Neutral Citation Number: 2013 EWHC 2622(TCC)

Case No: 2CF30125

IN THE MATTER OF AN INTENDED ACTION
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
CARDIFF DISTRICT REGISTRY

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 30 August 2013

Before :

His Honour Judge Milwyn Jarman QC

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Between :

ALYSON AUSTIN	**Applicant**
- and -	
MILLER ARGENT (SOUTH WALES) LIMITED	**Respondent**

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Stephen Tromans QC and Paul Stookes (instructed by **Richard Buxton Environment & Public Law**) for the **Applicant**
James Pereira and Jack Connah (instructed by **DLA Piper UK LLP**) for the **Respondent**

Hearing date: 2 August 2013

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JUDGMENT

His Honour Judge Jarman QC :

1. Mrs Austin, the applicant, wishes to bring private law nuisance proceedings against the respondent (Miller Argent) in respect of alleged noise and dust nuisance caused to her home in Bradley Gardens Merthyr Tydfil by opencast and reclamation operations which Miller Argent is carrying out at Ffos-y-Fran, about 2km east of the town centre. Planning consent to carry out those operations was granted by the National Assembly for Wales on 11 April 2005 after calling in the application.

2. The consent was subject to stringent conditions to control the operations and it is Mrs Austin's case that the noise and dust nuisance which is experienced at her home is caused, in part at least, by a breach of some of those conditions. Her solicitors have obtained a report dated 16 July 2012 from pollution consultants who conclude that residents in Bradley Gardens and in other nearby areas are likely to have experienced dust nuisance between 2009 and 2012. They also have a report dated 23 June 2009 from consulting engineers in respect of noise monitoring carried out in March and April 2009 which concludes that noise from the operations was such that complaints were likely, although the report also noted that as the operations moved further away from residential areas the number of complaints regarding noise had decreased.

3. Mrs Austin wants to obtain an injunction to restrain the alleged nuisance, and damages in respect of past nuisance. She is, I accept on the evidence before me, of modest means. Public funding to bring proceedings is not available. Previous applications by her and other local residents for a group litigation

order have been dismissed, and it has not proved possible to secure after the event insurance policies in respect of the potential costs of proceedings.

4. Accordingly she now applies for a cost protection order so that she should pay no costs to Miller Argent if she loses the contemplated proceedings, but that she should receive all her costs if she wins.

5. On her behalf it is accepted that such an application can only succeed if the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters made at Aarhus Denmark on 25 June 1998 (the Convention) applies to private law nuisance proceedings. The United Kingdom ratified the Convention on 23 February 2005 and it came into force in the jurisdiction on 24 May 2005. For present purposes a private nuisance may be defined as an act or omission connected with the use or occupation of land which interferes with the enjoyment of land by another person.

6. The application of the Convention to such proceedings involves complex issues, as the Ministry of Justice recognised in its 2012 document Cost Protection for Litigants in Environmental Judicial Review Claims, which was a response to public consultation. Reference was made to the observation of Lord Justice Jackson in his 2009 Review of Civil Litigation Costs, that cost protection for one party would potentially have a serious impact on the other party, who might well have very limited resources also.

7. The question has not been decided in the courts of England and Wales. The arguments for and against the application were summarised by the Court of Appeal in *Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107.* At

paragraph 44 Lord Justice Carnwath, giving the judgment of the court, observed that the arguments raised potentially important and difficult issues which may need to be decided at the European level. The court, which was dealing with appeals from two costs orders in private law nuisance proceedings, was content to proceed on the basis that the Convention was capable of applying to such proceedings. It was further observed that in the absence of a directive specifically relating to that type of case, there is no directly applicable rule of Community law and then this was stated:

> "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 contemplated proceedings in this case do not involve an application for judicial review of a decision by a public body. It is not said that Miller Argent is a company with very limited resources, but it is nevertheless emphasised on its behalf that it is a private concern carrying out commercial operations.

9. On behalf of Mrs Austin, it is submitted that the Convention makes no clear distinction between private and public proceedings and that the contemplated proceedings would raise issues of public interest, including whether there is or has been compliance with the conditions attached to the planning permission.

10. The recitals to the Convention recognise that adequate protection of the environment is essential to human well-being and the enjoyment of basic

rights, including the right to live in an environment adequate to his or her health and well-being.

11. Article 1 of the Convention provides:

> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

12. Further, Article 2 paragraph 3 of the Convention defines "environmental information" to include any information on factors such as substances, energy, noise and radiation, and activities or measures affecting or likely to affect air and atmosphere, the state of human health and safety, and conditions of human life, inasmuch as they are or may be affected by such factors.

13. Article 6 deals with public participation in decisions on specific activities and so far as material paragraph 1 requires that each party: a) shall apply the provisions of that article with respect to decisions on whether to permit proposed activities listed in annex I; b) shall, in accordance with its national law, also apply the provisions of the article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment.

14. Paragraph 2 requires the public to be informed amongst other matters of the public authority responsible for making the decision and paragraph 3 requires sufficient time to be allowed for effective public participation in environmental decision-making. Paragraph 6 requires public authorities to give access to relevant information including a description of the significant effect of the proposed activity on the environment and a description of the measures envisaged to prevent and/or reduce the effect, including emissions.

15. Article 9 concerns access to justice. Paragraph 2 provides that the public shall have access to a review procedure before a court of law to challenge "the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6..."

16. Paragraph 3 provides that 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. Paragraph 4 provides that the relevant procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and "not prohibitively expensive."

17. In the second edition (2013) of the Implementation Guide on the Convention published by the United Nations Economic Commission for Europe (UNECE), it is stated on page 206 that paragraph 3 above envisages that members of the public may enforce environmental law either directly by bringing the case to court to have the law enforced (rather than simply to redress personal harm),

or indirectly, by triggering and participating in administrative procedures so as to have the law enforced. Earlier in the guide, at page 18, reference is made to a decision of the European Court of Human Rights in *Giacomelli v Italy 2006,* in which it was held that breach of the right to respect for private and family life and the home in Article 8 of the European Convention on Human Rights, is not confined to physical breaches but can include noise and emissions.

18. The body responsible for the enforcement of the Convention is the Aarhus Convention Compliance Committee of UNECE. Lord Carnwath, by now a justice of the Supreme Court, made reference to that Committee in *Walton v Scottish Ministers [2012] UKSC 44* at paragraph 100. He said that although the Convention is not part of domestic law as such (except where incorporated through European directives), the decisions of the Committee "deserve respect on issues relating to standards of public participation."

19. The Committee from time to time publishes reports upon such compliance. In paragraphs 45 to 47 of such a report dated 24 September 2010, compliance by the UK with Article 9 paragraphs 3 and 4 of the Convention with reference to private law nuisance was considered, as a result of a communication on behalf of the claimant in *Morgan v Hinton Organics* and others. It was found that each of the paragraphs is so applicable, and noted that the UK acknowledged that private nuisance proceedings in that context are within the scope of the latter paragraph.

20. In a report dated 28 June 2013, the Committee considered a communication from Mrs Austin and indicated it did not agree with the UK's restrictive interpretations of its recommendations in the earlier report as not relevant to

private nuisance proceedings. In light of the UK position in relation to costs in such proceedings, however, it has agreed to consider the present communication under the ordinary, and not the summary, procedure.

21. The requirements of the Convention have been incorporated into two directives, the most relevant of which to this case is Directive 2011/92/EU of the European Parliament and Council (the Directive) dated 13 December 2011. That codifies a previous directive (85/337/EEC) and amendments on the assessment of the effects of certain public and private projects on the environment. The recitals refer to the need to achieve protection of the environment and the quality of life, to decisions which may have a significant effect on the environment as well as on personal health and well-being, and to the Convention.

22. Article 5 of the Directive provides a number of requirements including, amongst other steps, measures to ensure that the developer of such projects supplies a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment. Article 6 requires authorities and the public to be given such information and an effective opportunity to participate in environmental decision making procedures, and Article 8 provides that the results of such consultations and information shall be taken into consideration in the development consent procedure. Once a decision to grant or refuse consent is made, the public must under Article 9 be informed and supplied with a description where necessary of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

23. Article 11 paragraph 1 includes a requirement that members of the public with a sufficient interest shall "have access to a review procedure before a court of law....to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive." Paragraph 4 provides that the provisions of that article should not exclude the possibility of a preliminary review procedure before an administrative authority and shall not effect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. This then follows: "Any such procedure shall be fair, equitable, timely and not prohibitively expensive."

24. If that article applies to the proposed proceedings in this case, it is accepted by the parties that the requirement that the proceedings should not be prohibitively expensive is binding on this court. That has been confirmed by a number of decisions of the European Court of Justice. In Case C-427/07 *Commission v Ireland [2009]* it was held the discretionary practice of the Irish courts in dealing with costs cannot be regarded as a valid implementation of the obligations arising from the forerunner of Article 11 of the Directive. In Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo Zivotneho Prostredia Slovenskej Republiky [2009],* the court considered Article 9 paragraph 3 of the Convention in the context of a different directive, known as the Habitats Directive, relating to the protection of certain species of wildlife. The court observed at paragraphs 47-49 that in the absence of EU rules, it is for domestic legal systems to lay down detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. If such rights are not to be undermined then it is "inconceivable" that the paragraph is

to be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

25. The Convention and the Directive (or its forerunner) and the particular question of the costs of proceedings were considered in C-260/11 *Edwards and another v Environment Agency and other [2013]*. The court confirmed the principle set out in *Lesoochranárske*. A number of other principles from the judgment may conveniently be summarised as follows:

i) The prohibitive nature of costs must be assessed as a whole taking into account all of the costs borne by the party concerned.

ii) As neither the Convention nor the Directive specify how the cost of judicial proceedings should be assessed, that assessment cannot be a matter for national law alone.

iii) Where a national court is called upon to consider at an early stage in proceedings the possibility of capping the costs for which the unsuccessful party may be liable, it must satisfy itself that the requirement that the proceedings should not be prohibitively expensive has been complied with, taking into account both the interest of the person wishing to defend his rights and the public protection of the environment.

iv) The assessment must be based not only on the basis of the person concerned but must also be based on an objective analysis of the amount of the costs.

v) The court must take into account the situation of the parties concerned, whether there is a reasonable prospect of success, the importance to the claimant and to the protection of the environment, the complexity and the potentially frivolous nature of the claim.

vi) The fact that a claimant has not been deterred in practice from asserting his or her claim is not in itself sufficient to establish that the proceedings are not prohibitively expensive for the claimant.

26. In C-420/11 *Leth v Republik v Österreich [2013],* the court held that where a home is affected by noise so as to render it less capable of fulfilling its function and the individual's environment and quality of life are affected, a decrease in its value may be a direct economic consequence of a project within the forerunner of the Directive so as to be covered by the objective of its protection. The claim in that case was founded upon the failure to transpose and implement the Directive before granting development consent.

27. As well as the domestic decisions referred to above, there are other relevant observations by the courts of England and Wales. In *R (Prokopp) v London Underground and others [2003]EWCA Civ 961,* Lord Justice Schiemann said at paragraphs 41 and 42 that the forerunner of the Directive did not explicitly deal with the situation where a developer breaks a condition on a consent which under national law has the effect of causing the consent to lapse. He did not accept that the purpose of the Directive would be undermined if Member States are in general left to police in whatever manner they regard as appropriate the progress of a project once it has started.

28. In *Eweida v British Airways plc [2009] EWCA Civ 1025,* the Court of Appeal considered protective costs orders and costs capping orders in connection with a claim for unlawful discrimination in the workplace in respect of religious belief. The appellant had been told that because of the respondent's then uniform policy, she was not permitted to wear a cross which denoted her Christian faith in such a way as to be visible. The court referred to the core principles for protective cost orders set out in *R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192,* which includes that the applicant has no private interest in the outcome of the case. It is accepted on behalf of Mrs Austin that her case does not come squarely within such principles. It is common ground that cost capping is not appropriate in the present case.

29. Lord Justice Lloyd, at paragraph 29 after citing one example of what he regarded as a cost capping order in private law family proceedings, observed that so far as he was aware there was no other example of private litigation where the *Corner House* principles have been considered for possible application, let alone applied. He referred to *Morgan v Hinton Organics* as private law litigation.

30. At paragraph 38, he said that the issue in the case then before the court may not be usual, but the nature of the claim was commonplace. The issue may be of general importance, but the claim was a private claim for the benefit of the appellant. At paragraph 39 he said: "Even if the private interest can be applied with some flexibility, the appellant's private interest is too significant to make it appropriate to treat the case as within the *Corner House* principles."

31. Against this background, it is submitted on behalf of Mrs Austin that private law nuisance is part of the national law which relates to the environment, and the ability to pursue such proceedings as a mechanism for environmental control is consistent with the recitals to the Convention and to the overriding objective in Article 1, to contribute to the protection of the right to "live in an environment adequate" to health and well-being. Noise and dust pollution comes within its definition of environment and the applicability is supported by the Committee and by the Court of Appeal in *Morgan v Hinton Organics.*

32. Moreover, it is submitted, an individual has rights under the Directive to ensure that measures to mitigate the adverse effects identified in the process and required by conditions to any subsequent development consent, are fulfilled. Article 11 requires a procedure before a court of law or equivalent body by which individual rights can be asserted and appropriate remedy provided. Private law nuisance proceedings amount to a review procedure by which the substantive legality of Miller Argent's actions is challenged. That challenge is not to the grant of consent, but to Miller Argent's actions in implementing such consent without complying with the conditions imposed as part of the process under the Directive. Thus the proposed claim is within the contemplation of Article 11.

33. On behalf of Miller Argent, reliance is placed upon the observation in *Morgan v Hinton Organics* that in the absence of a directive giving effect to the Convention, its principles are at most something to be taken into account in resolving ambiguities or exercising discretions, and that in *Prokopp* that the Directive does not regulate the implementation after consent. Moreover,

private law nuisance is not a "review procedure... to challenge the substantive or procedural legality" of any decision for the purposes of Article 11. In the present case, a challenge was made to the development consent which was rejected by the Court of Appeal.

34. In my judgment, the latter submissions are to be preferred. For present purposes, it is only by virtue of the Directive that the Convention becomes directly applicable in the UK. Otherwise, it remains a matter to be taken into account, in the words of Lord Justice Carnwath (as he then was), in resolving ambiguities or in exercising discretions.

35. The Directive in my judgment deals only with the process leading to the decision whether or not to give development consent and if so what conditions should be imposed on such consent in order, amongst other matters, to avoid, reduce or offset the major adverse effects identified as part of the process. Whilst in the widest sense, private law nuisance proceedings which involve a question of whether the conditions have been complied with, may be said to amount to a review of the legality of Miller Argent's actions within the meaning of Article 11, I am of the view that it is clear in reading the Directive as a whole that that is not the sort of review contemplated. Lord Justice Schiemann in *Prokopp* made a clear distinction between the making of the decision on the one hand and the policing of its implementation on the other. He clearly considered that the Directive dealt specifically only with the former. That is the extent to which the European Parliament has decided to give direct effect to the Convention in Member States. In my judgment there

is no room to imply that the requirements of the Directive apply also to implementation.

36. Insofar as I have discretion to make the order sought, then I would decline to make it. I accept that there is a greater public interest element in this case than there was, for example, in *Eweida.* I accept also that the proposed proceedings have a reasonable prospect of success and are likely to involve issues as to whether there has been a breach of the conditions in question, and that any injunction is likely to benefit other homes in the immediate vicinity of Mrs Austin's homes. However, it is uncertain whether any injunction would benefit homes in other vicinities close to the development which covers a large area. Any remedy is likely to be directed to the precise conditions prevailing at Mrs Austin's home and may well be implemented in practice without any significant change in the development processes as a whole.

37. Finally, if I were to make an order, it would not be in the terms sought. I accept that Mrs Austin has already incurred costs and disbursements in the order of £5,000 and is of modest means. I have regard to the principles in *Edwards* and also to the figures set out in CPR 45 in respect of judicial review proceedings limiting parties' costs in such proceedings to £5,000 and £35,000 respectively. Whilst some judicial review proceedings may be complex and costly, I consider that private law nuisance proceedings of the kind contemplated are likely to involve complex factual and expert oral evidence which is not usual in judicial review proceedings. It is submitted on behalf of Mrs Austin that a reciprocal limit should not be imposed but that fairness to Miller Argent can be achieved by the new rules for cost budgeting under CPR

3.19. I do not consider that such provisions will wholly achieve fairness between the parties. The limits I would have imposed had I made the order would have been £7,500 and £40,000 respectively.