement notice. However, this notice was again defective in that it failed to provide a clause that the abatement notice would not be suspended on appeal [AB 339-40]. The 1st Respondent appealed the notice and at the first directions hearing of the appeal on 11th December 2007, the Council and the 1st Respondent agreed to stay the appeal proceedings pending the outcome of the final hearing of these civil proceedings. The Agency had not confirmed one way or the other whether it would take action on the October 2007 odour problems.

20. In recent correspondence, the Agency and the Council have stated that it is incorrect to suggest that the Appellants have no interim remedy but that there is a civil remedy, judicial review and proceedings under s 82 of the Environmental Protection Act 1990 [AB 413-4]. However, and most importantly, none of these has any realistic chance of being heard before trial, which is what the application for interim relief sought. Moreover, judicial review proceedings can only seek to challenge the failure of the Agency and the Council to act properly and could not directly resolve the odour problems in the short term. While any action s 82 of the EPA 1990 would involve initiating an entirely fresh set of proceedings whereby the Appellants acting as a prosecutor and for matters to be pursued in the magistrates' court. The Appellants simply do not have the resources to pursue this.

21. In theory, the Appellants could issue a further application for interim relief, but this would almost certainly be contested and with no prospect of support from the Agency or the Council. The only other form of injunction would be an absolute prohibition in any operations at the Respondent's waste site that would be likely to cause odour emissions. However, this would require the Appellants providing an undertaking in damages to the Respondent, which they were simply unable to do because of the prohibitive cost. In effect, the Appellants would be underwriting the costs of the 1st Respondent's business in circumstances where it is uncertain whether or not the Respondent is financially stable in any event. See e.g. the latest set of audited accounts of the 1st Respondent. [AB 395-402] That the Appellants were not in a position to provide an undertaking in damages to the 1st Respondent was made clear in correspondence leading up to the 9th November 2007 injunction hearing.

22. On the 10th January 2008, the Council wrote to the 1st Appellant recognising that the abatement notice of the 2nd October 2007 was suspended but stating that this does not prevent the authority from issuing further abatement notices [AB 411]. In the light of this, any involvement in any potential breach of the injunction order of the 9th November 2007 appears modest, uncontroversial and by far the most cost effective means of seeking to resolve further odour problems. It would simply have been referring a breach back to the court in proceedings that had already been initiated. Were either the Council or the Agency to institute their own proceedings they would have to obtain their own officers to attend to give evidence, they would also have their own legal costs. By contrast, reference in an interim injunction appeared to be a very efficient use of public resources, where little or no legal costs of the public bodies would be incurred. The only situation where such costs would be more than the public bodies own legal proceedings was if they had pre-

determined that they simply were not going to take any legal action to prohibit the odours themselves.

23. Article 9(3) of the Aarhus Convention 1998 affords the right to members of the public to have access to judicial procedures to challenge acts and omissions by private persons which contravene provisions of its national law relating to the environment. Article 9(4) states that this includes injunctive relief. On the 9th November 2007, the Court agreed that there was a serious issue to be tried and that the Appellants should be afforded some form of interim relief against the odour emissions from the 1st Respondent. The actions of the Environment Agency, the Council and the Court Order of the 21st December 2007 have effectively prevented the Appellants from access to those judicial procedures.

Ground 2: Costs award prohibitively expensive

24. An application for injunctive relief falls within the scope of the Aarhus Convention 1998 (even though any requirement to provide an undertaking in damages quite possibly falls foul of the prohibition on prohibitive expense). However, the costs award in this case can only be regarded as prohibitively expensive and so contrary to Article 9(4).

25. The award of costs has placed an undue burden on the Appellants. The total costs of the Agency and the Council were together summarily assessed at £5,132. The 1st Respondent has since claimed the sum of £19,190.25. In circumstances where the Court has made a finding that there is a serious issue to be tried and that the Appellants should have some form of interim injunctive relief to prohibit further odour pollution it is contended that such a costs award is unjust.

26. The Appellants have the benefit of legal expenses insurance to pursue the substantive claim, although this is limited to £50,000 per

Appellant (total £100,000). The costs award has the effect of (a) preventing any future application for interim relief being made even though this may be justified and (b) putting at real risk the prospect of whether the Appellants can pursue their claim to trial in any event, because any funds reserved for the trial would have been spent.

27. It could be contended that s 82 proceedings may be a less costly option than civil proceedings but, in practice, this is not the case. While an abatement order may be obtained by any individual prosecuting a matter, such an order equates to an abatement notice served by a council, and where the prosecution for any breach of an abatement order will be subject to defences such as best practicable means. In short, s 82 proceedings could very quickly become as costly as civil proceedings and only infrequently provides a realistic option for controlling nuisances.

CONCLUSION

28. On the 3rd January 2008, the Appellants and other local residents once again experienced serious odour problems emanating from the 1st Respondent's waste site. They contacted the Environment Agency and the Council. The odours were acknowledged by the Council [AB 411]. There has been no effective control or limitation put on the 1st Respondent since.

29. The Appellants have, in the absence of effective regulation by the Environment Agency and the Council, sought to protect their own environment and locality by way of civil proceedings. They have sought interim injunctive relief when odour pollution has become serious. The Court has found that there is a serious issue to be tried and that some form of injunction was appropriate.

30. Subsequently, the Agency and the Council have resisted any involvement in trying to protect the Appellants and this has resulted in the loss of protection and cost liability of around £25,000. The costs award is putting at risk the opportunity of proceeding to trial and so obtaining a final order. It has also effectively prohibited the Appellants from seeking further interim relief.

31. The only reason an injunction was not granted which otherwise would have been was (i) the unwillingness of the Environment Agency and the Council to become the arbiter of whether or not offensive odours were evident at or near the Appellant's home (something that is part and parcel of their regulatory role), and (ii) the 1st Respondent's refusal to agree to an appropriate independent alternative to the EA/Council. By refusing to co-operate as to the identification of a suitable 3rd party, the Defendant has successfully resisted the injunction and become entitled to the costs. This is unfair and, again contrary to the Aarhus Convention 1998.

32. The Appellants submit that there are important issues raised by this appeal and that there are real prospects of success of the Court of Appeal finding that the approach taken was unlawful. The Order of the 21st December 2007 is unfair and prohibitively expensive and is, therefore, contrary to the Article 9(4) of the Aarhus Convention 1998.

33. In the circumstances, it is proposed that the Order should be quashed.

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