

**ENVIRONMENTAL LAW FOUNDATION**

**Communicant**

**and**

**UNITED KINGDOM**

**Party concerned**

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**ANNEX 1**  
**DETAILED FACTS AND ALLEGED NON-COMPLIANCE**

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**SUMMARY**

1. This communication is submitted by the Environmental Law Foundation (ELF), a UK charity that enables communities and individuals to use the law to protect and improve their environment. ELF submits that the UK has enacted legislation that will restrict access to environmental justice and is contrary to the Aarhus Convention. In particular, s. 46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 (LASPOA 2012) amends the Courts & Legal Services Act 1990 by inserting a new section:

58C(1). A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).

3. This means that the premium for after-the-event (ATE) insurance, which generally covers: (i) the costs of expenses, such as court fees, expert reports, travel etc, and (ii) the exposure and risk of paying an opponent's costs, can no longer be recovered if a claimant is successful in a legal claim. The reasons for non-compliance are set out in Section B.
4. The role of private nuisance in securing environmental redress has recently been affirmed in the Court of Appeal case of *Barr v Biffa Waste Services*

*Ltd* [2012] EWCA Civ 312. Also, in its final report relating to Communication ACCC 23, the UN Compliance Committee noted that:

47. "Private nuisance is a tort (civil wrong) under the United Kingdom's common law system. A private nuisance is defined as an act or omission generally connected with the use or occupation of land which causes damage to another person in connection with that others use of land or interference with the enjoyment of land or some right connected with the land. The committee finds that in the context of the present case, the law of private nuisance as part of the parties concerns the law relating to the environment and therefore within the scope of Article 9 paragraph 3 of the convention".

5. The UK courts have recognised that private nuisance may fall within the ambit of the Aarhus Convention see e.g. *Morgan v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 [2009] Env LR 30 at §§22 and 44. The costs involved in private nuisance has prompted the UK government to suggest that there are alternative legal options available to those experiencing environmental problems to avoid the need to revert to private nuisance. The options include:

- (a) Summary proceedings s. 82 of the Environmental Protection Act 1990.
- (b) An ombudsman complaint.
- (c) Judicial review challenging administrative actions.
- (d) A private prosecution.
- (e) Before the event (BTE) insurance.

6. ELF does not regard items (b) to (d) as providing any realistic mechanism of review. It does recognise that s. 82 proceedings could provide an alternative mechanism to private nuisance proceedings in some instances. However, s. 82 is limited in its scope and application due to:

- (a) environmental nuisances outside the statutory nuisance definition;
- (b) the defence of Best Practicable Means;
- (c) the defence of reasonable excuse;
- (d) procedural and evidential limitations of s. 82 proceedings;

- (e) the defence that the nuisance is not ongoing;
  - (f) the Prosecution of Offenders Act 1985;
  - (g) lack of application to multiple claims and claimants;
  - (h) limited claim for compensation; and
  - (i) the potential for a costs claim by a successful defendant.
7. In terms of BTE cover, the reality is that this is an inadequate answer to non-compliance with the Aarhus Convention for the reasons set out below.
  8. Section 46 is to enter into force in April 2013 and will result in private nuisance proceedings being prohibitively expensive for all those people that are unable to afford (a) the expenses necessary in private nuisance proceedings and (b) the risk of exposure to an opponent's costs. The availability of ATE insurance to: (a) fund those expenses and cover the risk of exposure to an opponent's costs, is critical to ensuring the private nuisance proceedings can be pursued.
  9. Articles 9(3) and (4) of the Aarhus Convention require the UK to ensure that members of the public have access to judicial procedures to challenge acts and omission by private person and public bodies which contravene national environmental laws and, further, that those procedures shall provide adequate and effective remedies, including injunctive relief, and be fair, equitable, timely and not prohibitively expensive. By removing the ability to recover the premium of ATE insurance policy in private nuisance proceedings, the UK is creating a serious gap in national environmental law and the result will be that a vital judicial procedure that enables communities and individuals to challenge environmental harm (i.e. private nuisance) will be unfair, inequitable and prohibitively expensive.
  10. ELF also submits that s. 46 will be in breach of Article 9(5) the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. Instead, s. 46 will be adding or increasing financial and other barriers in the way of access to environmental justice.

## A FACTUAL AND LEGAL BACKGROUND

1. This communication is submitted by the Environmental Law Foundation (ELF), a UK charity that enables communities and individuals to use the law to protect and improve their environment<sup>1</sup>. ELF relies upon a national network of specialist environmental lawyers who provide initial advice and assistance on a *pro bono* basis.
  
2. As set out in the initial communication paper and above summary, ELF submits that the UK has enacted primary legislation that will restrict access to justice in environmental matters and therefore is contrary to the Aarhus Convention. In particular, s. 46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 (LASPOA 2012) amends the Courts and Legal Services Act 1990 and inserts a new s. 58C which states:

(1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).
  
3. This means that the after-the-event (ATE) insurance which generally covers: (i) the costs of expenses such as court fees, expert reports, travel etc, and (ii) the exposure and risk of paying an opponent's costs can no longer be recovered if a claimant in legal proceedings is successful in a legal claim. The reasons for non-compliance are set out Section B below.

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<sup>1</sup> The Environmental Law Foundation is a registered charity (no. 1045918) and company limited by guarantee (co. no. 2485383). Its aims are to raise awareness of communities and individuals of their environmental rights and how to use those rights; to empower vulnerable communities and individuals to have a voice in decisions that affect their environment and quality of life; to enable communities and individuals to use the law to protect and improve their environment; to share and develop expertise in law and practice to improve access to information, public participation in decision-making and access to justice in environmental matters; and to challenge decisions in the public interest that have adverse environmental impacts. ELF supports the fundamental and urgent requirement that everyone, our children, grandchildren and all future generations should live without harm to other living things or damage to the ecological balance of the planet. ELF's contribution is in the empowerment of communities by providing a cross-disciplinary means of action ensuring that people have a voice in protecting and improving their environment.

4. This section covers the factual background to the alleged non-compliance including an outline of how private nuisance remains a critical component in securing access to environmental justice in the UK.

### **1. Background and use of private nuisance in environmental justice**

5. Private nuisance proceedings are one of the oldest forms of legal action in the UK, developing and formalising in the 19<sup>th</sup> century. With the development of environmental regulation and statutory control in the early 1990s it was anticipated that the need for private nuisance would diminish<sup>2</sup>. However, it continues to provide an opportunity for redress where regulators are either unable or unwilling to resolve environmental problems. The High Court case of *Barr & Others v Biffa Waste Services Ltd* [2011] EWHC (TCC) is a case in point. In that judgment the role of the Environment Agency is described as follows:

576. Inevitably, since they were so often the focus of Biffa's wrath, that brings me on to the EA. Although in some ways they tried to do their best to protect the interests of the residents of the Vicarage Estate, there can be no doubt that they were under huge pressure from a number of quarters. The relevant office was responsible for a number of different landfill sites and they had to try and adopt an easy working relationship with the representatives of Biffa with whom they were going to be dealing on a regular basis. The system depended on co-operation and when, following the replacement of Ms Richards by Mr Pynn, Biffa thought that they were being unfairly treated, they responded by placing intolerable pressure on the EA representatives. I have no doubt that that was at least one factor in the absence of any subsequent prosecution.

577. The EA's principal concern must be the regulation of the activities in accordance with the permit. But, on the material before me, it does not appear that this was always at the forefront of the EA's consideration. When the complaints started to be made in increasing numbers, the EA were unable to respond decisively. In the end, they became not much more than a messenger, passing on the complaints from the residents to Biffa and hoping something might be done about it. Indeed, it seemed that the senior management in Biffa regarded the EA as nothing more than a form of complaints-handling organisation,

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<sup>2</sup> See e.g. the opinion of Lord Goff at §17 *Cambridge Water Co. Ltd v Eastern Counties Leather* [1994] 2 A.C. 264.

working on their behalf. This seems to me to be a complete travesty of the EA's statutory role.

578. I should also say that, in my view, better claims might have emerged had it not been for the rather pusillanimous attitude of the EA at the time. The minutes show that, at least at one point, they seemed to accept that Biffa were in breach of the permit on an almost daily basis (paragraph 103 above). If that was right, the EA should have been much more aggressive in its dealings with Biffa. A situation in which, on the one hand, Mr Barr made over 200 complaints, but where, on the other, Biffa were found to be in breach of the permit on just 4 occasions, and never again after February 2005, is profoundly unsatisfactory, and responsibility for that apparent discrepancy must rest, in large part, with the EA.

579. I consider that the EA should have been much more forceful with Biffa. For example, they might have said that Biffa could only operate the site if, between April and September (when the bulk of the complaints were generated), they only worked at low levels. If that meant having more than one cell open at a time, then so be it. The EA should also have been approaching the odour problems in the technical and detailed way that Biffa's Mr Allum did, and should have made the same careful recommendations (see paragraphs 105-108 above). In my view, the EA should have been proactive in telling Biffa what they could – and what they could not – do, and should have threatened to rescind the permit if Biffa did not co-operate.

580. Ultimately, of course, what is required in a situation like this is a proper amount of detailed co-operation between the regulator and the regulated. That co-operation, certainly after the belated conviction, was in very short supply. That led to ultimately futile exchanges of correspondence about particular smells on particular streets at particular times, which had occurred three months earlier, and which were of no benefit to anybody. Such sterile debate was certainly of no benefit to the residents of the Vicarage Estate. It is to be hoped that, in future, the EA and Biffa will be able to adopt a more co-operative working relationship and to try and bring the interests of those directly affected by odour, such as the residents of the Vicarage Estate, rather more sharply into focus.

6. In *Read v Lyons & Co* [1947] AC 156 nuisance was defined as: 'the unlawful interference with a person's use or enjoyment of land or some right over, or in connection with it'. The use of private nuisance has been extensive and the range of environmental nuisances is wide and flexible. This is clear from the case law, see e.g. the dictum of Lord Evershed in

*Thompson-Shwab v Costaki* [1956] 1 WLR 335 who at 338 cites Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880:

“It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according the ordinary usages of mankind living in society, or more correctly in a particular society. The forms which nuisance may take are protean.”

7. The UK Courts have recognised that private nuisance may fall within the ambit of the Aarhus Convention was summarised by the Court of Appeal in *Morgan v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 [2009] Env LR 30 at §§22 and 44:

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 ... 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 ... Furthermore provisions of the convention have been reproduced in two EC Environmental Directives, dealing respectively with Environmental Assessment and Integrated Pollution Control ...

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).

8. The relevance and role of private nuisance in securing environmental redress has recently been affirmed in the Court of Appeal case of *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312 which overturned a

comprehensive attempt by the High Court to limit the application of private nuisance in circumstances where a regulatory regime was in place.

9. In its final report relating to Communication ACCC 23 the UN Compliance Committee noted that:

47. "Private nuisance is a tort (civil wrong) under the United Kingdom's common law system. A private nuisance is defined as an act or omission generally connected with the use or occupation of land which causes damage to another person in connection with that person's use of land or interference with the enjoyment of land or some right connected with the land. The committee finds that in the context of the present case, the law of private nuisance as part of the parties concerns the law relating to the environment and therefore within the scope of Article 9 paragraph 3 of the convention".

10. The report: *Review of Civil Litigation Costs: Final Report* (Dec 2009) (the Jackson Report), which reviewed the costs of nuisance proceedings concluded that the Aarhus Convention applied to only 'a small proportion' of nuisance cases i.e. "... those in which the alleged nuisance is an activity (a) damaging the environment and (b) adversely affecting the wider public, rather than the claimants alone"<sup>3</sup>. ELF submits that this interpretation is incorrect in two regards.

Firstly, it is not ELF's experience that only a small proportion of nuisance cases harm the environment and adversely affect the wider public. As stated above nuisance was defined as "the unlawful interference of the person's use or enjoyment of land ..." (*Read v Lyons & Co*). Any interference with one person's enjoyment of the land is likely to also affect his neighbours.

Secondly, ELF submits that this interpretation is too narrow and cannot, contrary to the report, take into account the UNECE Aarhus Implementation Guide. The criteria of both (a) and (b) would, for instance, exclude actions such as a sewage flood that may harm the environment but

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<sup>3</sup> pp 314-5 of the Jackson Report.



only discharge onto a particular claimant's land. Neither the Aarhus Convention, nor the Aarhus Implementation Guide attempts to restrict the application of the Convention to matters that only affect a wider group of the persons that are not claimants to proceedings. Indeed, the application of such a narrow approach would prohibit a claim by a group of residents living in a hamlet in which all the residents sought to claim against a polluter. It would also prevent a noise nuisance claim for which it could be argued that there was no 'harm to the environment'. This would be absurd and would exclude a large number of prominent private nuisance cases including: *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), *Watson v Croft Promo-sport Ltd* [2009] EWCA Civ 15.

11. In fact, the Aarhus Implementation Guide (2000) confers a wide meaning to the environment including the state of human health and life. It notes at page 35 that:

The Aarhus Convention does not contain a definition of "environment". Article 2, paragraph 3, is important, not only for its obvious relation to the Convention's provisions concerning information, but also because it is the closest that the Convention comes to providing a definition of the scope of the environment. It is logical to interpret the scope of the terms "environment" and "environmental" accordingly in reference to the detailed definition of "environmental information" wherever these terms are used in other provisions of the Convention.

12. The definition of the environmental information in Article 2(3) of the Convention provides:

"Environmental information" means any information in written, visual, aural, electronic or any other material form on:

- (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the

environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

13. Finally, the UK has recognised that private nuisance falls within the scope of the Convention, see e.g. *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, §§42-44 and *Austin v Miller Argent* [2011] EWCA Civ 928, §51.
14. From the above it is reasonable to suggest that private nuisance is an appropriate mechanism for ensuring environmental justice and that this falls within the remit of the Aarhus Convention, the types of private nuisance that fall within the Convention are not narrow in scope and certainly should not be limited by a requirement that there is a wider section of the public beyond claimants are affected. ELF submits that the application of the Convention to private nuisance is wide and not as limited as that suggested in the Jackson Report.

## **2. The concerns of private nuisance proceedings**

15. The concerns are that private nuisance proceedings are often expensive. ELF recognises this. Many cases are commenced in the High Court where the court fees alone can exceed £3,000<sup>4</sup>. Added to this are the costs of expert fees and of legal representation. To determine whether or not private nuisance exists requires the need to gather, present and hear evidence. The substantive trial normally lasts between four and 10 days, although many cases last much longer particularly where the claimants

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<sup>4</sup> There is concern that the court fees currently being charged (and certainly the fee increases proposed by the Ministry of Justice (MoJ)) to issue and pursue environmental claims are themselves contrary to Article 9(4) of the Aarhus Convention. In 2011, the MoJ published a consultation paper proposing the court fees in the High Court and Court of Appeal will aim to be 'cost neutral' by 2014/15.

comprise a group of affected residents. The costs of environmental nuisance cases almost always exceed £100,000 per party and often can exceed £2 million. The concerns about costs to the parties are very real and the availability of ATE insurance to a claimant ameliorates the exposure to the risk of paying an opponent's costs if a claim is ultimately unsuccessful.

16. An example is the case of Derek Barr & Others –v- Biffa Waste Services Ltd. On the 12<sup>th</sup> of May 2011 an Order was sealed in that case in the following terms:-

CLAIM NO: HT-09-165

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
TECHNOLOGY AND CONSTRUCTION COURT  
WESTMILL LANDFILL GROUP LITIGATION  
BETWEEN:

DERRICK BARR & OTHERS

Claimants

and

BIFFA WASTE SERVICES LIMITED

Defendant

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JUDGMENT

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**UPON** hearing Leading Counsel for the Claimants and Leading Counsel for the Defendant

**AND UPON** the action brought by the 30 Lead Claimants having been tried before the Honourable Mr Justice Coulson at the Technology and Construction Court between 16 November 2010 and 16 December 2010 with Judgment reserved at the end thereof

**AND UPON** the Court delivering Judgment in writing pursuant to CPR 40.2 in respect of that trial

**IT IS ORDERED THAT**

- (1) The claims of each of the 30 Lead Claimants who are identified in Schedule 1 hereto be dismissed and Judgment be entered for the Defendant in respect of each such claim.
- (2) In the light of the said Judgment in writing and in consequence the admission by the non lead Claimants herein that each of their respective claims would fail at trial, the claims of each of the non Lead Claimants who are identified in Schedule 2 hereto be dismissed and Judgment entered for the Defendant in respect of each such claim.
- (3) The Claimants (and for the avoidance of doubt that includes those persons who were Claimants but who have discontinued their respective proceedings herein

without provision being made for the costs of this action including in particular those who are identified in Schedule 3 hereto) shall each and in accordance with the provisions of the costs sharing provisions of the Order made herein on 27 March 2009 pay to the Defendant its costs of this action, such costs to be assessed upon the standard basis at all times until 30 September 2010 and then upon the indemnity basis from 1 October 2010.

- (4) The Claimants shall pay to the Defendant by no later than 4 p.m. on 17 May 2011 the aggregate sum of £1,900,000.00 90 (One Million Nine Hundred Thousand Pounds) on account of such costs.
  - (5) The Claimants shall each pay interest upon the sums due to the Defendant in respect of such costs at the rate of 4% per annum such interest to be payable from 16 November 2010 until payment of the costs due.
  - (6) The Claimants application for an extension of time within which to ask this Court for permission to appeal is refused.
17. In this case the Claimants had the advantage of a ATE insurance. The above Order was overturned on appeal.
18. Damages awarded in nuisance actions are often moderate. This limits the ability of Claimants to discharge costs out of damages. The Claimants in nuisance actions are frequently primarily motivated by a desire to bring the nuisance to a conclusion rather than to seek damages.
19. The costs involved in private nuisance has prompted the UK government to suggest that there are alternative legal options available to those experiencing environmental problems to avoid the need to revert to private nuisance. The options include:
- (a) Summary proceedings by persons aggrieved by statutory nuisance under Section 82 of the Environmental Protection Act 1990.
  - (b) A complaint to the Parliamentary Ombudsman or Local Government Ombudsman about a public body.
  - (c) An application for judicial review challenging administrative actions or failing to take such actions e.g. by the Environment Agency or a local authority.
  - (d) A private prosecution; a right preserved by Section 6(1) of Prosecution of Offences Act 1985<sup>5</sup>.
  - (e) Before the event (BTE) insurance.

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<sup>5</sup> §24 of the Final Report of the Compliance Committee on Communication ACCC/23.

20. ELF does not regard items (b) to (d) as providing any realistic mechanism of review. The complaint to an ombudsman is limited to whether a third party, the public body, has acted in a way that amounts to maladministration and, even if a finding of maladministration results, the ombudsman has no power to require effective resolution of the environmental harm and simply can make recommendations to the public body to act. These recommendations can be ignored without redress. Judicial review is, in similar fashion, a collateral attack upon a public body and does not directly resolve the environmental concerns. A private prosecution necessarily involves the polluter committing an offence, which is often unlikely to be the case.
21. ELF recognises that s. 82 proceedings could provide an alternative mechanism to private nuisance proceedings in some instances. It also notes that the Jackson Report acknowledges that s. 82 proceedings have a role to play in nuisance proceedings. However, s. 82 is limited in its scope and there are many instances where s. 82 cannot be used to resolve environmental concerns. These are set out in the next section.

### **3. The limitations and restrictions of s. 82 proceedings**

22. Section 82 of the EPA 1990 is held out to be an effective means of providing an affordable mechanism of resolving environmental harm and as an alternative to private nuisance claims in the County Court and High Court. This is because it does not expressly provide a means for a successful defendant to claim costs from an unsuccessful applicant. That is, while s. 82(12) provides that costs may be claimed by an applicant it does not explicitly allow a defendant who has successfully resisted proceedings to claim against an unsuccessful applicant (although see below).
23. It is recognised that s. 82 may be an appropriate form of proceedings for some environmental matters. However, these tend to be localised disputes between one immediate neighbour and another. There are, in practice, a

number of factors that limit the use of the s. 82 procedure in many instances. These are set out below.

***(a) Environmental nuisances outside the statutory nuisance definition***

24. The range of environmental nuisances is wide and flexible. This is clear from the case law. See e.g. the dictum of Lord Evershed in *Thompson-Shwab v Costaki* [1956] 1 WLR 335 who at 339 cites Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880:

“It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society. The forms which nuisance may take are protean.”

25. In contrast, the scope of s. 82 proceedings is fixed in statute and a statutory nuisance will only exist if it falls within one or more of the categories of nuisance set out in s. 79(1) of the EPA 1990:

- (a) any premises in such a state as to be prejudicial to health or a nuisance;
- (b) smoke emitted from premises so as to be prejudicial to health or a nuisance (*but not* if: the premises are occupied for naval, military or air force purposes or by a visiting force (s. 79(2)), the smoke is from a chimney of a private dwelling in a smoke control area (s. 79(3)(i)); it is dark smoke from a chimney of a boiler or industrial plant(s.79(3)(ii)); it is smoke emitted from a railway locomotive steam engine (s. 79(3)(iii)); or (iv) it is dark smoke from industrial or trade premises);
- (c) fumes or gases emitted from premises so as to be prejudicial to health or a nuisance (*but only* if it is a private dwelling (s.79(4)));
- (d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance (*but not* from a railway locomotive engine (s. 79(5)));

- (e) any accumulation or deposit which is prejudicial to health or a nuisance;
- (f) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;
- (fa) any insects emanating from relevant industrial, trade or business premises and being prejudicial to health or a nuisance (*but not* if: the insects are wild animals under Sch 5 of the WCA 1981 (save for those in s. 9(5) of that Act) (s. 79(5A)));
- (fb) artificial light emitted from premises so as to be prejudicial to health or a nuisance (*but not* if: it is occupied for naval, military or air force purposes or by a visiting force (s. 79(2); if it comes from (a) an airport, (b) harbour premises; (c) railway premises; (d) tramway premises; (e) a bus station and any associated facilities; (f) a PSV operating centre; (g) a goods vehicle operating centre; (h) a lighthouse; and (i) a prison (s. 79(5B)));
- (g) noise emitted from premises so as to be prejudicial to health or a nuisance (*but not* if: it is occupied for naval, military or air force purposes or by a visiting force (s. 79(2)); or it is noise caused by aircraft other than model aircraft (s.79(6)));
- (ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street (*but not* if: it is noise made by (a) traffic; (b) by any naval, military or air force or visiting force, or (c) by a political demonstration (s. 79(6A)));
- (h) any other matter declared by any enactment to be a statutory nuisance; which may include: s. 141(1) of the Public Health Act 1936 and any well, tank, cistern, or water butt for the supply of water for domestic purposes; s. 259(1)(a) any pond, pool, ditch, gutter, or watercourse that is foul ... ; s. 259(1)(b) any part of a watercourse, not being a part

ordinarily navigated by vessels employed in the carriage of goods by water, which is so choked or silted up as to obstruct or impede the proper flow of water, s. 268(2) a tent, van, shed, or similar structure used for human habitation which is in such a state, overcrowded or insanitary; s. 151(2) of the Mines and Quarries Act 1952 and a shaft or outlet of an abandoned mine, and a quarry without an efficient and properly maintained barrier.

26. Further restrictions on the statutory nuisance provisions are found in s. 79(1A) and that no matter shall constitute a nuisance to the extent that it consists of, or is caused by, any land being in a contaminated state.
27. Thus, the following matters would not constitute a statutory nuisance but could otherwise form the basis of private nuisance (or other) proceedings that will be subject to the general costs follow the event rules:
  1. A range of smoke emissions, particularly dark smoke from business premises see e.g. *Anthony v Coal Authority* [2005] EWHC 1654 (QB) in which a fire broke out at a disused coal spoil tip resulting in clouds of smoke and noxious fumes.
  2. Fumes or gases from business premises.
  3. Dust, steam etc from railway locomotive steam engines or from non-business premises e.g. homes.
  4. Insects from non-business premises.
  5. Artificial light from military buildings, airports, harbours railways; tramways; bus and coach stations, goods vehicle depots, lighthouses and prisons.
  6. Noise from military buildings and non-civil aircraft see e.g. *Dennis v MoD* [2003] EWHC 793 (QB) in which harrier squadrons trained at a military airbase and flew directly over the Defendant's property.



7. Noise from traffic or political demonstrations see e.g. *Andrews v Reading BC* [2005] EWHC 256 a claim for compensation to install sound proof window glazing; *Bontoft & others v East Lindsey DC* [2009] EWCA Civ 603, a claim for noise from HGVs exiting and using public road, and *Halsey v Esso Petroleum* [1961] 1 WLR 683.
  8. Harm caused by the contamination of land see e.g. *Blue Circle Industries plc v MoD* [1999] Env LR 22 and *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264.
  9. Shadowing and loss of light see e.g. *Tameres Ltd v Fairpoint Properties Ltd* [2006] 41 EG 226 and *Regan v Paul Properties Ltd* [2006] EWCA Civ.
  10. Flicker from repetitive moving objects e.g. wind turbines see e.g. 1319, *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525.
28. The above non-exhaustive list highlights that the initial scope of statutory nuisance is limited and excludes a large number of environmental problems that have otherwise been successful in private nuisance proceedings. The reasons set out below explain why s. 82 may be an unsatisfactory mechanism for resolving environmental problems and where private nuisance does provide an effective remedy.

***(b) The defence of Best Practicable Means***

29. Section 80(7) of the EPA 1990 provides that it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance. The defence is not available in certain limited exceptions, primarily when the nuisance activities emanate from a private dwelling. There is no similar defence in private nuisance. In *Barr v Biffa* it was held that in a private nuisance action “there was no requirement for the Claimants to allege or prove negligence ...”
30. While the application of a defence may not, at first glance, appear

unreasonable, it can lead to a continuing nuisance occurring in circumstances where this would otherwise constitute a nuisance in civil law proceedings. The following extract from Malcolm and Pointing: *Statutory Nuisance Law and Practice 2e* (OUP, 2011, pp 276-7) concisely explains the point:

17.05 It is not necessary to show that the means deployed brought the nuisance to an end. It is enough if they were adequate to 'prevent, or to counteract the effects of, the nuisance'. So, while it may be possible to show that use of BPM eliminated the nuisance, that is not essential. It would be enough to show that the effects of the nuisance were counteracted to a sufficient extent. Thus, in a case involving barking dogs, removal of the dogs would remove the nuisance. But it might be sufficient to reduce the number of dogs, thus reducing the level of the noise without eliminating it<sup>6</sup>. 'Short of eliminating the nuisance, the "best practicable means" concept involves consideration of the scope for counteracting the effects of the nuisance.' Thus, the defence operates so that, although the nuisance may otherwise have been established, it is not actionable because the defendant has succeeded in showing that BPM have been used to deal with it. No more can be required of the defendant, within the context of Part III of the EPA 1990, than this. A defence case, therefore, may accept that a nuisance has been committed, but focus exclusively on the means used to counteract its effects. ...

... Whether or not the BPM defence is made out remains a decision for the court. The establishment of the defence is designed to achieve a balance between the interests of the parties involved. It may well have the effect of enabling a business to carry on its activities, while leaving residents with a nuisance which they must tolerate. ...

[emphasis added]

31. The question of balancing the interest between the parties also arises in private nuisance proceedings. The critical difference between the two regimes is that private nuisance recognises the continuance of a nuisance and will, if appropriate, provide compensation for a continuing nuisance see e.g. *Shelfer v City of London Electrical Lighting Co* [1895] 1 Ch 287 (and the claimant succeeds) whereas in statutory nuisance, the prosecutor

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<sup>6</sup> See e.g. *Manley v New Forest DC* [2000] EHLR 113 (the case of the howling Siberian huskies which reappears in *Manley v New Forest DC* [2007] EWHC 3188 (Admin), [2008] Env LR 23): *Budd v Colchester BC* [1999] Env LR 739.

(the applicant) would have unsuccessfully prosecuted the case and would have lost.

32. It should be recognised that the BPM defence is (with some limited exceptions) only available to statutory nuisances arising from industrial, trade or business premises. The burden of proving that BPM exists is on the defendant. The burden is on a balance of probabilities which contrasts with the higher standard required by an applicant in proving the nuisance exists beyond reasonable doubt (see below).

33. There are further concerns with the standard at which BPM can be attained. For the purpose of statutory nuisance, BPM is defined in s. 79(9) of the EPA 1990 as:

(a) 'practicable' means reasonably practicable having regard among other things to local conditions and circumstances, to the current state of technical knowledge, and to the financial implications;

(b) the means employed include the design, installation, maintenance and manner and periods of operation of plant and machinery, and the design, construction, and maintenance of buildings and structures;

(c) the test is to apply only so far as compatible with any duty imposed by law;

(d) the test is to apply only so far as compatible with safety and safe conditions, and with the exigencies of any emergency or unforeseeable circumstances;

and, in circumstances where a code of practice under s. 71 of Control of Pollution Act 1974 (noise minimization) is applicable, regard shall also be had to guidance given in it.

34. In *Chapman v Gosberton* [1993] Env LR 218, the High Court held that the

BPM defence involved the defendant having to discharge the onus of proof, on a balance of probabilities, in that they had taken reasonably practicable means to prevent or counteract the effect of their noise. The weakness in the reasonably practicable means defence threshold is compounded by the misapplication and scope of the defence. Newman J in *Manley v New Forest DC* [1999] PLR 36 commented that BPM was developed as a means of pollution control and that an important part of the concept had always been that it allowed for flexibility to cater for local and individual circumstances. He noted that: 'Its introduction reflected a conciliatory and co-operational approach, so that the method of enforcement would not place an undue burden on manufacturing industry and on businesses.'<sup>7</sup>

35. In summary, the defence of BPM provides a mechanism to avoid a finding of nuisance in circumstances where a nuisance exists where financial factors may be relied upon, and where the 'best' in BPM means 'reasonably practicable'. In contrast, in civil proceedings this provision is not available to the Defendant.

*(c) The defence of reasonable excuse*

36. Section 80(4) of the EPA 1990 provides that:

If a person on whom an abatement notice is served, *without reasonable excuse*, contravenes or fails to comply with any requirement or prohibition imposed by the notice, he shall be guilty of an offence.

37. It is unclear whether the 'reasonable excuse' defence applies to s. 82 proceedings. Essentially it is a defence for failure to comply with the abatement notice and under s. 82, the abatement order issued by the Magistrates' Court may reasonably be regarded as the equivalent as that abatement notice. If s. 80(4) could be applied to the abatement order

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<sup>7</sup> *Manley v New Forest DC* [2000] EHLR 113 per Newman J. (further discussed in Stookes, P: *A Practical Approach to Environmental Law 2e* (OUP, 2009).

served then a brief analysis of this defence is appropriate.

38. There is no further definition of what may amount to a 'reasonable excuse'. There is some judicial guidance e.g. in *Wellingborough DC v Gordon* [1993] Env LR 218 the court held that the defence of reasonable excuse is unavailable for the deliberate and intentional contravention of an abatement notice and in *Saddleworth UDC v Aggregate and Sand* (1970) 114 SJ 931 lack of finance was held not to be a reasonable excuse. However, in *Hope Butuyuyu v LB Hammersmith & Fulham* [1997] Env LR D13 the significance of personal circumstances was taken into account when assessing whether a reasonable excuse existed, while in *Lambert Flat Management Ltd v Lomas* [1981] 1 WLR 898 it was suggested that there may be some 'special reason such as illness, non receipt of the notice or other potential excuse for not entering an appeal'.
39. In contrast with BPM, the burden of proving that the reasonable excuse defence does not apply rests with the prosecution.
40. In summary, the defence of reasonable excuse, although quite limited in scope and application to s. 82 proceedings, adds an additional burden on a prosecutor seeking to resolve environmental harm which does not arise in private nuisance proceedings.

***(d) Procedural and evidential limitations of s. 82 proceedings***

41. Section 82 proceedings are criminal in nature and the 'person aggrieved' by the environmental harm and who is entitled to bring proceedings is the prosecutor. The prosecutor is required to progress the prosecution based upon proving a nuisance existed according to the criminal standard of proof (beyond reasonable doubt). This is a higher burden upon the 'person aggrieved' than is the case in private nuisance proceedings that the nuisance is 'more probable than not'. Further, the prosecutor will generally be required to comply with the standards set by the Code for Crown Prosecutors published by the CPS (see e.g. [www.cps.gov.uk](http://www.cps.gov.uk)). The Code

notes in its introductory paragraph that:

“The decision to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. The CPS [and other prosecutors] should apply the Code for Crown Prosecutors so that it can make fair and consistent decisions about prosecutions.”

42. And while s. 82 proceedings is intended to provide a relatively simple and straightforward mechanism for lay people to resolve environmental concerns. Many defendants may apply to seek to place pressure (including financial pressure) on lay prosecutors to ensure formal prosecution due process is followed. See e.g. the *McCaw v Middlesex SARL* (2008) (unreported, 29.9.08) City of London Magistrates Court, which involved a hearing over a three week period and an interim appeal to the High Court in *R (Lynn McCaw) v City of Westminster Magistrates Court and Middlesex SARL* [2008] EWHC 1504 (Admin) by way of case stated in relation to an application for a PCO and other procedural matters.

***(e) The defence that the nuisance is not ongoing***

43. Section 82 proceedings may only be pursued if a statutory nuisance exists at the date of the complaint made to the magistrates' court (the precursor to the magistrates' court issuing the summons) and it is not possible to bring proceedings in respect of a nuisance that has not yet occurred (see *Pearson v Birmingham CC* [1999] Env LR 536 at 539). Contrast this with the option of a *quia timet* injunction in private nuisance proceedings.
44. The s. 82 pre-action procedures are less onerous than those in Practice Direction: *Pre-action conduct* §7.1 and Annex A (2010) and require notice of intention to issue proceedings, this is not a formal notice but must explain that if the nuisance does not stop proceedings may commence.
45. If the Court is satisfied (to the criminal standard) that a statutory nuisance exists, or if abated is likely to recur, it is required to make an abatement order and an order for costs under s. 82 (12). If a nuisance does not exist at

the date of the hearing and is not likely to recur, no abatement order may be granted by the court, although costs may be awarded under s. 82 (12).

*(f) The Prosecution of Offenders Act 1985*

46. The statutory nuisance provisions do not lend themselves to claims by multiple complainants. There is no reason in principle why a number of s. 82 proceedings cannot be brought jointly although there is no provision for the joining s. 82 prosecutions together or comparable rules as found under CPR Part 19 for Group Litigation Orders.

*(g) Multiple claims and claimants*

47. The availability of pursuing a claim in public nuisance is more often characterised as a claim involving a number of private nuisance claims, rather than statutory nuisance. It has also been suggested as an alternative where statutory nuisance is otherwise unavailable.
48. This is evident from the use of public nuisance proceedings when nuisance events affect a section of the community rather than an individual. In *A-G v PYA Quarries Ltd* [1957] 2 QB 169 at 187 Romer LJ, in delivering the leading judgment, held that:

“Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances.”

[emphasis added]

49. In his article: *Public nuisance: beyond Highway 61 revisited?* (ELR, 2011) John Pointing concludes:

It would be unusual for environmental forms of public nuisance to be so serious and so out of the ordinary that the statutory scheme provided under Part III of the Environmental Protection Act 1990

proves to be inadequate. Nevertheless, the common law action provides a useful, last ditch defence to egregious nuisances - that is, those events 'whose effect is to endanger the life, safety, health etc of the public. But the justification is not for the reasons given by Lord Bingham, who maintained in *Rimmington* that the law of public nuisance is 'clear, precise, adequately defined and based on a discernible rational principle'. It is rather that exceptional situations demand effective and proportional remedies, and the common law is flexible enough to provide them. The justification for retaining public nuisance as part of the common law is pragmatic not principled; retention enables justice to be done when the circumstances are unusual or where the harm is egregious.

***(h) Limited claim for compensation***

50. Claims in private nuisance will invariably seek two remedies (a) an injunction to prevent any continuing harm and (b) damages for past nuisance (up until the point that the nuisance activities cease). Due to the application of the ss. 2 & 5 of the Limitation Act 1980, the claim for past nuisance damages is limited to up to six years prior to the date of the issue of the claim.
51. Damages for past nuisance in private nuisance proceedings are a matter for the Court. In private nuisance these damages awards tend to be low compared to say compensation for personal injury. In *Watson v Croft Promo-sport Ltd* [2009] EWCA Civ 15, the Court of Appeal did not disturb a High Court finding of £2,000 per annum for noise nuisance with a total of £16,000 for eight years, while in *Bontoft v East Lindsey DC*, the Court awarded a sum ranging from £3,000 - £4,000 per annum to each claimant which resulted in total claims of £7,500 to £10,000 for two and a half years of past nuisance. In *Thornhill v Nationwide Metal Recycling Ltd* [2011] EWCA Civ 919 a sum of £5,000 for one year's nuisance per claimant was agreed for past noise nuisance. It can be seen that private nuisance the remedy sought
52. In contrast, the primary purpose of s. 82 proceedings is to secure an abatement order. Although, under s 130 of the Powers of Criminal Court



(Sentencing) Act 2000 (PCCSA 2000), the court has discretion to make a compensation order for 'any personal injury, loss or damage' arising from the offence. However, the starting date for compensation is between the date the notice of intention to start proceedings expires and that date of the s. 82 hearing. This will inevitably lead to a very modest compensation payment comprising special damages (e.g. damages to clothes, furniture etc) plus any personal or familial distress subject to evidence being adduced to substantiate such distress. Further, the compensation payable is limited to a maximum payment of up to Level 5 in the magistrates court (currently £5,000) see s. 131 of the PCCSA 2000.

53. In summary, the compensation claims in s. 82 are prospective in nature and so damages are limited to the period after date of any letter before action expires compared with a period of up to six years before, and are limited to a maximum of £5,000 in any event. Compared even to the modest damages awarded in private nuisance proceedings the s. 82 sums are extremely low and are unlikely to have little if any deterrent effect or compensatory value to a person aggrieved.
54. The costs that may be claimed under s. 82(12) are comparable to the costs that may be claimed in civil proceedings. However, the options for assessment of those costs more readily falls to summary assessment by the magistrates (although there is provision to have the costs subject to detailed assessment see e.g. s. 76 of the Criminal Procedure Rules 2011). The tendency is for summary costs assessments by the magistrates to result in lower costs awards than may be expected in the County or High Court under the CPR notwithstanding that the Criminal Procedure Rules applies comparable guideline rates to those given by the Senior Courts Costs Office.

*(i) The potential for a costs claim by a successful defendant*

55. Although s. 82(12) does not provide an express statutory mechanism for a defendant to claim its costs from an unsuccessful application there is the

possibility to claim costs under Reg. 3 of the Costs in Criminal Cases (General) Regulations 1986 (costs unnecessarily or improperly incurred) and s. 19A of the Prosecution of Offences Act 1985 (an application for costs against legal representatives). The application of these rules will tend to be the exception rather than the rule. Nevertheless, the option remains open to the defendant to seek to rely on the provisions and argue that an unsuccessful prosecutor has acted unreasonably in pursuing proceedings.

*(j) Conclusion on s. 82*

56. It can be seen from the above limitations that s. 82 simply does not provide an adequate alternative to private nuisance proceedings. Particularly problematic is the limited scope of statutory nuisance categories, the application of the BPM defence and the limited compensation provisions.

**4. Gaps in environmental justice without private nuisance**

57. In the light of the preceding sections it is evident that removing the option or availability to take proceedings in private nuisance will result in gaps in environmental justice. The ability for group claims, something encouraged by Part 19 of the Civil Procedure Rules as a mechanism for cost effective proceedings and case management, is lost while the range of environmental problems that may be resolved through legal proceedings is considerably restricted. In short the loss of environmental nuisance claims leaves considerable gaps in access to environmental justice.

**5. Before the event insurance**

58. The Jackson Report notes that private nuisance cases may be possible by the use of before the event (BTE) insurance, although acknowledging that there has to be an increase in take up; and the continued use of CFAs, notwithstanding that a success fee may not be claimed. The practical reality is that BTE insurance is simply not available for the overwhelming majority of proposed claimants in private nuisance proceedings. This was

evident in the case of *Austin & others v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 92 a group litigation claim involving over 500 proposed claims in which Jackson LJ noted that:

“38. On the basis of the evidence and submissions before Judge Jarman, it was far from clear that any claimant would be in a position to proceed. Only two claimants had BTE insurance. The limit of that BTE cover was £50,000. Furthermore far more than two claimants are necessary to constitute a viable group action.”

59. Hugh James Solicitors have undertaken research on the availability of BTE insurance in a number of their environmental claims. The research found that since 2008 Hugh James have handled nuisance cases where the number of individuals involved totalled some 4,333 people. Of this just 35 have had an effective BTE insurance policy. This is approximately 0.08% of those who it is felt had legitimate claims in nuisance.
60. The reasons for the lack of availability of BTE are various and relate to restrictions placed on the cover available including that the nuisance is occurring before the policy came on cover and a strict time limit for notifying an insurer of the nuisance problem, particularly when many people simply do not associate environmental nuisance with cover provided by, say, their buildings or contents insurance. The overriding concern is that most often BTE insurance providers seek to avoid providing cover if at all possible.
61. Extracts from letters received by Hugh James Solicitors from various insurers illustrate this point:

Claimant A (letter of 15 April 2009):

*Because of this, unable to offer cover under the terms of the policy. The first exclusion on the policy is for, “any legal cause of action reported to us more than 6 calendar months after the cause of action occurred or commenced.*

*Additionally, our records show that the policy was taken out by \_\_\_ in February this year was new business. The nuisance first occurred in 2004, and therefore it pre-exists policy cover.”*

Claimant B (letter of 2 July 2010):

*Thank you for your letter dated the 10<sup>th</sup> of June, advising us that you have been instructed by the above mentioned to pursue a compensation claim in respect of “odour nuisance” from the Downend Composting Site.*

*Unfortunately as it appears that the incident has been ongoing since 2003, this is outside the 90 days notification limit that we have on our policies...”*

Claimant C (letter of 27 October 2008):

*It is a condition of the policy that the incident in question arises from the period of legal expense insurance cover. The incident date, or date of occurrence is defined by the policy as being the date of the event that may lead to a claim. If there is more than one event arising at the same time from the same cause, the date of occurrence is the date of the first of these events.*

*You have stated that this site has been in operation and causing a nuisance since 2002. Your client’s legal expense policy with - commenced on the 28<sup>th</sup> of February 2006, due to this we are unable to provide any indemnity to your client on this occasion...”*

Claimant D (letter of 13 February 2009):

*We thank you for your recent letter confirming this matter has been going on for some 10 years.*

*Whilst we sympathise with the client’s position unfortunately this is not a matter that would be covered through the legal expense policy as the Claimant has taken out legal cover with [ ] insurance on the 3<sup>rd</sup> of December 2007.*

*As the matter happened 8 years prior to that you would need to contact the insurance company at the time of the incident who may be able to assist on your behalf.*

*We are now closing our file of papers.”*

Claimant E (letter of 5 May 2009):

*You have advised us that \_\_\_ first became aware of the problem approximately 5 years ago, and it appears that her legal expense insurance was taken out in November 2005.*

*Regrettably we are unable to accept this Claimant under the policy terms. Under paragraph 9 of the "what is not insured" element of the legal expenses section of the policy, "any claim directly or indirectly caused by, contributed to or arising from (a) an event occurring before the commencement of insurance under this section is not covered.*

*We attach a copy of the terms and conditions of the definitions, general exclusions and legal expenses section of the policy for your information ...*

Claimant F (letter of 20 July 2009):

*In order for us to be in a position to provide legal assistance a claim must fall within one or more of the areas of cover and not be excluded anywhere in the policy exclusions.*

*However, it is stated in the policy cover that we are unable to provide cover for any incident or matter arising prior to the inception of this policy.*

*- legal expenses policy started on 30<sup>th</sup> of August 2004. From the information provided by you by phone on the 20<sup>th</sup> of July 2009. The time the dispute arose appears to be before cover had commenced in 2002.*

*Unfortunately, this claim would appear to fall within the aforementioned exclusion and for this reason we would be unable to provide legal expense cover..."*

Claimant G (letter of 30 April 2010):

*It is a condition of the policy that the incident in question arises within the period of legal expenses insurance cover. The incident date, or date of occurrence is defined by the policy as being the date of the event that may lead to a claim. If there is more than one event arising at the same time or from the same cause, the date occurrence is the date of the first of these events.*

*From the information provided I note that the odour nuisance began in 2004. I have contacted [ ] insurance provider [ ], who advised that \_\_\_ legal expenses cover did not commence until the 18<sup>th</sup> of August 2007. Therefore I regret to advise the*

*incident pre-dates the period of insurance and therefore we cannot consider the claim further.*

*Please note, I have not considered the merits of your client's claim in coming to this decision and will reserve our rights generally under the policy.*

*Having explained why we are unable to assist your client on this occasion, it is possible that your client could pursue their claim in another way and they should consider whether; - they may be eligible for public funding – they may be able to instruct a solicitor under a Conditional Fee Agreement... ”*

Claimant H (letter of 9 July 2010):

*... our records show that \_\_\_ has had the benefit of policy cover under policy number 14818122 from the 25<sup>th</sup> of June 2006 to date.*

*We see from the information you have provided, that you state our policyholders have experienced odour nuisance from the Downend Composting Site from 2004 to date. Unfortunately, it is clear that this dispute stated when our policyholders did not have the benefit of legal expense insurance cover with [ ]. For the reasons explained above we would not be able to assist you with funding the legal costs associated with pursuing this claim...*

Claimant I (letter of 1 December 2010):

*... we have carried out a validation check with [ ] who advise that whilst your client does have a household legal expense policy in place, unfortunately the policy wording specifically excludes claims being brought as part of a group or class action...*

Claimant J (letter of 26 November 2007):

*We have assessed the claim under the terms of the policy and regret to advise that we unable to assist on this occasion.*

*The policy will consider claims that fall within one of the following heads;*

- *Personal injury*
- *Consumer credit*

*Unfortunately the type of claim that our insured wishes to pursue does not fall within either of the above categories.*

*I am sorry that we cannot assist and wish our insured every success at achieving a satisfactory outcome of this matter.”*

Claimant K (letter of 1 May 2009):

*Thank you for your letter dated the 20<sup>th</sup> of April 2009 in relation to the sewage treatment works. Unfortunately the above policy would not be able to provide the client with appropriate cover for the involvement in the group action.*

Claimant L (letter of 29 September 2010):

*We note from your letter that \_\_\_ wish to bring a group action claim concerning odour nuisance. The [...] legal expenses policy covers nuisance actions subject to assessment of merits of 51% or above and in excess of £250. However the policy does not support group actions, only that of claims which are being brought individually by policyholders who satisfy the terms and conditions of the [ ] legal expense policy.*

*Accordingly the claim is excluded from assistance under the [ ] legal expense policy.”*

Claimant M (letter of 8 August 2011):

*... please note that the policy is in place with a view to litigation and court action and we would advise that your client looks to an alternative means of resolving the matter in the first instance. Accordingly, we would advise that your client contacts his local Environmental Health Officer who should be in a position to investigate the matter as a statutory nuisance. Under the statutory provisions (arising from the Environmental Protection Act 1990) the EHO has the power to issue the appropriate Notice to prevent the nuisance and if continued, to take appropriate action. We advise this as an alternative because civil action is generally timely and costly whereas the EHO may enforce against the nuisance with ease and efficiency.*

*Of course if for some reason the EHO is not in a position to investigate the matter as a statutory nuisance, we will be happy to do so subject to a letter from the EHO confirming their stance and the following information...”*

62. In addition, to the all too common circumstances above, many proposed claimants do not possess legal expense insurance.
63. In summary, notwithstanding the optimism of the Jackson Report that ‘everybody should buy BTE cover’, the reality is that it is simply not an adequate answer to non-compliance with the Aarhus Convention, even when people do have cover, every effort is made by a BTE insurer to prevent the policy covering environmental nuisance claims.
64. It can be seen that the provision of ATE insurance plays a critical role in ensuring that environmental private nuisance claims can be pursued.

#### **6. Background to the introduction of section 46**

65. Certain elements of the LASPO Bill were introduced as part of the implementation of the civil litigation cost reforms proposed in the Jackson Report. Section 46 was in the Bill. This was subject to debate and consultation.
66. There were efforts made in the House of Lords and in parliamentary debates explaining the consequences of introducing the measures now found in Section 46. A draft amendment was proposed to the Bill to the effect that in all environmental claims, including private nuisance, a procedure known as ‘qualified one-way costs shifting’ (QUOCS) could apply to dispense with the need for ATE insurance, at least for covering the exposure or risk of paying the opponent’s costs.
67. Amendment to the Bill was tabled in the House of Lords which would have addressed the concern about spiralling legal costs while at the same time ensuring compliance with the Aarhus Convention. The amendments to the LASPO Bill proposed by Lord Thomas of Gesford QC were as follows:

Amend clause 45 so that it reads as follows (amendments not in the published bill are underlined):



#### **45 Recovery of insurance premiums by way of costs**

(1) In the Courts and Legal Services Act 1990, after section 58B insert—

*“58C Recovery of insurance premiums by way of costs*

- (1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2), (2A) or (2B).
  
- (2) The Lord Chancellor may by regulations provide that a costs order may include provision requiring the payment of such an amount where —
  - (a) the order is made in favour of a party to clinical negligence proceedings of a prescribed description,
  - (b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for one or more expert reports in respect of clinical negligence in connection with the proceedings (or against that risk and other risks),
  - (c) the policy is of a prescribed description,
  - (d) the policy states how much of the premium relates to the liability to pay for an expert report or reports in respect of clinical negligence (“the relevant part of the premium”), and
  - (e) the amount is to be paid in respect of the relevant part of the premium.
  
- (2A) The Lord Chancellor may by regulations provide that a costs order may include provision requiring the payment of such an amount where —
  - (a) the order is made in favour of a party to proceedings which include an environmental claim,
  - (b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for any disbursements including any expert report in respect of an environmental claim (or against that risk and other risks).

(2B) The Lord Chancellor may by regulations provide that a costs order may include provision requiring the payment of such an amount where —

- (a) the order is made in favour of a party to proceedings which include an environmental claim,
- (b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay the costs of the opposing party, and
- (c) prior to the commencement of proceedings the opposing party was put to its election under the regulations to agree to an order for Qualified One Way Costs Shifting but did not agree that such an order should be made.

(3) Regulations under subsection (2) may include provision about the amount that may be required to be paid by the costs order, including provision that the amount must not exceed a prescribed maximum amount.

(4) The regulations under subsection (2) may prescribe a maximum amount, in particular, by specifying —

- (a) a percentage of the relevant part of the premium;
- (b) an amount calculated in a prescribed manner.

(5) In this section —

“clinical negligence” means breach of a duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services);

“clinical negligence proceedings” means proceedings which include a claim for damages in respect of clinical negligence;

“costs insurance policy”, in relation to a party to proceedings, means a policy insuring against the risk of the party incurring a liability in those proceedings;

“environmental claim” means a claim by which a person seeks any remedy or relief in respect of an act, omission or decision relating to the environment, and for the purpose of this section, an act, omission or decision relates to the environment if information about it would be environmental information within the meaning of Article 2(3) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Justice does at Aarhus, Denmark on 25th June 1998;

“expert report” means a report by a person qualified to give

expert advice on all or most of the matters that are the subject of the report;

“proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in court), whether commenced or contemplated.”

- (2) In the Access to Justice Act 1999, omit section 29 (recovery of insurance premiums by way of costs).
- (3) The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force.

Insert new clause 46A so that it reads as follows (underlined):

**46A Qualified one way costs shifting**

- (1) An unsuccessful Claimant in proceedings which include an environmental claim or which are brought under Part 54 of the Civil Procedure Rules shall not be ordered to pay the costs of any other party save that such an order may be made where the Claimant has acted unreasonably in bringing or conducting the proceedings.
- (2) The Lord Chancellor may by regulations provide that a Claimant in proceedings other than proceedings which include an environmental claim or which are brought under Part 54 of the Civil Procedure Rules shall not be ordered to pay the costs of any other party other than where the Claimant has acted unreasonably in bringing or conducting the proceedings.
- (3) "environmental claim" means a claim by which a person seeks any remedy or relief in respect of an act, omission or decision relating to the environment, and for the purpose of this section, an act, omission or decision relates to the environment if information about it would be environmental information within the meaning of Article 2(3) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Justice done at Aarhus, Denmark on 25th June 1998.

Insert new clause 46B so that it reads as follows (underlined):

**46B Undertakings in environmental cases**

- (1) A claimant who seeks relief before the trial or hearing of an environmental claim as defined by need not give an undertaking as to damages as a condition of the grant of that

relief.

- (2) "environmental claim" means a claim by which a person seeks any remedy or relief in respect of an act, omission or decision relating to the environment, and for the purpose of this section, an act, omission or decision relates to the environment if information about it would be environmental information within the meaning of Article 2(3) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Justice does at Aarhus, Denmark on 25th June 1998.

68. The proposed amendments were not adopted by the UK Government and s. 46 of the LASPOA 2012 is the legislative result.

69. The UK Government has outlined proposals for a limited form of QUOCS based upon the use of protective costs orders (PCOs) for cases which fall within the Aarhus Convention. However, the use of PCOs is limited to public law claims such as judicial review. Paragraph 5 of the executive summary to the Consultation Paper: *Costs Protection for Litigants in Environmental Judicial Review Claims* (Dec 2011) provides that:

“The Government has accepted for some time that it would be in the interests of Applicants in Environmental Judicial Review Cases to provide greater clarity about the level costs through a codification of the rules on PCOs which sets out the circumstances in which a PCO will be granted and the level at which it will be made.”

70. There were no proposals regarding private nuisance litigation. The consultation period closed on 18 January 2012. Representations were made to the government that the paper failed to cover private nuisance proceedings and that as a consequence (and given the proposals in s. 46) the UK was likely to breach its obligations under the Aarhus Convention.

71. On the 17<sup>th</sup> of September 2012 the UK Government via the Department of Environment Food and Rural Affairs wrote to the Secretary of the Aarhus Convention Compliance Committee providing an update on the steps that the UK is taking in relation to a Decision 1V/91. The letter set out proposals to codify the existing case law on protective costs orders. It is

clear from that letter that the provisions apply to judicial review cases and have no application to private nuisance litigation.

72. The responses to the PCO proposals by the UK Government fail to mention the absence of provision relating to private nuisance. It is submitted that they are, in any event, inadequate even for environmental judicial review claims - with a default costs cap that is too high for most claimants and a reciprocal cap on defendant's liability resulting in continuing inequality of arms.
73. The present position is that s. 46 is to enter into force in April 2013 and will result in private nuisance proceedings being prohibitively expensive for all those people that are unable to afford the risk of (a) the costs and expenses of private nuisance proceedings (including court fees and expert fees) and (b) the risk of exposure to an opponent's costs.

## **B ALLEGED NON-COMPLIANCE BY SECTION 46**

74. ELF submits that the introduction of s. 46 of the LASPOA 2012 breaches the key provisions of the Conventions Articles 9(3), 9(4) and 9(5). The non-compliance is set out below.

### **1. Article 9(3) and 9(4) non-compliance**

75. The availability of ATE insurance to: (a) fund the costs and expenses of private nuisance proceedings; and (b) cover the risk of exposure to an opponent's costs, is critical to ensuring the private nuisance proceedings can be pursued. The potential costs risk of the opponent's costs is severe as is evident from §26 of *Austin v Miller Argent* where the defendant mining company claimed costs of opposing a pre-action application for a group litigation order (GLO) (i.e. before proceedings had even commenced) in a case involving dust and noise from opencast coal mining operations. In *Austin* the question of ATE insurance had not been determined at the time of the application. Following the refusal of the

GLO and a bill of over £1/4 million, ATE insurers were unwilling to fund the claim, notwithstanding that the problems of dust and noise remained.

76. Without ATE it is almost certain that the claimants in the following cases would have been prevented from taking any effective legal action:

1. *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 490, where the defendants would have argued in statutory nuisance proceedings that the defence of BPM but not resolve the environmental harm of odours.
2. *Bontoft & others v East Lindsey DC* [2008] EWHC 2923, where the claim would not have fallen under the statutory nuisance regime at all.
3. *Thornhill v others v SITA* [2009] EWHC 2037 (QB), and *Thornhill v others v NMR* [2011] EWCA Civ 919.
4. *Watson v Croft Promo-sport Ltd* [2009] EWCA Civ 15.

77. Article 9(3) of the Aarhus Convention provides:

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.

While, Article 9(4) of the Convention states that:

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. Decision 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]

78. Taken together, the provisions of Article 9(3) and (4) require the UK to ensure that members of the public have access to judicial procedures to challenge acts and omission by private person and public bodies which contravene national environmental laws and, further, that those procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. In removing the ability to recover the premium of ATE insurance policy in private nuisance proceedings, the UK is creating a serious gap in national environmental law and the result will be a critical judicial procedure for challenging acts and omissions resulting in environmental harm (i.e. private nuisance) that will be unfair, inequitable and prohibitively expensive.
79. ELF further submits that s. 46 of the LASPOA 2012 will be in conflict with the CPR 1 and the overriding objective of the Civil Procedure Rules which requires the Court to ensure that: it deals with cases justly which includes in Rule 1(2) that, so far as is practicable:
- (a) ensuring that the parties are on an equal footing;
  - (b) saving expense;
  - (c) dealing with the case in ways which are proportionate —
    - (i) to the amount of money involved;
    - (ii) to the importance of the case;
    - (iii) to the complexity of the issues; and
    - (iv) to the financial position of each party;
  - (d) ensuring that it is dealt with expeditiously and fairly; and
  - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

## **2. Article 9(5) non-compliance**

80. In addition to the non-compliance with Articles 9(3) and (4), ELF submits that in enacting s. 46 of the LASPOA 2012, the UK will be in breach of Article 9(5) of the Convention. This provides that:

In order to further the effectiveness of the provisions of this article [Article 9], each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

[emphasis added]

81. Contrary to the provisions of Article 9(5), s. 46 will be adding or increasing financial and other barriers in the way of access to environmental justice. This is direct conflict with its obligations under the Directive.

### **C REMEDYING THE NON-COMPLIANCE**

82. The non-compliance with Articles 9(3)-(5) of the Convention can be resolved and ELF submits that there are at least three options open to the UK:

- 1) A commitment by the UK not to bring into force s. 46 of the LASPOA 2012. This option must provide sufficient certainty to ATE providers that the premium for ATE insurance to cover the expenses and opponents' costs in environmental nuisance proceedings will continue to be recoverable from an opponent.
- 2) The introduction of Regulations to permit the use of ATE insurance recovery in environmental nuisance claims. This is non-contentious and it is understood that precisely these Regulations are being introduced in the field of personal injury.
- 3) The express inclusion of environmental nuisance claims within the PCO regime although with any reciprocal cap being placed upon a claimant's costs. The concept of a reciprocal cap on the costs



recoverable by a claimant has the potential to result in unfair and inequitable proceedings by opponents with large funds (which is almost always the case in private nuisance proceedings).

- 4) The introduction of qualified one way costs shifting (QUOCS) into private nuisance litigation. Qualified one way costs shifting would mean that claimants in private nuisance litigation would not be required to pay the Defendant's costs if the claim is unsuccessful, but the defendants would be required to pay the claimant's costs if the claim is successful. While, at first glance, this appears to be an imbalance between two parties, it should be recognised that in environmental nuisance claims, there is, almost always an inherent inequality of arms, whereby claimants are likely to be individuals without either private or public insurance cover seeking to protect their environment while defendants will almost always be organisations with public liability insurance to cover the prospect of litigation and who will also be seeking to make a financial reward for its owners through its operations. Thus, QUOCS are simply mechanisms of ensuring equality of arms.

Dated: 18<sup>th</sup> September 2012

Signed .....  .....

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