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Mr Jeremy Wates
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12 March 2010

Dear Mr Wates

Aarhus Convention – costs – Jackson Report

As you know this firm has been closely concerned with costs issues for people who may benefit in getting access to justice from Article 9(4) of the Convention ("prohibitive expense"). We closely follow developments, including the implications of the Jackson Report.

We have seen letters written to you by the Coalition for Access to Justice (CAJE) and Client Earth (CE) about the Jackson Report. Considering our continuing interest in the matter including specific complaints with the ACC we thought it might be helpful to write to you to confirm that we agree with both the broad thrust and most of the detail of what CAJE and CE say. We have the following observations which we trust may be helpful:

1. The Jackson Report proposal for costs shifting to be the norm is of course welcomed. However it is fatally undermined by the proposed discretion of providing an exception of what is "reasonable" having regard to "all the circumstances". This sort of exception will inevitably lead to a continuation of the existing problems of people who are concerned about exposure to costs having to spend time and money seeking PCOs and the problems and expense that these entail.

2. At the very least there should be a rule that a claimant in proceedings to which the Aarhus Convention relates should <u>never</u> have to pay costs of opponents <u>unless</u> opponents apply for an order otherwise and that such would <u>only</u> be available in specific and narrowly defined circumstances. As to the latter, one has in mind, for example, claims that are in reality commercial disputes (but that would not stop a company having and being protected in relation to a genuine claim about environmental protection); or cases where it is obvious that it would not be prohibitively expensive for the claimant, corporate or otherwise, to bring a case including taking the risk of adverse costs and reasonable for him/her/it to do so.

3. This last is a particularly difficult problem for us, as raised in earlier correspondence (please see my letter of 30 June 2009). Put shortly "prohibitive expense" is a difficult concept in the context of altruistic activities such as environmental protection. As the system works presently in this jurisdiction, the need for people who are relatively well

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off to disclose information about their means puts them off from being claimants at all. Even for exceptionally wealthy people, the sorts of costs involved in litigation here are such that they could reasonably say that the exposure is prohibitively expensive: not in the sense of literally being so, as it may be afforded if it were to be about some private matter, but why should they have to spend or risk very large sums for the public good?

4. Our letter of 30 June 2009 referred to the Rugby Cement case. There is a continuing dispute about how the Aarhus Convention should apply there, which is presently before the Supreme Court. The UK government is seeking to appeal against a decision of the Supreme Court's costs officers, to the effect that the Aarhus Convention can be taken into account at the stage of detailed assessment of costs, to the Justices themselves. This is surprising as the UK government has specifically advised the ACC that the detailed assessment process is one of the ways that it implements the Convention: see its response of 28 July 2009 under reference ACC/C/2008/33 in the Port of Tyne case at §116(b). Anyway for present purposes two points arise which I trust may be of interest to you.

5. First, I am attaching a list of questions which the UK government considers our client (who took these proceedings in the public interest, indeed to assist the Court when the earlier claimant dropped out, and whose circumstances are modest) should be required to answer in relation to the issue of "prohibitive expense". Please glance at the list of questions. I trust that you will agree that this sort of intrusive enquiry is likely to put off any claimant with any sort of spare resources that they might wish to use to bringing a claim. We were shocked.

6. Secondly, the reason for these questions relates to the UK government's approach to the concept of "prohibitive expense". In its appeal application, the position is stated thus:

> **Meaning of not "prohibitively expensive"**
>
> 56. The meaning of "prohibitively expensive" is an issue that arises, on the [UK government's] case, in the alternative.
>
> 57. The Costs Officers concluded relying on the 2008 Sullivan Report that the assessment of what is "prohibitively expensive" starts with an assessment that extends beyond the parties to the litigation. That is to say consideration begins with an assessment of whether the costs would be "prohibitively expensive" for the "ordinary" member of the public. The Costs Officers went on to say that the assessment then needed to look at other matters including the financial resources of the parties.
>
> 58. It is submitted that the "prohibitively expensive" test is and should be focused exclusively on the actual circumstances of the parties to the litigation. There is no need to consider, and no warrant for considering, what would be "prohibitively expensive" for the "ordinary" member of the public. Not merely is such a test extraordinarily difficult, if not practically impossible, to apply. It also asks a question that is irrelevant - the fact that a notional ordinary member of the public might find a set of costs prohibitively expensive tells one little or nothing as to whether the litigant in question would do so.

7. The above encapsulates the key problem with public interest litigation in this jurisdiction – the relevance of the resources of the actual person (an individual, NGO or even a company) who is prepared to be a claimant in an environmental case. This is further complicated by the support (or not) that the individual may have from others, who in turn may or may not be wealthy. In our view the idea of focussing on the means of an individual is not only inappropriate, but (given the intrusive sorts of "means testing" questions suggested) is likely to have a severely discouraging effect on anyone coming forward as a claimant.

8. Whatever the position may be on one's own side, as a matter of law, we are also concerned that the Jackson Report's proposed rule to consider financial resources of all the parties to a dispute is in any event incorrect. This is because in an Aarhus context Article 9(4) is concerned with prohibitive expense to the claimant. Usually opponents are central or local government agencies of infinite resources. (We are increasingly encountering local authorities pleading poverty in PCO cases. If that is genuinely the case then there is nothing stopping them applying for cost capping under normal domestic rules.)

9. These is also the suggestion that conduct should be relevant to making costs orders: we agree, but making "wasted costs" orders is a well established and separate jurisdiction which should not interfere with the basic certainty that claimants require as to proceeding confidently with environmental claims.

10. The suggestions in the Jackson Report (which we accept are not the preferred recommendations) as to "default" costs (see footnote 7 of CE's letter) would be highly unsatisfactory. People do not seem to appreciate that the sums mentioned are large amounts of money for most litigants. Also no account seems to be taken of the need to pay one's own lawyers. While we will often work on a no-win, no-fee basis, this is very risky and we prefer to charge something. But this sort of default exposure proposal is then in addition to own side costs.

11. As for nuisance cases, we do not understand why one-way costs shifting is not advocated in nuisance cases just as in judicial review cases. We agree that ATE insurance makes litigation absurdly expensive, but if the costs of it are not recoverable then that will prevent most environmental nuisance cases where damages recovered are very limited. Even higher levels of BTE insurance would not, in our experience, cover opponents' costs in many cases. There are other serious practical difficulties. It would be so easy, one would think, just to have a one-way shifting rule.

Overall, while the Jackson Report's intentions are welcomed, as crafted the proposals will not remove the inherent uncertainty in the costs regime in this jurisdiction. We ask ACC to do all it can to ensure that it does so, and makes it as simple as possible. Most importantly, the mechanisms must not involve discouraging claimants, which having to disclose any details of resources is plainly likely to do.

Yours sincerely

Richard Buxton

ANNEX from Rugby Cement case

Questions relating to Mrs Pallikaropoulos means

1. Please provide full details of the "legacy" to which you have referred (which in para 6 of your witness statement to the Supreme Court dated 20 November 2009 you describe as "the residue of my aunt's estate"), including its source, the date on which you received it and its nature and original amount. How much of it remains unspent?

2. How much of the original sum referred to in question 1 was spent in connection with proceedings in the Administrative Court and the Court of Appeal? How much was spent in direct connection with your appeal to the House of Lords?

3. Please provide details of your husband's employment/profession, his income and assets, and his main place of residence, and the source and amount of his income and any assets, including stocks, shares and real property.

4. Please provide details of any income you receive from your husband.

5. Has your husband made any contribution, direct or indirect, to the funding of legal costs, expert advice or any other matter relating to the Administrative Court or the Court of Appeal?

6. Has your husband made any such contribution in relation to your appeal to the House of Lords?

7. Please provide details of any other income you receive, including its source and amount. If you are not in employment (as you state in paragraph 5 of your witness statement to the Supreme Court dated 20 November 2009), please provide full details of any state benefits you receive.

8. Please provide details of any bank, building society or other accounts you hold and the amounts they (i) currently contain; (ii) as at the date of your petition to the House of Lords; (iii) as at the date of the hearing of the appeal before the House of Lords; (iv) as at the date of the costs order of 18 July 2008.

9. Please provide details of any stocks, shares, real property or any other assets you own, or in which you have an equitable interest.

10. In your witness statement to the Supreme Court dated 20 November 2009 you stated that you presently owe the bank £15,000 (para 3). Is this still the case, and what is the cause of this debt? When and how do you expect to pay off the debt?

11. Please provide details of the financial basis on which your solicitor and Counsel are acting for you (referred to in submissions on costs to the House of Lords on 30 April 2008 as a "hybrid conditional fee arrangement (at rates equivalent to those "risk rates" that the LSC would have paid had the matter been publicly funded)".

12. Please provide full details of the fees you have paid to your solicitor and your Counsel in relation to this appeal, when the sums involved were paid, and any fees which remain outstanding. (In your submissions to the House of Lords on costs on 30 April 2008 your Counsel stated that your own costs at that time were "in excess of £60,000 including VAT". In your witness statement to the Supreme Court dated 20 November 2009 you confirmed that figure but explained that this excluded the £25,000 you had paid as security monies (para 2).) Please explain in what way you consider those costs were not prohibitively expensive.

13. Please explain in whose name your house is registered. Please explain who owns the equity in your house, particularly in light of the fact that you live there and are responsible for your children.

14. What is the current value of your house? What was the purchase price, and how long have you lived there?

15. Please provide full details of any mortgage or other charges on your house and in whose name these are.

16. Who owns or has equitable interest in your father's house?

17. In your witness statement to the Supreme Court dated 20 November 2009 (para 3) you state that the total costs of your travel to care for your father, his carers etc. are about £1,200 per month. In para 5 you refer to "the carers and the driver". Please provide full details of all persons paid to care for your father and drive him or yourself, and the sums they are paid.

18. In relation to the sums referred to in question 16, do you have to pay this yourself? Alternatively, please explain how this sum is funded.

19. Please provide details of the make, type and age of your car, who is the registered owner, and who paid for it.

20. Please provide details of any children you have who are below the age of 18.

21. You stated in your witness statement to the Supreme Court dated 20 November 2009 that "Both children are still studying but living at home" (para 3). Please confirm whether this remains the case, how their care is funded, by whom, and how much is paid.

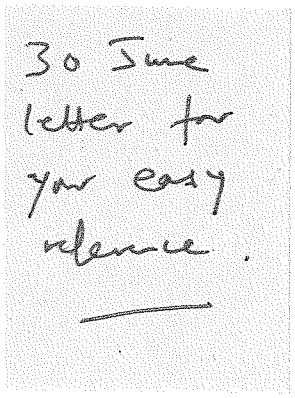
22. Are any of your children in private education? If so, who pays the school fees, and how much are they?

23. Please provide details of the membership and finances of Rugby in Plume.

24. Has any contribution to your legal costs of the proceedings in the House of Lords been made by any other person or organisation? If so, please provide full details.

25. Please provide full details of your personal expenditure in relation to proceedings in the Administrative Court and the Court of Appeal, including legal costs, experts' fees, administrative costs, travel and accommodation etc. In his letter to the House of Lords dated 9 February 2007, your solicitor explained that he advised the Court of Appeal that you had spent "in the region of £40,000 of [your] own money already on various expenses, including expert and legal fees...". In your witness statement to the Supreme Court dated 20 November 2009 (para 2) you stated that you had spent "£20-30,000 on related matters over the years prior [to your appeal to the House of Lords]". Please explain the apparent discrepancy between your solicitor's statement to the Court of Appeal and your own statement to the Supreme Court. Please explain in any event in what way you consider these costs were not prohibitively expensive.

26. In relation to the previous item, please explain how such expenditure was financed.



Mr Jeremy Wates
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UNECE, Environment and Human Settlement Division
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CH-1211 Geneva 10
Switzerland

30 June 2009

Dear Mr Wates

Aarhus Convention, costs and "prohibitive expense"

I hesitate to contact you just before your compliance meeting to which my colleague Paul Stookes is going (matter: ACCC/2008/23) but he suggested that quite aside from the issues he has, the Committee may in the context of other UK complaints be considering the question of what "prohibitively expensive" means.

Acting for claimants with all sorts of different financial arrangements I hope the following observations may be helpful.

First it must be remembered that costs of a case will involve ones own lawyers as well as (in the UK) exposure to the costs of opponents. It may be that in relation to own-side costs one can work on a conditional fee (no-win, no-fee, or no-win, part-fee) arrangement and so reduce costs to an affordable level. The point is that it is the totality of costs, not just opponents' costs, which must not be prohibitive.

That said, it is the prospect of opponents' costs which is the major factor making litigation about environmental matters in the UK prohibitive.

It is true that the jurisdiction to grant protective costs orders (PCOs) is significantly helpful but these have all kinds of problems, including costs exposure in getting them (which may be as much as £7,000, which sum may in theory need repeating if the matter goes to appeal), and the time and associated own-side costs in applying for them.

As CAJE mentions in its submissions to you, we strongly support the possibility of a regime of "one-way costs shifting" as canvassed in the recent Jackson report, which would in fact be consistent with rules relating to legal aid and have significant costs advantages for unsuccessful defendants and thus the overall costs of legal proceedings.

It is unclear as a matter of language what "prohibitively expensive" means. However we do suggest that the intent of the Aarhus Convention would be completely undermined if it were (for example) literally someone's total assets, or even a substantial sum. An expense which might not be prohibitive in one context (for example, spending money to deal with a dire problem of a child) may be prohibitive in another (for example contributing to a common cause).

Even saying that there should be a modest liability to discourage frivolous claims is not much of an argument because in our experience of environmental claims people simply do not go to court and spend money on their own lawyers frivolously, and anyway in the UK such claims are usually weeded out at an early stage by the permission process in judicial review. Nuisance claims are usually far too long, big and complicated to contemplate otherwise than with the most serious intent. We have never brought what we considered originally, or with hindsight, to be a frivolous claim.

The conventional response from opponents is that adverse costs orders are to compensate the successful defendant, but the reality is that such defendants are either the state or large organisations, in either case infinitely better resourced. They are also well used to not getting costs in legally aided cases The possibility of such orders are perceived as threats against taking proceedings, they always continue during a case ("swords of Damocles") as a serious, stressful and time-consuming worry, and when made are perceived not as compensation but as punishment for having brought the case.

In this context there is a sub-issue relating to the resources of groups or their individual backers.

It is often said that a group of many, perhaps several thousand, people can obviously afford to pay adverse costs, alternatively that individual backers are wealthy and they will have no problem in doing so. We would comment:

(a) It is unrealistic to suppose that large groups find it possible, let alone easy, to raise a lot of money. Put shortly, that is not "the way life works". People may contribute to (in our experience, not huge sums) for own side costs. But psychologically they resent contributing to costs which may be paid to the state or another wealthy opponent in relation to environmental matters which they perceive as the state's responsibility or fault in the first place.

(b) Large groups often have a small committee running them, which may include one or more relatively better off individuals. However we consider it wrong as a matter of policy or practice for people who are prepared to contribute generously to cases including their own costs to be required to pay opponents' costs on the basis that the matter is in one sense not prohibitively expensive. There are several reasons for this, among them:

- It discourages altruistic support from those who may be prepared to be generous towards less well off people. (See the example at the end of this letter.)

- It does not recognise that ordinary people, even if they might be able to spend some money on litigation which involves themselves or their families, assist in environmental cases for altruistic reasons. They have no obligation to pay money for environmental protection, let alone to risk large sums against a state or other well-resourced opponent.

- Even where a case has a private element, for example nuisance proceedings, the matter complained of is almost always something which has arisen through no fault of the claimant, or a nuisance conducted by an organisation for its benefit. The situation is even more obvious in public law cases, for example, a planning permission or a permit authorising polluting activities which affects innocent partie(s).

- One asks why should a better off individual not be able to seek the protection of the court on the same terms as the vast majority of the populace? After all, wealthier people on the whole contribute both a higher proportion in terms of tax rates and in absolute terms to a nation's taxes.

- In fact, the number of truly wealthy people to whom the very large sums involved are truly "affordable" are miniscule in number (and seldom get involved in these types of cases). The usual situation is a homeowner who has retirement etc. savings which (partly due to property values) is on paper quite well off, but cannot reasonably be expected to spend money on the legal fees of public authorities or well resourced organisations.

Overall, as you know there is a very serious problem in the UK of being discouraged from making good claims for fear of opponents' costs. That is the major point which the Aarhus Convention has the potential to be hugely helpful about in environmental protection. We already have experience of it starting to enable claims to be brought that would not have been possible to bring previously. We trust UNECE will continue to protect its already helpful effect.

I hope these observations are of some help.

Yours sincerely

Richard Buxton

PS: We can offer several examples, but it may help to give the Committee a flavour of the problem to mention the Rugby Cement case. This had been legally aided until the end of the Court of Appeal stage. For various complicated reasons the case had to be taken over by a private individual in the House of Lords. We duly applied for a PCO which was refused. The House of Lords said they were not satisfied as to the claimant's means although it had been copiously explained that she was a householder who owned an ordinary house without otherwise substantial assets and that it was wholly inappropriate to have a full "means test". Our client felt so strongly about the case (which, after all, the House of Lords had recognised was of public importance and related to the proper application, in effect across the whole cement industry, of various EU directives) that she nevertheless continued with the claim. She lost on an exercise of discretion relating to non-revelation of information about particulate emissions, which even the lower courts had considered unfair (though had also applied discretion).

In the meantime we had written to the European Commission about the PCO problem, which had responded specifically stating that this was "a further example of the bad application of Directive 2003/35/EC" (which, as you recall, implements the Aarhus Convention in certain EU directives). Despite pointing all this out to the House of Lords in making later submissions on costs they ordered, without giving any reasons for rejecting those submissions, our client to pay the costs of both state respondents (central government and the Environment Agency), claims totalling some £83,000. Our client is completely unable to pay. She would have to sell her house to do so. We are looking to redress via the European Commission and possibly a reference on the point to the European Court of Justice. While we may yet also come to you about it, for your present purposes we trust you will see this as an example of how the domestic courts even at the highest level have misapplied Aarhus and what a terrible effect not applying it, using the conventional rules, has. It is all the worse because although our client lives in Rugby she is much further away that the worst affected people who have not dared to take proceedings for costs reasons. It is a real case of altruism gone wrong.