Application to the Aarhus Convention Compliance Committee

ALYSON AUSTIN

Communicant

and

UNITED KINGDOM

Member State

ANNEX 1: DETAILED SUBMISSIONS

Annexes

2. Chronology
3. Photos of Location
4. Orders and judgments relating to this case
5. Communicant's application for costs protection
6. Operator's argument and evidence in reply
7. Relevant authorities, legislation & case law

Note: any documents referred to are to pages within Annexes 2-7 e.g. [**2.1**]

A INTRODUCTION

1. The non-compliance in this communication is, in one sense, relatively simple. The communicant, Mrs Alyson Austin an individual living in Merthyr Tydfil, South Wales, asked the High Court to direct that a pre-action costs protection application of 1.11.12 in relation to a proposed claim for noise and dust pollution proceed on the basis that each party paid their own costs (or 'no order for costs'). The Court declined to do so and the order of 31.1.13 directed that the pre-action costs hearing proceed on the basis of 'costs in the application' **[4.93]**. This has meant that the communicant, an individual of modest means, could not proceed with the application because the exposure to the costs risk was prohibitive.

2. The policy, jurisprudence and legislative proposals underlying the application give rise to points of general public importance and highlight a systemic and widespread concern about access to justice in the UK. This includes the particularly high costs of bringing and pursuing claims and the exposure to adverse costs risk; conflicting case law as to whether costs protection is in fact available and, in particular, whether it is available in cases starting from a private law rather than public law basis; and emerging legislation found in s. 46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 [**7.560**] which is set to restrict access to insurance mechanisms, which have, until now, been available to help individuals secure access to justice in environmental nuisance claims.

3. Nuisance proceedings form a key element in the UK legal justice system for reviewing the infringement of environmental rights in that they allow citizens to enforce basic amenity rights directly against those who interfere with them. The UK Court of Appeal has recently affirmed the importance and independence of private nuisance in *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312. In Communication ACCC/23/2008 the Aarhus Compliance Committee stated that in the context of odour nuisance:

> "… the law of private nuisance is part of the law relating to the environment of the Party concerned, and therefore within the scope of Article 9 paragraph 3 of the convention." [**7.620**]

4. The UK has suggested that there may be alternative legal options available to the communicant. The communicant submits that the alternatives are either too limited in scope to achieve an appropriate remedy or, in the case of judicial review of a regulator's failure to act, prohibitively expensive in itself and unrealistic in terms of the prospects of acquiring an equivalent remedy to those available in nuisance. In a situation where one owner/occupier wishes to prevent the material interference of their property against the consequences of actions or operations of a neighbour, private nuisance remains the most appropriate cause of action and the only one which will allow the communicant to assert her environmental rights in a comprehensive manner.

5. The communicant has taken all practical steps to bring substantive proceedings but is being prevented from doing so by the prohibitive level of cost involved in private nuisance suits (which stems in large part from the level of evidence that has to be gathered, mostly at the claimant's expense), and the unwillingness of the UK courts to take steps to protect her from the threat posed by a defendant (the operator) which has already shown its willingness to run up punitively high levels of costs.

6. The communicant submits that the current judicial process, as evidenced by the order of 31.1.13, is in breach of Article 9 of the Convention in that it fails to ensure that the communicant has access to judicial procedures to challenge acts and omissions by private persons contravening law relating to the environment that are fair, equitable, timely and not prohibitively expensive. There is also concern that revisions to the Civil Procedure Rules relating to the Convention exclude private nuisance proceedings from what is defined as an 'Aarhus Convention claim'.

B FACTUAL BACKGROUND TO THE COMMUNICATION

1. History behind the non-compliance of 31.1.13

7. An outline chronology is at Annex 2 relating to the Ffos-y-fran opencast coal operations. It is the largest opencast coal mine in the UK[1]. The

[1] In January 2007, the operator's director, James Poyner, explained in evidence to the Member State's Select Committee on Welsh Affairs that the Ffos-y-fran scheme represented the largest authorised coal mining reserve in South Wales.

communicant notes that the operator repeatedly places reliance upon the operations being a 'land reclamation scheme'[2]. There was the removal of a series of hazardous waste tips on the opencast site, however this according to the operator concluded in January 2009. The communicant has raised concerns about the adverse environmental effects of the opencast coal mine since 2004, when she first became aware of the proposal to develop the site. She made submissions to the planning inquiry in September 2004. She was appointed to the operator-run community liaison committee in 2007. Soon after the opencast mining operations commenced in 2007 she contacted the environmental regulator, Merthyr Tydfil County Borough Council (MTCBC) and the operator expressing concerns about noise and dust pollution.

8. The communicant has since 2008, acting by herself and with others raised concerns of continuing and excessive noise and dust deposition emanating from opencast coal mining operations located within 500 metres from her home. Photographs of the site and images of the communicant's home in relation to the opencast coal mine are at Annex 3. Further plans are found at **6.456-620**. The levels of dust and noise along with their frequency, intensity, duration and nature are such that they may reasonably be argued to constitute a nuisance at common law in the UK[3]. The communicant has sought to resolve the nuisance through correspondence and attempted negotiation with the opencast operator, Miller Argent (South Wales) Ltd (the operator). She has also raised concerns the environmental regulator, Merthyr Tydfil County Borough Council who has not itself taken any action against the operator.

[2] [1] The scheme is referred to as land reclamation by the operator. This is a misnomer. Land reclamation has never been urgent or necessary at the site. A Member State decision of January 2001 refused opencast extraction at Ffos-y-fran relying upon an Inspector's finding that the 'risk to public safety at present appears slight …' (see the Outline Chronology) and that '… I see that coal extraction as the operational means chosen to achieve the reclamation and in that context I believe it is excessive and harmful.' [2] Much of the opencast extraction is being carried out on what was greenfield, common land. Further, Merthyr Tydfil County Borough Council (MTCBC) stated in a letter of 8.12.03 that the classification of the potentially contaminated sites at Ffos-y-fran did not imply that 'the tips in their present state or in any future anticipated circumstances pose a significant risk to humans, animals or the environment'. [3] The reference to 'land reclamation' downplays the fact that the operations are opencast coal mining in a highly inappropriate location. Another 'land reclamation scheme by opencast methods' was proposed 2 km from Ffos-y-fran at Merthyr Village. Again it was, in fact, opencast coal extraction.

[3] See the evidence in support of the claim provide in support of the detailed submissions.

9. In 2009, the communicant instructed Richard Buxton Environmental & Public Law solicitors to raise concerns about noise and dust nuisance with Miller Argent (South Wales) Ltd (the operator) and to seek to stop noise and dust pollution from affecting the locality. Although the operator has, on a number of occasions, sought to compensate some local residents in a selective manner by way of car washing vouchers and cash payments, it has consistently denied that either noise or dust is a problem [**5.309**].

10. The communicant has attempted to issue legal proceedings in the High Court to prevent the nuisance. To date, this has not been possible. In June 2010 the communicant and 491 other residents applied to the High Court for a pre-action group litigation order (GLO) in order to manage a large number of proposed claimants in one legal claim. On 11.11.10, the High Court dismissed the GLO application due to uncertainty as to the proposed claimants' funding provisions: *Austin & others v Miller Argent* (11.11.10) (unreported) [**4.71**]. On 2.12.10 the operator sought payment of £257,104 for its legal costs of the pre-action application. The High Court order of 11.11.10 was appealed.

11. On 29.7.11, the Court of Appeal dismissed an appeal against the High Court decision when, on the day of the appeal, the operator gave an undertaking to the court that it would only claim costs on a *pro rata* basis, that it would limit those costs to a total of £553 and that it would not to pursue any proposed claimant for those costs *unless* they recommenced legal proceedings. The Court of Appeal accepted the undertaking and dismissed the appeal (see *Austin & others v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928 [**4.76**]). The consequence of the judgment meant that residents were, in fact, prevented from pursuing a claim by the financial constraint. Meanwhile the noise and dust pollution continued.

12. After the July 2011 appeal, the communicant sought to resolve the problems as an individual, seeking to reach a negotiated solution with the operator: see e.g. [**5.304**]. This proved unsuccessful. As a last resort, the communicant issued a further pre-action application in the High Court on 1.11.12, this time asking for costs protection in order to pursue legal proceedings. Certain directions arose from the application and a subsequent telephone case management hearing was held on 31.1.13.

The pre-action costs application included a detailed statement of case, witness evidence from the communicant, other residents, noise experts, dust experts, and correspondence: see Annex 4.

13. To help ensure that the preliminary pre-action costs protection hearing could proceed without fear of another £0.25 million costs bill, the communicant proposed that it be heard on the basis of either 'no order for costs' or 'each party pay their own costs'. This would mean that she would not be exposed to the operator's costs if the application was unsuccessful. The hearing would not be without cost: the communicant would have expenses and court fees to pay, although her own legal costs could be avoided by the communicant instructing her legal representatives on a conditional fee agreement (CFA)). However, an order that 'each party pays their own costs' would mean that the one day pre-action costs hearing would not be prohibitively expensive. The communicant submitted that in all the circumstances including the financial means of the operator as 'a large company' the proposed order would be fair and equitable.

14. On 31.1.13 the High Court declined to direct that the one day costs hearing should be on an 'each party pays their own costs' and directed that the pre-action costs protection application should be on the basis of 'costs in the application' [**4.93**]. This left the communicant exposed to considerable costs risk because if the application for costs protection was dismissed the operator would be entitled to claim its costs from the communicant. In the light of the operator's previous costs claim the potential costs exposure for the one-day pre-action costs hearing was likely to be significant. And, while the communicant was advised that to comply the Aarhus Convention some form of costs protection was required to be provided by the High Court, this was uncertain.

15. The High Court order of the 31.1.13 and the consequent costs exposure has prevented the communicant from proceeding with the one day costs protection hearing. The communicant has appealed that decision. However, having attempted to progress this matter through an appeal process once beforehand, it is likely that she will face even further prolonged delay as part of that appeal: see e.g. the earlier Court of

Appeal judgment of 29.7.11 [**4.76**].[4] Meanwhile the noise and dust continues.

16. The proposed claimants appealed to the Court of Appeal raising concern that the costs order was prohibitively expensive following the costs claim and further that dismissing the GLO application was unfair in that if there was uncertainty as to the proposed claimants' costs they would apply to the court for costs protection [**4.94-103**].

2. Evidence of pollution

17. In the communicant's view, the circumstances were such that the opencast mine should never have been permitted. The site boundary is situated as close as 36 metres to local homes and at the edge of Merthyr Tydfil town, in an elevated situation with the densely populated heart of the town arranged in a horseshoe shape around the foot of the mine. The Welsh Government policy on coal extraction recognises that opencast coal operations cause pollution and in 2009 it set a minimum separation or buffer zone of 500 metres between opencast coal operations and sensitive receptors such as homes **[7.566]**. The communicant took part in the consultation of this policy and had fought, in vain, to get the 500 metres protection applied to the Ffos-y-fran opencast. Had a 500 metre buffer zone been provided to Ffos-y-fran most, if not all, of the problems of noise and dust for the communicant and most other residents may well have been significantly reduced. Instead 36 metres separates the opencast mine from the local community.

18. The communicant submits that the frequency, intensity, duration, and offensiveness of the noise and dust deposition highlighted in the communicant's statement at [**5.378-385**] are such that it constitutes a nuisance in common law.

19. Problems of noise are also recorded in the council's summary noise assessment of June 2008 and January 2009 [**5.140-144**]; in the noise report of Hilson Moran of June 2009 [**5.145-169**]; at paragraphs 3-7 of the

[4] See e.g. the approach of the Court of Appeal in the recent PCO application of *R (Eaton) v Natural England* C1/2012/2323 of 20.2.13.[**7.672-673**]

statement of Robert Griffin of 25 October 2012 [**5.348-349**]; and noted in correspondence from local residents [**5.222-249**] As can be seen from the Communicant's diary entries, noise problems are frequent and experienced, on average, around twice a week [**5.381-382, 384**]. They are intense enough such as to cause unacceptable noise intrusion inside the home. They involve prolonged periods of noise throughout the day. The nature and character of the noise, described as often unrelenting low frequency droning of heavy machinery, is offensive [**5.380**]. Noise interference has been caused since 2008.

20. The dust deposition experienced at the communicant's property, as described in the EPML report of July 2012, is again at such a level as to constitute a nuisance:

> 1.2.1 The frequency of excessive dust deposition at Bradley Gardens, Mount View, and Blaen Dowlais from March 2009 to June 2012 exceeded the threshold at which complaints are justified such that residents living at Bradley Gardens, Mount View, and Blaen Dowlais are likely to have experienced a dust nuisance over the monitoring period. [**5.200**]

21. The EPML report explains that dust deposition is lowest when no opencast activity is being carried on (i.e. over the Christmas period) notwithstanding that the wind direction at that time is blowing from the mine towards residential areas [**5.200**].The impact of dust deposition is that it leaves the communicant's home and garden permanently dirty. Dust complaints have also been raised by other residents in the locality. Problems of dust deposition have been continuing since 2008.

22. The communicant submits that the extent of the noise and dust constitute a nuisance in themselves. That is: if noise did not arise, the dust alone would be a nuisance; if dust deposition was not experienced, noise alone would be a nuisance. The communicant submits that the cumulative effects of noise and dust is such that nuisance from the opencast mine may reasonably be characterised as substantial or serious.

3. Circumstances of the communicant

23. Details of the communicant's personal circumstances including her financial situation are set out in a witness statement before the court

[**5.378**]. In summary, the communicant is 49 years old and works part-time as a self-employed book-keeper. She lives at 10 Llwyn-yr-Eos Grove, Bradley Gardens, Merthyr Tydfil with her husband, Christopher Stanley Austin, and their two children; Thomas, aged 16 years and Emily, aged 13. The family home is situated around 450 metres from the opencast mine [**3.61**]. It is located in a residential area. It is marked on the plan at [**5.394**]. Chris was the main breadwinner of the family up until he was made redundant in 2010. He has been unable to find a permanent job since then and is in receipt of an occupational pension.

24. The communicant was a member of the Ffos-y-fran Community Liaison Committee for some time at which she sought to raise matters about noise and dust with the operator and MTCBC. In November 2010, the operator unsuccessfully sought to prevent the communicant from attending the Liaison Committee. In July 2012 the operator wrote to the communicant and informed her that she was no longer required to attend the Liaison Committee citing 'a conflict of interests' as the reason: see e.g. [**5.399**].

25. The communicant does not have legal expenses insurance cover that will limit the adverse costs risk of the proposed claim. The communicant and other residents applied for after-the-event (ATE) insurance in 2010. ATE insurance was ultimately not offered. This is unsurprising following the Respondent's costs claim for £257,104. Were it to offer cover an ATE provider would immediately face costs liability of over £0.25 million. Moreover, the introduction of s. 46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPOA 2012) which prevents the recovery of an ATE insurance premium from an opposing party in private nuisance (and other proceedings) effectively means that, in practice, ATE insurance cover is no longer available in these types of claim from 1.4.13.

26. The communicant has instructed legal representatives by way of a Conditional Fee Agreement (CFA) and in that way she could afford to be legally represented. However, the communicant could not afford to issue