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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

5th September 2014

Dear Ms Marshall

Communications ACCC/C/2013/85 & ACCC/C/2013/86

1. Thank you for your letter of 12 August 2014, inviting the United Kingdom to respond to your queries relating to the above communications.

After the event (ATE) insurance

2. The Committee has asked for a concise description of how the system of ATE insurance worked prior to the entry into force of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 (including the financial aspects, namely the costs for obtaining ATE) and what has changed since then.
3. ATE insurance is usually taken out in conjunction with a conditional fee agreement (CFA) and covers a party against liabilities which might be incurred if a case is lost. These may include: (i) any liability to the other party under an adverse costs order; and (ii) their own disbursements (this may in some cases include counsel's fees). ATE insurance premiums can be substantial. They tend to be higher in certain types of claim, for example, those less frequently litigated and higher value claims (where premiums are individually calculated). The premiums are likely to be higher the later in the proceedings that ATE insurance is taken out. Premiums for simpler low cost, high volume litigation (e.g. road traffic accident claims) are generally lower, but not insignificant.
4. Before the implementation of the relevant part of section 46 of the LASPO Act 2012, which came into force on 1 April 2013, the ATE insurance premium was 'recoverable from' (i.e. payable by) the losing party. Although either party could take out ATE insurance, it was generally taken out by claimants. The way in which the ATE insurance market previously operated meant that there was an element of self-insurance of the ATE insurance premium - payment of the premium was deferred until the outcome of the claim was known. If the claim was lost, the premium was not payable. If the claim was won, then a slightly larger amount was recovered from the



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losing defendant to pay for the premiums which were not paid in respect of lost claims. The overall effect was that, in most cases, the claimant was not required to make any payment towards the ATE insurance premium, but was insured against all liabilities. This meant, in turn, that defendants effectively bore the costs in all cases. So, in cases that defendants lost, they paid their own costs in the normal way, and also paid the claimants' costs, including a success fee (i.e. an 'uplift' on the claimant solicitor's base costs) and the claimant's ATE insurance premiums. In cases that defendants won, they would recover their costs but ultimately paid in full by reason of their liability to pay higher sums in ATE insurance premiums in cases which they lost.

5. After the implementation of section 46 of the LASPO Act 2012 - which came in to effect on 1 April 2013 - the ATE insurance premium is no longer recoverable¹ from the losing defendant. If ATE insurance is taken out, the claimant is responsible for paying it according to the terms of the agreement with the insurer, and not by the defendant.
6. In England and Wales, the UK Government has introduced 'qualified one way costs shifting' (QOCS), which caps the amount that claimants may have to pay to defendants. Claimants who lose, but whose claims are conducted in accordance with the rules, are protected from having to pay the defendant's costs. QOCS is currently only available in personal injury and fatal accident cases, but the Government will consider the possible extension of QOCS to other categories of law, in due course, once there is some experience of the QOCS regime in these areas.
7. The UK Government does not hold any data on the costs of obtaining ATE insurance; this is a private law arrangement between the claimant and the ATE insurer.

Case Law

8. The Committee seeks the UK Government's opinion of recent judgments and their impact for the issues before the Committee.
9. Turning first to *Coventry and others v Lawrence and another*² and the judgment given in the UK Supreme Court. This case concerned proceedings issued by the owners of a property close to a speedway track known as the 'Stadium' for an injunction prohibiting their activities, on the ground that they gave rise to a nuisance by noise.
10. As we stated in our presentation to the Committee in March³, Lord Neuberger, the President of the Supreme Court, reiterated in that judgment that the term 'nuisance' 'is properly applied only to such actionable user of land as interferes with the

¹ However, there is a permanent limited exception, for clinical negligence cases, where ATE insurance premiums covering the cost of expert reports will remain recoverable.

² [2014] UKSC13 (<http://www.bailii.org/uk/cases/UKSC/2014/13.html>)

³ Paragraph 19, note of oral presentation by Charles Banner to the Committee on 26 March 2014 (http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-85/Correspondence_Party_concerned/ACCC_C-85_opening_FINAL.pdf)

enjoyment by the plaintiff of rights in land'. It is a cause of action focused on enabling those with interests in the land to protect their private property rights rather than enabling members of the public to challenge environmentally deleterious acts, the latter function being performed by the Environmental Protection Act 1990 (EPA).

11. The Committee asks under which conditions the courts would issue injunctions to stop the activity in question and under which conditions the courts would decide that it is appropriate to provide compensation. The differing roles of the tort of nuisance and the EPA are underlined by the contrasting remedies available. Section 82(2) of the EPA requires the court, if satisfied that the law prohibiting statutory nuisances has been contravened, to make an order, breach of which is a criminal offence, requiring the defendant to abate the nuisance and/or prohibiting the nuisance from recurring. The tort of nuisance does not oblige the court to make any order requiring the activity in question to cease.
12. The UK Supreme Court held that, particularly where planning permission has been granted for the activity in question and/or where the activity is in the public interest and/or an injunction would result in disproportionate financial implications for the defendant, damages may well be the appropriate remedy (which would allow the activity in question to continue).
13. The Committee may also wish to be aware of a second Supreme Court judgment in this case, given on costs.⁴ In particular, paragraphs 36 and 37 give Lord Neuberger's views on the changes affecting ATE insurance. Paragraphs 48 and 67 concern the specific Aarhus Convention issues raised in that case.
14. Turning secondly to *Austin v Miller Argent Limited*.⁵ As the Committee is aware, in this case Mrs Austin is pursuing her own claim in private nuisance alleging that she is affected by the dust and noise from the land reclamation project Ffos-y-Fran which unreasonably interferes with the enjoyment of her home. She claims that this would not have happened if the respondent complied with the conditions imposed on its planning permission to mitigate the adverse environmental effects of its activities.
15. The recent Court of Appeal judgment in *Austin v Miller Argent* confirmed the view that private nuisance claims could potentially be within scope of the Convention and helpfully sets out criteria for the courts to consider when determining whether this is the case. The Court found that, in order for a private nuisance claim to fall within the scope of the Convention, the following conditions should be met: (a) the nature of the complaint must have a close link with the particular environmental matters regulated by the Convention; and (b) the claim must, if successful, confer significant public environmental benefits. The Court also found that, where the purpose of the claim is principally to protect private property interests and any public benefit is limited and incidental, it should not attract Aarhus costs protection. In this case, had the court decided to award a protective costs order, the Civil Procedure Rules⁶ provide that the court may generally make any order for the purpose of managing the case and furthering the overriding objective. The overriding objective being that

⁴ *Coventry and others v Lawrence and another* (No 2) [2014] UKSC 46

(<http://www.bailii.org/uk/cases/UKSC/2014/46.html>)

⁵ [2014] EWCA Civ 1012 (<http://www.bailii.org/ew/cases/EWCA/Civ/2014/1012.html>)

⁶ CPR 3.1(2)(m) (<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03#3.1>)

cases should be dealt with justly and at proportionate cost which includes ensuring the parties are on an equal footing and the case is dealt with expeditiously and fairly.

16. In our response to the Committee of 20 December 2013, the UK Government stated that it did not accept that all private nuisance claims are caught by Convention requirements. Private nuisance proceedings focus on enabling those with interests in land to protect their private property rights rather than enabling members of the public to challenge environmentally deleterious acts. However, on the occasions where a private law nuisance claim relates to actions which do not merely harm the claimant's private property rights but also contravene provisions of national law relating to the environment, there are judicial and administrative procedures which may be relied upon by members of the public. This judgment is helpful in establishing criteria as to when private nuisance claims may be caught by the Convention.
17. Can UK private nuisance law be used to challenge an act or omission by an operator of a disturbing activity if the activity which caused the harm was a 'one off', had ceased or had not yet commenced?
18. We have set out in paragraph 10 above the definition of 'nuisance'. It would ultimately be a matter for the courts to decide whether the law of private nuisance would apply in a particular case, but private nuisance could potentially be used to challenge 'one off' activities, activities which had ceased and activities which had been threatened but had not yet commenced. In order for such a claim to engage the costs protections of the Aarhus Convention, it would have to meet the criteria set by the courts in *Austin v Miller Argent*. As we have stated previously in our responses to the committee, there are a number of statutory and administrative procedures available to members of the public to challenge acts or omissions by an operator.⁷
19. Types of case where private nuisance to be only adequate and effective way to challenge acts or omissions
20. The UK Government notes the invitation to comment on the questions posed to the communicants. We have set out above the circumstances in which we and the UK courts consider private nuisance claims may be caught by the Convention.

Legal avenues available to members of the public to challenge

21. The Committee seeks the legal avenues available to members of the public to challenge the activities listed in paragraph 27 of the communication in ACCC/C/2013/85 and Annex 2 of the joint submissions of the communicants dated 26-03-2014.
22. The method of challenge will ultimately depend on the individual circumstances of the case. In the UK Government's letter of 20 December 2013 and again in our presentation to the Committee in March, we set out the different procedures to which

⁷ Paragraphs 36-67 of letter dated 20 December 2013
(http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-85/Correspondence_Party_concerned/UK_response_85_86.pdf)

members of the public may have access for indirect or direct enforcement where there is an alleged contravention of national law of the sort within the scope of the Convention.

23. We note that in relation to paragraph 27 of communication ACCC/C/2013/85, these categories (extrapolations by the communicants of matters not covered by one of the available avenues – statutory nuisance) would, to the extent that they are actually within the scope of the Convention, in principle be capable of being remedied by the administrative and judicial procedures listed in paragraph 9(a) to (c) of the United Kingdom’s oral submission to the Committee.⁸ This will depend on the individual circumstances in which the issue arises.

Yours sincerely

Ahmed Azam

Ahmed Azam
United Kingdom National Focal Point
to the UNECE Aarhus Convention

⁸ Note of oral presentation by Charles Banner to the Committee on 26 March 2014, (http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-85/Correspondence_Party_concerned/ACCC_C-85_opening_FINAL.pdf)