SECTION 6 – GROUNDS OF APPEAL

Grounds of Appeal

1. The Court of Appeal was wrong in law in its approach to the conditions under which an action in private nuisance will fall within Article 9(3).

Whilst the Court was correct to hold that an action in private nuisance is capable of falling within Article 9(3) of the Aarhus Convention as a procedure to challenge acts and omissions by private persons which contravene provisions of national law relating to the environment, the Court erred in law in holding that it is a requirement that the claim, if successful, must confer *"significant public environmental benefits"* (para. 22). This puts a gloss on the wording of the Convention which is not justified. Noise and dust are plainly environmental matters within the wording of Article 2 of the Convention, and there is no distinction between noise and dust which affect many or affect few. The Court's approach also fails to recognise the overall objective stated at Article 1 of the Convention, which is that the provisions on access to justice are intended to "*contribute to the protection of the right of any person ... to live in an environment adequate to his or her health and well-being*". Private nuisance in cases where the nuisance arises from environmental factors, such as noise and dust, is therefore within the scope of Article 9(3), whether it is a single family or a wider community which is affected. The Court was wrong to regard the absence of public environmental benefits as disentitling the Appellant from costs protection. Note as above the specific observation of the CJEU in Case 530/11 Commission v. UK directly contrary to the Court of Appeal's approach.

2. Consequently, the Court was wrong in finding that the Appellant's intended claim was not within Article 9(3) and should not attract costs protection.

The Court's error under Ground 1 above led it into further error in finding that the Appellant's proposed claim fell outside Article 9(3). Both the Court of Appeal and the judge were wrong to find that any public benefit was limited and uncertain (para. 46). An order requiring the Respondent to comply with the conditions imposed to prevent or limit noise and dust would plainly be of public benefit. The Appellant lives on a housing estate and is unlikely to be the only person affected by noise and dust. But even if there were no public benefit in that sense, this should not mean that the claim would not fall within Article 9(3).

3. The Court of Appeal was wrong to hold that Article 9(2) of the Convention and Article 11 of the EIA Directive are not engaged.

In holding that the EIA Directive is concerned only with procedures up to the point of the grant of consent for development, the Court of Appeal failed to take the correct purposive approach to ensure the effectiveness of EU law. The Directive is clear in requiring that the public should be informed, when consent is given, of the main measures to avoid, reduce and, if possible, offset the major adverse effects (Article 9(1)(c)). The public must also be informed of the content of the decision and any conditions attached thereto (Article 9(1)(a)). There would be no point whatsoever in informing the public of these matters if the public has no means of ensuring that the measures are actually deployed and the conditions complied with. Further, these are matters which are the product of the public participation provisions of the Directive. As such, a private nuisance claim which raises the issue of the legality of the Respondent's conduct in not complying with the relevant conditions is properly to be regarded as a challenge to acts or omissions which are subject to the public participation procedures of the Directive.

4. The Court of Appeal was wrong to find that the principles in Case C-240/09 Lesoochranárske zoskupenie VLK were not applicable to the exercise of discretion as to costs.

The Court was wrong to hold that the Appellant had no EU right to the benefit of the conditions and their enforcement was not the enforcement of an EU right (para. 34). The Appellant, in seeking to bring proceedings under Article 9(3) of the Convention, is seeking to ensure that the relevant conditions imposed as a result of the EIA process, and intended to prevent unreasonable levels of noise and dust, are complied with. The conditions are imposed for the benefit of those, such as the Appellant, who might be affected by these matters. Their enforcement is therefore, contrary to the Court's finding, a matter of EU right.

5. The Court of Appeal was wrong to regard the Article 9(4) requirement that costs should not be prohibitive as no more than a factor to take into consideration when deciding whether to grant a PCO.

The Court was wrong in according Article 9(4) of the Convention weight simply as a factor to be taken into account when deciding whether the grant a PCO. It is accepted that costs, and whether a PCO should be made, are matters of judicial discretion. However, it does not follow that all relevant factors are of equal weight. The passage from the speech of Lord Bridge in R v. Home Secretary, ex parte Brind cited at para. 37 should be read in the context of the

case, of administrative discretion having been conferred by Parliament, and that discretion being subject to judicial control. Lord Bridge's comment about *"judicial usurpation of the legislative function"* (p. 748F) should be understood in that context, which is a different one than the exercise of judicial discretion on costs. The correct approach should have been to start from the premise that the Appellant should not have been subject to procedures which would be prohibitively expensive, then to ask whether there were any factors which outweighed the importance of achieving that objective, in accordance with the UK's international obligations. As submitted under Grounds 1 and 2, the private nature of the claim should have been accorded limited, if any, weight. The first instance judge had not applied the correct test, and the Court was wrong to hold that there was no basis for interfering with his conclusion that no PCO should be granted (para. 47).

6. The decision of the Court of Appeal was incompatible with the Appellant's Convention rights.

It is accepted this point was not raised below, but it is a potentially important point identified by the Supreme Court in a judgment handed down subsequent to the Court of Appeal decision in present case: Coventry v. Lawrence (No. 2).

Basis on which permission is sought

7. Permission is sought on the basis that (a) the grounds have a real prospect of success; and (b) there is some other compelling reason why the appeal should be heard, namely that it raises important issues of public interest on access to justice, on compliance with the UK's international obligations, and in respect of Grounds 3 and 4 on Community law (which latter issues should be subject to consideration by the Court as to whether a reference to the CJEU is required).

8. It is also submitted that in view of the comments of the Supreme Court in Coventry v. Lawrence (No. 2) that there is a point of public importance as to European Convention rights of prospective claimants such as the Appellant under Articles 6, 8 and A1P1.

Consequential matters

9. The Appellant seeks an order for costs protection in respect of the appeal. This should take into account her limited means (her family's income is around £2,000 a month) and the legal costs and disbursements which she has already incurred or for which she has become liable £7,481. The fee for an appeal to the

Supreme Court would itself be £1,000, though an application will be made under the Supreme Court Fees Order 2009 for remission of the fee.

STEPHEN TROMANS Q.C.
CATHERINE DOBSON
PAUL STOOKES

15 August 2014

UKSC 2014/new matter

IN THE SUPREME COURT
On appeal from the Court of Appeal (Civil Division)

BETWEEN

ALYSON AUSTIN

Appellant

and

MILLER ARGENT (SOUTH WALES) LTD

Respondent

NOTE IN SUPPORT OF THE APPELLANT'S APPLICATION FOR FEE REMISSION

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1. The Appellant applies for fee remission for the court fee normally payable on an application for permission to appeal to the Supreme Court. The primary reason for the request is that in the exceptional circumstances of the case the application fee of £1,000 is prohibitively expensive.

2. The question of prohibitive expense is central to the appeal. The Appellant is trying to bring legal proceedings in an effort to stop dust and noise pollution affecting her home but is prevented from doing so by the cost of bringing legal proceedings. In the grounds of appeal (s. 6 of the Notice of Appeal) the Appellant explains that this is contrary to her rights under European and international law including the Aarhus Convention 1998, the EIA Directive 2011/92/EU and the European Convention on Human Rights: see e.g. the substantive grounds of appeal.

3. The primary concern about prohibitive expense is the costs risk in being exposed to the Respondent's costs liability in the event that her claim is unsuccessful. Notwithstanding that both the High Court and the Court of Appeal have acknowledged that the substantive private nuisance claim is reasonably arguable and/or has reasonable prospects of success: see e.g. paras. 5 and 45 of *Austin v Miller Argent* [2014].

4. A further and important aspect of the appeal is the significant cost of the Appellant's own expenses (aside of her own legal representation is made affordable by entering into conditional fee agreements (CFAs) or where her lawyers have worked on a *pro bono* basis (e.g. in the High Court hearing of

2.8.13). The Appellant's expenses, liability and disbursements to date amount to £7,481. A sizeable proportion of these existing costs arise from court fees in the High Court and Court of Appeal. If the Appellant is ultimately able to issue legal proceedings she will also face, at the very least, another £2,280 in court fees (assuming it is unnecessary to make any interim applications).

5. Thus, notwithstanding the central argument of the Appellant's adverse costs risk (the other side to the argument to the concern recently raised by the Supreme Court in *Coventry v Lawrence No. 2* [2014] UKSC 46), the application fee of £1,000 in Supreme Court is simply not affordable to this Appellant. When considered against the backdrop of existing fees and disbursements (£7,481) and assessed objectively against, say, the Civil Procedures Rules maximum liability of £5,000 for environmental judicial review claims set in CPR 45.41-44 and CPR PD 45.5.1 this is too expensive. It is particularly so in the Appellant's case where she and her family are of 'modest means'. See e.g. the monthly income summarised in the attached EX160 which notes an annual family income of under £20,000 which below the national average (which is typically regarded to be around £25,000 pa) and also the findings of the High Court and Court of Appeal: see e.g. *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012 *per* Elias LJ, para 5). The Appellant and her husband do have disposable capital above the fee remission limit. These are savings which are used as part of the monthly income and have been put by to contribute towards their children's higher education fees.

6. In terms of the £5,000 maximum liability noted in the CPR 45.41-44, it is also important to note the findings of the European Court of Justice in Case C-530/11 *Commission v UK* [2014] which held that when assessing prohibitive expense (e.g. anything over £5,000 for the CPR) the costs of legal proceedings should include: (a) 'the costs borne by the party concerned as a whole' (para 44) and (b) that the costs should include the costs already incurred at earlier levels in the same dispute (para 49).

7. In all the circumstances including: (i) the modest means of the Appellant, (ii) the objectively based maximum liability limit of £5,000 in the CPR, (iii) the costs and liability already incurred by the Appellant of £7,481, and (iv) approach of the CJEU in *Commission v UK*; the Appellant applies for complete fee remission. The Appellant considers that this is justified because of: (a) the exceptional circumstances of the case as set out above (and further discussed in the grounds of appeal); and (b) that the application fee of £1,000 would, in the circumstances, be prohibitively expensive and contrary to the Aarhus Convention 1998.

Richard Buxton Environmental & Public Law
17.8.14