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Mr Jeremy Wates
Secretary to the Aarhus Convention
UNECE, Environment and Human Settlement Division
Room 332, Palais de Nations
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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).

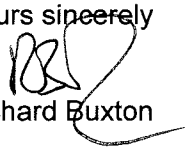
- One asks why should a better off individual not be able to seek the protection of the court on the same terms as the vast majority of the populace? After all, wealthier people on the whole contribute both a higher proportion in terms of tax rates and in absolute terms to a nation's taxes.

- 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.