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Ref. CO/1408/2019

IN THE COMBINED COURT CENTRE AT LEEDS

Oxford Row
Leeds

Before MR JUSTICE FREEDMAN

IN THE MATTER OF

THE QUEEN (ON THE APPLICATION OF KENT) (Claimant)

-v-

TEESSIDE MAGISTRATES PARTY (Defendant)

Dr Paul Stookes Solicitor Advocate for the Claimant

Mr C Knox (instructed by Womble Bond Dickinson LLP) for the Interested Party

JUDGMENT

28th NOVEMBER 2019, 14.01-15.28

MR JUSTICE FREEDMAN:

I Introduction

1. On the 28th of November 2019 I heard an application for a renewal of an Aarhus Convention Claim application by the claimant. This is the judgment arising out of that hearing. Although I have had overnight to prepare the judgment, it remains an ex tempore judgment.

2. The claimant challenges the decision of District Judge (Magistrates' Court) Helen Cousins dated 31st January 2019 refusing his "out of time" application to amend the name of the defendant in a summons in respect of an alleged summary only offence brought by him against the company whom he had named as "Banks Mining Group Ltd" in the information provided in respect of the summons application. The intended defendant to those proceedings is said to have been the interested party. Its proper name is HJ Banks & Co Ltd.

3. The offence is alleged to have occurred between 20th May 2018 and 22nd June 2018, which means that the statutory time limit for bringing proceedings, namely six months, expired on 22nd December 2018. In this case an information against Banks Mining Group Ltd was laid on 30th October 2018 and the summons was issued with a return date of 12th December 2018 at Peterlee Magistrates' Court, albeit that in error there was almost a month's delay before the court office actually produced the summons on 28th November 2018. It was only sent by the prosecutor the following day, effectively giving the interested party just 12 days' notice of the hearing.

II History

4. The core facts are that the claimant instigated proceedings against the proposed interested party alleging one offence, that: *"Between 20th May 2018 and 22nd June 2018 at Pont Valley, County Durham, he damaged or destroyed a breeding site of a wild animal of a European protected species, namely the Great Crested Newt contrary to Regulation 43(1)(d) and (8) of the Conservation of Species and Habitats Regulations 2017."*

5. Mr Gerald Sydenham, a solicitor acting on behalf of the interested party, wrote to the court on 6th December 2018 requesting that the first hearing be put back from 12th December 2018 to a later time in December 2018 or in January 2019. Nevertheless, the first hearing proceeded on 12th December 2018 and directions were given for trial.

6. On 25th January 2019 the interested party sent to the court a procedural application which related, in part, to the defendant for the criminal proceedings being incorrectly named. This was followed on 29th January 2019 by a further application for the recusal of DJ Cousins, which is irrelevant to the matters that are now before the court.

7. The claimant responded on 30th January 2019 with an application to amend the name of the defendant in the summons to the name of the interested party in these proceedings. The claimant had used the name Banks Mining Group Ltd instead of HJ Banks & Co Ltd. It was

submitted on behalf of the claimant that there was no confusion as to the identity of the interested party, simply confusion as to the correct company name, as the interested party referred to itself and was referred to by the court in different ways.

8. A case management hearing was listed for 31st January 2019 to deal with these applications. The claimant's application was refused by DJ Cousins on the basis that the established case law prevented her from making such an amendment. As the offence in question is a summary matter, the six-month time limit for bringing the charge under section 127 Magistrates' Courts Act 1980 expired on 22nd December 2018. A new summons, therefore, cannot be issued for this offence.

9. The power to amend is provided under section 123 of the Magistrates' Court Act 1980. That reads as follows:

> *"123, Defect in process.*
> *(i) No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variants between it and the evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint.*
> *(ii) If it appears to a magistrates' court that any variants between a summons or warrant and the evidence adduced on behalf of the prosecutor or complainant is such that the defendant has been misled by the variants, the court shall, on the application of the defendant, adjourn the hearing."*

10. There is case law to the effect that there is a distinction between a mistake as to the identity of a corporate defendant and a misstatement of its name. In a number of cases the court has drawn a distinction between those authorities where the court had overturned the decision of the magistrates' court to allow an amendment that stems from a misidentification of the defendant such that the correct defendant was not before the court and a misstatement of the defendant's name. See *R (Essence Bars Ltd) v Wimbledon Magistrates' Court* [2016] EWCA Civ 63 and *Platinum Crown Investments Ltd v North East Essex Magistrates' Court* [2017] EWHC 2761 (Admin).

11. It was submitted that the district judge did not consider this distinction. The claimant submits that it was a misstatement of the name of the defendant rather than the identity of the defendant. The corporate entity named did not exist and therefore it was likely, submits the claimant, to be a misstatement of his name. The defendant was said to be aware of the proceedings from the date of the issue of the summons.

III Application for judicial review

12. The claimant submitted that he was entitled to proceed by way of judicial review. If there was an entitlement to proceed by way of case stated, then he submitted that he had either course and was entitled to choose judicial review. In the statement of facts and

grounds he expanded upon these submissions relating to the error of law of which he complained and it is not necessary for the purpose of this judgment to set out the six different grounds upon which he relied.

13. At paragraphs 38 to 40 he referred to the Aarhus Convention. He refers to the CPR Rule 45.41:

> *"(1) This section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.*
> *(2) In this Section—*
> *(a) "Aarhus Convention claim" means a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 ("the Aarhus Convention");*
> *(b) references to a member or members of the public are to be construed in accordance with the Aarhus Convention."*
>
> *... "45.42*
> *(1) Subject to paragraph (2), rules 45.43 to 45.45 apply where a claimant who is a member of the public has—*
> *(a) stated in the claim form that the claim is an Aarhus Convention claim; and*
> *(b) filed and served with the claim form a schedule of the claimant's financial resources, which is verified by a statement of truth and provides details of—*
> *(i) the claimant's significant assets, liabilities, income and expenditure; and*
> *(ii) in relation to any financial support which any person has provided or is likely to provide to the claimant, the aggregate amount which has been provided and which is likely to be provided.*
> *(2) Subject to paragraph (3), rules 45.43 to 45.45 do not apply where the claimant has stated in the claim form that although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply."*
>
> *"45.43*
> *(1) Subject to rules 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 45.44.*
> *(2) For a claimant the amount is—*
> *(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;*
> *(b) £10,000 in all other cases.*

(3) For a defendant the amount is £35,000."

… "45.44
(1) The court may vary the amounts in rule 45.43 or may remove altogether the limits on the maximum costs liability of any party in an Aarhus Convention claim.
(2) The court may vary such an amount or remove such a limit only on an application made in accordance with paragraphs (5) to (7) ("an application to vary") and if satisfied that—
(a) to do so would not make the costs of the proceedings prohibitively expensive for the claimant; and
(b) in the case of a variation which would reduce a claimant's maximum costs liability or increase that of a defendant, without the variation the costs of the proceedings would be prohibitively expensive for the claimant.
(3) Proceedings are to be considered prohibitively expensive for the purpose of this rule if their likely costs (including any court fees which are payable by the claimant) either—
(a) exceed the financial resources of the claimant; or
(b) are objectively unreasonable having regard to—
(i) the situation of the parties;
(ii) whether the claimant has a reasonable prospect of success;
(iii) the importance of what is at stake for the claimant;
(iv) the importance of what is at stake for the environment;
(v) the complexity of the relevant law and procedure; and
(vi) whether the claim is frivolous.
(4) When the court considers the financial resources of the claimant for the purposes of this rule, it must have regard to any financial support which any person has provided or is likely to provide to the claimant.
(5) Subject to paragraph (6), an application to vary must—
(a) if made by the claimant, be made in the claim form and provide the claimant's reasons why, if the variation were not made, the costs of the proceedings would be prohibitively expensive for the claimant;
(b) if made by the defendant, be made in the acknowledgment of service and provide the defendant's reasons why, if the variation were made, the costs of the proceedings would not be prohibitively expensive for the claimant; and
(c) be determined by the court at the earliest opportunity.
(6) An application to vary may be made at a later stage if there has been a significant change in circumstances (including evidence that the schedule of the claimant's financial resources contained false or misleading information) which means that the proceedings would now—
(a) be prohibitively expensive for the claimant if the variation were not made; or
(b) not be prohibitively expensive for the claimant if the variation were made.

(7) An application under paragraph (6) must—
(a) if made by the claimant—
(i) be accompanied by a revised schedule of the claimant's financial resources or confirmation that the claimant's financial resources have not changed; and
(ii) provide reasons why the proceedings would now be prohibitively expensive for the claimant if the variation were not made; and
(b) if made by the defendant, provide reasons why the proceedings would now not be prohibitively expensive for the claimant if the variation were made.
(Rule 39.2(3)(c) makes provision for a hearing (or any part of it) to be in private if it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.)"

"45.45
(1) Where a claimant has complied with rule 45.42(1), and subject to rule 45.42(2) and (3), rule 45.43 will apply unless—
(a) the defendant has in the acknowledgment of service—
(i) denied that the claim is an Aarhus Convention claim; and
(ii) set out the defendant's grounds for such denial; and
(b) the court has determined that the claim is not an Aarhus Convention claim.
(2) Where the defendant denies that the claim is an Aarhus Convention claim, the court must determine that issue at the earliest opportunity.
(3) In any proceedings to determine whether the claim is an Aarhus Convention claim—
(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;
(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings to be assessed on the standard basis, and that order may be enforced even if this would increase the costs payable by the defendant beyond the amount stated in rule 45.43(3) or any variation of that amount."

14. In the statements of facts and grounds at paragraph 39 the claimant stated the following:

"This case clearly relates to matters covered by the Aarhus Convention. Article 9(3) of the Convention states that members of the public must have access to a review mechanism to challenge acts, inter alia, by private persons that contravene national law. The proceedings in question relate to a

> *contravention of domestic habitats regulations, and therefore are fully covered by Article ((3). It is therefore indisputably an "Aarhus Convention Claim". The claimant is a member of the public of modest means who lives in the area where the alleged offence was committed. He, therefore, has sufficient interest in bringing the claim."*

15. Thus, the claimant applied for a protective costs order limiting his costs liability to £5,000. He sought, by the application for judicial review, an order quashing the decision under challenge of the magistrates' court. He also sought a declaration that the name change should be allowed on the summons as per the claimant's application and the case remitted to the magistrates' court for trial. He also sought an order that the defendant should pay the claimant's costs and a protective costs order as set out above.

16. Pursuant to CPR 45.42(1)(b), the claimant filed and served with the claim form a schedule of his financial resources, verified by a statement of truth, providing details of his assets, liabilities, income and expenditure. At paragraph 8 of this statement he referred to the fact that his solicitors had advised that his legal costs through to a one day substantive hearing could be in the region of £25,000 to £35,000 plus VAT and that he and his solicitors were in the process of completing a partial conditional fee agreement. He said that even assuming that that would be agreed he understood that his own legal costs through to a one day substantive hearing, if he was unsuccessful in the case, were likely to be in the region of £15,000 to £20,000 plus VAT.

17. He said that he was not able to fund this case from his own resources and he was relying on others in the local community to assist him. He said that he was in the process of setting up a fund-raising appeal web page to raise funds for the legal costs of the case. He had received assurances from members of the community and staff members of the Coal Action Network that he would not be left "holding the bag" and that these legal fees would be raised somehow, but he had only oral assurances. He said that considering the budget for his own side costs he was simply unable to endure further exposure beyond the £5,000 for opponent costs that he anticipated would be granted under cost protection rules.

18. The acknowledgment of service is dated 26th April 2019. It has attached to it at section C summary grounds for contesting the claim by the interested party. It contests the matter on numerous bases, to which I shall return, but at this stage I refer to what it has to say about the application for a protective costs order. At paragraph 5.1.2 it says that the interested party denies that the claim is an Aarhus Convention claim on the following grounds, namely that Article 9(3) provides: *"Members of the public too 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."*

19. However, the decision which the claimant is seeking to judicially review relates to the legality of the district judge's decision to refuse his application for an amendment to the name of the defendant on the summons. While the private prosecution itself related to provisions of national law relating to the environment, the decision which the claimant is seeking to judicially review does not. Further, the claimant does not seek to assert that a statutory time limit in environmental law prosecutions is unlawful or inappropriate.

20. It also says that the claimant has provided a statement of financial resources. Whilst the interested party accepts that the claimant may not be able to fund the case from his own resources, it refers to the passage to which I have referred about the extent to which the claimant was seeking to rely on others in the local community to assist him in helping to fund his own side's legal costs.

21. It says that the statement of financial resources does not refer to the crowd funding page which already exists and has raised £7,346 and estimates the cost of private prosecution at £10,000. That, it says, should be taken into account in considering the claimant's financial resources. It says that the interested party has already had to incur very substantial and unwarranted costs in dealing with the unlawful activities of individuals involved in a sustained campaign against it, including in relation to the private prosecution. It submits that it would be wholly unreasonable for the IP's cost recovery to be limited in circumstances in which there would be no application for judicial review, absent the serious and unjustifiable errors made by the claimant and/or his legal representatives in bringing the private prosecution.

22. Reverting to other aspects of the acknowledgment of service. The defendant says that the then solicitors for the majority of the defendants in previous trials were aware, or should have been aware, at the time of the issue of the prosecution of the correct identity of the interested party, not least because they should have been required to explain the terms of the restraining orders issued by the district judge to their clients: see paragraph 2.3.

23. At paragraph 3.1 the defendant says that the claimant does not have a sufficient interest in the matter to bring a judicial review claim. It draws attention to the fact that the claimant is a member of the public of modest means who lives in the area. It says that the weight of evidence indicates that the claimant may not, in fact, be the true claimant.

24. It draws attention to the fact that there had been a previous letter from Richard Buxton, solicitors now who act on behalf of the claimant in these proceedings, in which they acted on behalf of Coal Action Network.

25. There have been identified two pressure groups, one Coal Action Network, and another campaign to protect Pont Valley. There are also identified other people involved in this matter seeking to procure the authorities in the first instance to bring a prosecution, including a Ms Hall who describes herself as a campaign worker, apparently involved in both pressure groups. There is also reference to a Mr Langton who gave evidence in the previous trial presided over by DJ Cousins. It is said that there has been a sustained campaign of protest by both pressure groups

26. At paragraph 3.1.11, it is stated that Ms Hall attended the hearing at which the decision was made that the summons was issued against the wrong party and not the claimant. The submission was therefore made that the claimant does not have standing to bring the judicial review because the private prosecution and application is, in fact, being made on the part of the campaign to protect Pont Valley and/or the Coal Action Network and/or individuals who are orchestrating activities (including unlawful conduct) against the interested party.

27. It was further submitted that the claimant is, in effect, a front for those organisations and individuals who, by virtue of their previous actions towards the interested party, have demonstrated determination to cause harm and disruption to the interested party.

28. Mr Knox, who appeared as counsel on behalf of the defendant, put the matter in a number of different ways in the course of the hearing, supplementing these written matters. He said that the claimant was a front person behind a group of others. He also said that he was a nominee or a nominal claimant, nominal party. He also said that the real party was the various campaign groups, whose aim it is to cause harm and disruption to the interested party.

29. Returning to the acknowledgement of service, it was also said that the application should have been made by way of case stated rather than by way of judicial review. It was said that there was delay, albeit within the three-month period, as a result of which the application had not been brought sufficiently promptly and, therefore, was time barred. It was also said that there was no error or law and that the evidence demonstrated that this was a mistake as to identity and not mistake as to the name.

30. At paragraph 5.2.5, albeit under the heading of "Costs", the acknowledgement of service states that: *"The claim is frivolous and disproportionate and it is part of a wider campaign by a group who routinely seek to unlawfully disrupt the permitted activities of our client, promote their own aims through publicity to air their opinions and further their aims of crowd funding unmeritorious litigation."*

IV Response of the Claimant

31. There have been two replies. In the first of those replies to the interested party's summary grounds of resistance, dated the 8th of May 2019, at paragraph 9, it was said, in response to the matters regarding lack of standing, that the claimant lives close to the interested party's site, about 2.5 miles away, and regularly walks and runs in the surrounding countryside. It states that he was deeply concerned about the impact of the mine's activities on the local environment and landscape and was aware of the presence of Great Crested Newts on the site.

32. He participated in a protest outside the entrance to the mine on the 18th of May 2018 and attended the police station personally to report a wildlife crime. He, therefore, challenged the suggestion that he is not the real claimant or that he is simply acting as a front for other organisations. He said that the fact that he is receiving backing for his private prosecution is not improper, but he is receiving support from organisations who share his concerns.

33. As regards the alternative remedy of an application by a case stated, he states at paragraph 14 that there is nothing to say that judicial review cannot be used to challenge a final decision of the magistrates' court. Delay is denied and there is an extensive section in the reply dealing with delay. He also sets out matters relating to whether it is a mistake as to the identity of the party or a misstatement of the name at paragraphs 24 to 29.

34. At paragraph 30 he referred to the Aarhus Convention. It was stated that he has adhered to the rules about what has to be stated in the claim and he said that there is no

reference in the rules to the interested party being entitled to challenge the assertion by the claimant that this is an Aarhus Convention Claim.

35. Dealing with the substance of the matter, he goes on to make submissions at paragraphs 33 to 38 in relation to the Aarhus Claim, to which I shall return. There was then a second reply that was served on the 12th of May of 2019. At paragraphs 17 to 18 he, again, refers to matters relating to interpretation in relation to the application of the Aarhus Convention, to which I shall return.

V The decision on the application for permission

36. The application for permission then came on paper before HH Judge Belcher and she gave her ruling on the 14th of June of 2019. In summary, she gave permission for the judicial review application. However, she said that the claim was not an Aarhus Convention claim. In relation to the reasons for permission she said the following, namely that:

> *"(1) Recent Divisional Court decisions had provided that final jurisdiction decisions could be challenged, either by way of judicial review or by way of case stated, and so the fact that a decision had been to choose judicial review with a longer time limit was not, without more, a reason for refusing permission.*
> *(2) The claimant did have sufficient standing. Whilst there may be a group of concerned individuals in the background, a private prosecution cannot be brought by a group. The claimant had standing to lay an information and apply for a summons. On that basis he must have standing in this court when the challenge relates to the very prosecution which he has initiated. Whether or not the CPS may wish to take over the prosecution in due course has no relevance at this stage.*
> *(3) The relevance of any group in the background providing funding to the claimant goes to the issue of costs, rather than to the issue of whether the claimant had standing.*
> *(4) She considered that there was no merit in the interested party's claim that she should refuse permission based on delay in issuing the proceedings. They were issued within the three month time limit and the claimant was entitled to take time to get advice and to consider whether or not to proceed.*
> *(5) It was arguable that the district judge had failed to properly apply the agreed correct test as to whether there was a mistake as to identity or in the statement of name. This is not simply a challenge to the merits but is a challenge that the district judge had considered irrelevant matters and/or inaccurate matters when reaching her conclusions on that issue, such as when the claimant's solicitor knew or ought to have known of the error in the company name, the effect of Mr Sydenham purporting to act for the interested party, the relevance or otherwise of any non-compliance with the gateway provisions and the relevance of the non-existence of a company in fact named on the summons.*

> *(6) The interested party's argument that any amendment to the summons in the future to name the interested party as the defendant is an abuse of process and a breach of the Article 6 rights to a fair and public hearing within a reasonable time does not properly arise in this judicial review and arises for consideration, if at all, if the amendment is allowed and the matter restored in the magistrates' court."*

37. The decision of HH Judge Belcher then moved on to consider the Aarhus Convention and in that regard I quote the entirety of what she wrote, which was as follows:

> *"C asserts that this is an Aarhus Convention claim. In their AoS each of D and IP denies this is an Aarhus claim. Section E in D's AoS contains the denial and gives the grounds for such denial. This is sufficient challenge for the purposes of CPR 45.45(i)(a), notwithstanding the point is not further addressed in the submission of DJ Helen Cousins.*
> *I have considered Article 9 of the Convention on access to information, et cetera, and the European Court case of," and then she sets out the entire name which is in Slovak and can be obtained from the papers, "(case C-240/09) reported at 2012 QB 606, and referred to in C's reply to the IP's summary grounds. In my judgment, it is clear that Article 9(3) of the Convention is designed to secure rights of access for a challenge to a decision if the matters likely to be contrary to environmental law. The outcome for prosecution, that is the decision to either convict or acquit for alleged breaches of environmental law, does not affect the environment. That decision cannot be considered to be a decision contrary to environmental law. On the contrary, it is specifically a decision as to whether someone else has committed a criminal offence, which happens to arise out of an alleged breach of environmental law. The claim in this case is a challenge to matters of criminal law and procedure. I do not consider this to be an Aarhus Claim.*
> *If C challenges this, as set out in paragraph 3 above, the court can also consider the points raised by the IP as to whether C is being funded by others in the interest group, such that the cap, if applicable, should be £10,000 under CPR 45.43. If this is not an Aarhus Claim, then the issue of the provision of funding by others is open to the court to consider, in any event, when considering what, if any, costs orders shall be made."*

VI Claimant's submissions

38. The claimant's skeleton argument, written by Dr Paul Stookes, a solicitor advocate of Richard Buxton Solicitors, who appeared on behalf of the claimant, dated 15th November 2019 then submits why the reasoning which I have quoted about the limited application of

Aarhus is challenged. At paragraph 7 he says that the claimant contends that the judge erred in concluding that the outcome of a prosecution under the Habitats and Species Regulations 2017 does not affect the environment. If convicted the interested party will be sentenced for breaching the environmental regulations. The purpose of sentencing includes, among other things, to prevent further similar crimes being committed, and, so in the present case, to prevent further destruction of the habitats of protected species. It is also to prevent others from committing similar offences.

39. Having referred to paragraph 9(3) of the Aarhus Convention he also refers to subparagraph (4) which provides additional criteria for the administrative and judicial procedures to which members of the public are to have access under subparagraphs (1) to (3), namely:

> *"In addition and without prejudice to paragraph (1) above, the procedures referred in paragraphs (1), (2) and (3) above shall provide adequate and effect remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."*

40. At paragraph 11 he drew attention to the Aarhus Implementation Guide, written by the United Nations Economic Commission for Europe ("UNECE") comprising 282 pages devoted to assisting parties, officials and others to understand the practical application and effect of the Convention. At page 198 of the guide it affirms that criminal proceedings are within the scope of paragraph 9(3) of the Convention. It states:

> *"Article 9(3) gives the public access to administrative or judicial procedures. This provision potentially covers a wide range of procedure for "citizen enforcement". This may be ensured by granting members of the public standing to directly enforce environmental law in courts. The obligation can also be met, for example, by ensuring a right for members of the public to initiate administrative or criminal procedures."*

41. In the next paragraph the Implementation Guide cites the UK's decision to allow private prosecutions as part of its legal structure to meet its obligations under the Convention, stating that the United Kingdom allows for private prosecutions and explaining what that means. It then states: "Regardless of the particular mechanism, the Convention makes it abundantly clear that it is not only the province of environmental authorities and public prosecutors to enforce environmental law, but the public also has an important role to play."

42. At page 202 the guide referred to the findings of the Aarhus Convention Compliance Committee, which emphasised that Article 9(4) of the Convention applied to situations where a member of the public seeks to appeal an unfavourable court decision that involves the public authority and matters covered by the Aarhus Convention.

43. It was therefore submitted by Dr Stookes at paragraph 15 of his skeleton argument, that the conclusion that the instant claim is outwith the Convention because it relates to the criminal law rather than to environmental law per se, is inconsistent with the meaning the UNECE has given to the Aarhus Convention.

44. Further, he submits that the outcome of a prosecution for alleged environmental crime does affect the environment. A conviction under national environmental law for the unlawful destruction of habitat housing a European protected species has a bearing on the environment. A conviction acts as a deterrent against similar environmental crime. He submits that the relationship between the underlying criminal proceedings in this case and the environment is clear.

45. The interpretation of the Convention by the courts has been broad. In *Secretary of State for Communities and Local Government V Venn* [2014] EWCA Civ 1539, Sullivan LJ noted at paragraph 10 that the intent of the Convention is to make the scope of the environmental matters to which the Convention applies *"as broad in scope as possible"*. He also drew attention to other English case law to that effect. For example, a claim relating solely to legal costs in the context of a development consent order coming under the Convention itself was a Convention claim: see *R (Trago Mills Ltd) v Secretary of State for Communities and Local Government* [2016] EWHC 1792 (Admin).

46. The defendant's submissions, through Mr Knox, were not put in the same way as HH Judge Belcher. He said that there was no blanket rule that no private prosecution could come within the Aarhus Convention. He said that does not mean that every private prosecution of every act said to have involved the environment is an Aarhus case. He acknowledged that some cases might and some cases might not. It was fact sensitive and he did not put it as highly as the judge, either in writing or orally.

VII Interested Party's submissions

47. In written submissions of the interested party on the claimant's application for an oral hearing on the application of the Aarhus Convention dated 23rd July 2019 at paragraph 3.1.3, it was stated that: *"While the private prosecution itself related to provisions of national law relating to the environment, the decision which the claimant is seeking to judicially review does not. Notably, the claimant does not seek to assert that a statutory time limit in environmental law prosecutions is unlawful or inappropriate."*

48. That document at 3.1.5 contrasts the bringing of the private prosecution to enforce environmental law with the nature of this application. It states that this application seeks not to enforce the claimant's rights under the Aarhus Convention but to protect the claimant from the potential adverse cost consequences arising from his failure to properly conduct the private prosecution and, as such, the application represents an attempt to widen the scope of the protection afforded by the Aarhus Convention.

49. At paragraph 3.1.6 it agrees with HH Judge Belcher's view that the outcome of a prosecution for alleged breaches of environmental law does not affect the environment. This then connects with the other point made by Mr Knox that on the facts of this case this private prosecution, looking at its particular facts and circumstances, is not a matter which affects the environment. It goes on to say that the private prosecution hinges on the uncorroborated testimony of one individual by reference to a photograph of a single newt in a bucket and that the site is a newt habitat and that there is not evidence of damage to the environment and, therefore, that the environment will not be affected by the outcome of the private prosecution.

50. Mr Knox also relies upon the following matters. First, that this was a procedural mess of the claimant's doing. Second, that it comprised as proceedings to unscramble its own mess. See his skeleton at paragraph 2.11. Third, that the proceedings were not brought by the claimant for his own purposes, to which I have made reference above. Fourth, that it was an abuse of process. He says that it was part of a campaign to impose pressure and to harass. It was a campaign of the pressure groups and not of the claimant. It hinged on the uncorroborated testimony of the one individual, in the manner to which reference was made in the 23rd July 2019 document, and, again, echoing the document at 2.13, it was not to enforce the claimant's rights under the Aarhus Convention but rather to protect the claimant from potential adverse cost consequences arising from his failure to properly conduct the private prosecution.

51. The claimant should not, therefore, be financially rewarded with costs protection in an action to rectify his own serious mistakes in his conduct of a private prosecution, which it is submitted on behalf of the defendant is *"evidentially tenuous and vexatious in its aims"*.

VIII Discussion

52. HH Judge Belcher did not have the advantage of the citation of law and other guidance which has been put before this court. In particular, as will be noted, the matter of the application of the Aarhus Convention was one of a number of points before her, whereas it has been the focus of this hearing. The matters of argument that were put before her were in short compass. She had to decide other matters and her reasoning in relation to those matters, as to the arguability of them, was set out with admirable clarity.

53. With the benefit of the greater information that is now before the court I have come to the following conclusions. First of all, I am satisfied that the Aarhus Convention is capable of applying to private prosecutions relating to the enforcement of environmental law. I am satisfied that enforcement through a criminal prosecution may well have a salutary effect not only on a defendant but also on the public. Hence, it is the case that in the citations that have been referred to a private prosecution is regarded as an important tool to that enforcement. I accept the legal analysis of the Claimant which is set out at paragraphs 38-45 above.

54. Secondly, I am entirely satisfied that the enforcement here of the particular law that is referred to a matter of coming within the Aarhus Convention of contravention of provisions of the UK national law relating to the environment.

55. Thirdly, I am satisfied that it would be wrong to treat a procedural matter as being separate from a substantive case. The procedural matter is to unlock the door into which the substantive case is to be brought in relation to environmental law. Thus, it is the case that the whole purpose of the judicial review proceedings is in connection with the enforcement of matters of national law relating to the environment.

56. The suggestion was made that the application for judicial review was a matter not of the prosecution itself but a separate proceedings in judicial review in order to correct a matter relating to the name of the defendant. It was submitted that that matter of procedure is not the same as the prosecution of the criminal law matter, but is a matter of procedure not covered by the Convention.

57. In my judgment, the suggestion that one is to keep separate procedural matters from the substantive matters would be unworkable. For example, if it were the case that there was a need for an extension of time or for a relief from sanctions in particular proceedings relating to the environment, then those matters would be matters in order to challenge acts and omissions by private persons and public authorities in respect of provisions of national law relating to the environment. They would not be separate and distinct from the proceedings themselves.

58. There is an analogy of an appeal. The Aarhus Convention Committee stated that an appeal matter should be regarded as coming within the ambit of the provisions of the Aarhus Convention. So it is the case in relation to judicial review, which is effectively a route of appeal from the magistrates' decision in order to open the door so as to continue to seek to enforce the matter relating to the environment.

59. The rules provide that the application of the Aarhus Convention should be decided at this stage of the proceedings. The suggestion is made that the case is an abuse of process, either in the sense that the evidence is weak or that it is being used for some improper purpose or that it is limited to one newt or that it is part and parcel of some application to impose pressure and to harass. In my judgment these are not matters upon which the court is able to form a view at this stage. HH Judge Belcher formed the view that the abuse of process arguments did not prevent permission to be granted and said that abuse of process matters would only arise in the event that the judicial review application was successful and the prosecution was allowed to continue against the proper party. None of these matter affect my conclusion that the Aarhus Convention applies.

60. As regards the submission that the claimant is acting as a mere nominee, on the information currently before the court, I reject that submission. A private prosecution has to be brought by an individual. The claimant does have his own interest identified in the evidence as a local person with a concern for environmental protection. He alone has stuck his head over the parapet. He is the prosecutor. It is not the case that any pressure group is a prosecutor and, therefore, he is entitled to seek to have the protection under the Aarhus Convention. It is not contrary to the need to have such protection that there is some contribution which he has from other people. Looking at the figures, the contribution has now gone up from the sum to which I referred above to a sum in the evidence of £12,000 or so, but it still leaves the claimant very significantly exposed.

61. This is not a case where the claimant has not been candid as to costs. He has properly stated that he has the interest of others, that he is seeking crowd funding, and that if he was imprecise in his language about not identifying the fact that crowd funding had already been obtained as to a certain amount there is no reason to believe that any such precision was with intent to mislead.

62. In my judgment, for all these reasons I have come to the conclusion that the Aarhus Convention applies and, without prejudice to that, that the objections that it does not apply to a criminal law prosecution are wrong and the notion that these are some freestanding proceedings and this is simply a procedural matter is wrong. This is all part and parcel of the application to enforce the private prosecution and I, therefore, come to the view that the Aarhus Convention applies.

63. HH Judge Belcher, at the end of her judgment, said that if the claimant challenges her decision by having an oral application as to the application of the Aarhus Convention claim, then the court can also consider the point raised by the interested party as to whether the claimant is being funded by others in the interest group such that the cap, if applicable, should be £10,000 under CPR 45.43. Mr Knox on behalf of the Interested Party has confirmed that no application is made to vary the cap from £5,000 to £10,000. Accordingly, this does not arise for determination. [In drawing up the judgment, I have removed from the discussion where helpfully Mr Knox made this clear].

64. For all those reasons I allow the application. That, I hope, deals with all of the matters which have been put before me and I would ask the parties to draw up an order and agree an order.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

I confirm my approval of the above transcript
Mr Justice Freedman
12 February 2020