Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107	
1. Key issue	Prohibitive costs
2. Country/Region	UK
3. Court/body	Court of Appeal
4. Date of judgment /decision	2nd March 2009
5. Internal reference	[2009] EWCA Civ 107
6. Articles of the Aarhus Convention	Article 9(4)
7. Key words	Prohibitive costs, private nuisance, interim relief

8. Case summary

This case was not a planning challenge, but an action in private law nuisance. An interim order for costs was made by the High Court against the claimants following the discharge of an interim injunction and the claimants appealed in respect of those costs. As part of that appeal, the claimants raised the issue of compliance with the Aarhus Convention.

Despite the fact that this was a private law matter in which no application was made for a Protective Costs Order (PCO), Carnwath LJ undertook a detailed analysis of the Aarhus Convention, including the case law on PCOs. Carnwath LJ also invited Defra (UK Government) to appear at the hearing. However, instead of appearing, the Defra submitted a written statement to the Court.

In essence, Carnwath LJ endorsed the flexible approach adopted by the Court of Appeal in *Compton* and *Buglife* and considered that, in principle, there would be no barrier to a PCO in a private law dispute. He also confirmed that the Court of Appeal did not endorse the development of separate principles for "environmental" cases. He noted:

"*the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The Corner House statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied "flexibly". Further development or refinement is a matter for legislation or the [Civil Procedure] Rules Committee."*

It is also clear from the Court of Appeal's analysis in this case (para 33) that any increased flexibility arises from application of a principle set out in the decision of the House of Lords in the case of *Bolton*. The House of Lords (as quoted in paragraph 33) said:

"*As in all questions to do with costs, the fundamental rule is that there are not rules. Costs are always in the discretion of the court and a practise, however widespread and longstanding, must never be allowed to harden into a rule."*

That is the overriding rule, as set out by the English House of Lords in relation to costs. Any relaxation of the Corner House criteria is thus underpinned by the fact that this remains an essentially discretionary regime.

Carnwath LJ did, however, expressly acknowledge that there would be a category of case where the Aarhus principles had been adopted into EU Directives. He continued by noting that the current Jackson Review of civil litigation costs provided an opportunity for considering Aarhus principles in the context of the system for costs as a whole. Finally, this case also addressed the legal status of the Aarhus Convention, summarising it as follows: (1) In international law, it is binding as an international treaty and enforceable by the Compliance Committee set up under the Convention to investigate complaints of non-compliance. (2) In European law, as the European Union is a signatory to the Convention, its provisions may be enforceable by the European Commission against Member States through enforcement action. (3) In domestic law, the Convention cannot be directly enforced as it has not been incorporated in domestic law, but may be taken into account by judges when resolving ambiguities or exercising discretion. ***Author's Note***: (1) this case is the subject of a Communication before the Aarhus Convention Compliance Committee (Communication 27); and (2) the Coalition for Access to Justice for the Environment (CAJE) intervened in this case in the Court of Appeal.	
9. Link address	Judgment attached as pdf