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24 March 2009

Dear Sirs

Communication to Compliance Committee ACCC/C/2008/23

We write further to the Committee's letter of 12 January 2009 and to the Court of Appeal hearing in this matter on 2-3 February 2009, for which judgment was handed down on 2 March 2009.

We enclose the judgment for your consideration and note the following by way of summary:

a) The appeal dealt with two matters (a) breach of Articles 9(3) & (4) of the Aarhus Convention 1998 following an interim costs order adverse to the Claimants (and for whom we act) and (b) apparent bias of the Defendant's consultant in the related nuisance proceedings. The above communication relates to (a) only.

b) The Court of Appeal broadly found that the interim costs order was unfair between the Claimants and the Defendant. It set this aside and replaced it with an order that the costs of the Defendant be reserved for the trial judge. However, it revised the order not on the basis of the Convention but on general principles of unfairness.

c) The Court of Appeal did not disturb the finding that the Claimants should pay the costs of the Environment Agency and the local Council (BANES) and, in that sense, the decision remains unfair and, in our view, contrary to the Convention. The Claimants has subsequently raised this with the Court of Appeal but the finding has not been revised.

d) At paragraph 47 of the judgment the Court of Appeal made some important *obiter* points about the application of the Aarhus Convention in domestic law including that:

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, [i.e. (ii) above] 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.

e) At paragraph 44, the Court of Appeal left open the question as to whether the Aarhus Convention applies to private nuisance proceedings stating that:

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

We are of the view that the Court of appeal judgment is helpful, but leaves a number of matters open. We ask the Compliance Committee provide its opinion and any recommendations on the following:

1) Whether, in its view, the Aarhus Convention 1998 applies to private proceedings. Article 9(3) of the Convention appears clear on this point stating that '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.' [emphasis added]. Our view is that it would be extraordinary if it did not.

2) Whether it agrees with the Court of Appeal's findings in (i) - (vi) above.

3) Whether it was unfair that the costs of the Environment Agency and BANES (the regulators) should be paid by the Claimants when there was a failure by those organisations to resolve the pollution problems in the first place. As indicated above, the Court of Appeal has not disturbed this finding. The Agency and BANES have now sought their costs from the Claimants rather than the polluting Defendant. They have therefore favoured the polluter rather than the local residents who are being polluted, yet have failed to regulate or prosecute the polluter when the Agency confirmed that offences have occurred.

4) Whether the approach of the Agency and BANES is consistent with the objectives of the Aarhus Convention when they have failed to protect local residents and properly regulate a site with extensive evidence of problems, regulatory offences and poor management.

   Defra's response of 30 October 2008 to the Compliance Committee's question '*Why did the regulators take no action?* is, in the Claimants view, inadequate. It lists a series of purported enforcement procedures none of which have been effective in resolving the problem odours from the Defendant's site. This much is confirmed in the Agency's letter of 14 February 2008 which states that odour offences were caused on the dates concerning the Claimants but that no action is to be taken (copy attached) and Defra's own statement that BANES withdrew its abatement notice in April 2008 because no further statutory nuisances had occurred. This statement wholly contradicts the Agency's view that an odour offences had occurred. The threshold or test (the standard of proof) for an offence being arguably higher than for a statutory nuisance.

Finally, please note that in separate proceedings relating to land use planning, the High Court held on 19 February 2009 that BANES had failed to comply with Article 10a of the EIA Directive 85/337/EC, which incorporates Articles 9(3) and (4) of the Aarhus Convention, by failing to carry out a comprehensive screening assessment for the Defendant's site and to determine whether the Defendant's waste site should be subject to EIA (see *R (Baker) v BANES* [2009] HC (Admin) formal judgment awaited.

We trust the above assists and look forward to hearing from the Compliance Committee with its views on the application of the Aarhus Convention and whether, in its view, the UK as a signatory party has fulfilled its obligations.

Yours faithfully

Richard Buxton

cc Dr Asa Sjostrom, Head of EUIC Core Team, Defra