Private nuisance claims

Andrew Francis explains how the Convention can be invoked to help the weaker party protect its costs in David and Goliath situations

Andrew Francis is a practising barrister at Serle Court, Lincoln's Inn

'The Convention is applicable in the English courts (indirectly as part of the UK's international obligations) as part of our domestic law.'

Imagine the following chain of events. Canchester is a large cathedral city extending over about 5 sq m. It has a university and a specialist science park with an emphasis on research into acoustic engineering and lasers. A large redevelopment is proposed for the centre of Canchester, extending over 10 acres. The bulk of the redevelopment is to replace unattractive post-war buildings constructed where property had been destroyed by bombing raids in 1941. Most of the historic buildings, including the market hall and Georgian houses, and shops near the cathedral will be retained within the scheme. But some will be demolished with listed building consent. The scheme is highly controversial. Planning consent is to be obtained by the developer (Magnum Developments Ltd), and it can be assumed that this will be accompanied by environmental impact assessments, conservation area consents and proposed section 106 agreements. Canchester City Council (CTC) owns part of the site and will appropriate its land for planning purposes and then lease back those parts required by Magnum for the redevelopment. CTC has indicated that, if necessary, it will override adverse rights under s237 Town & Country Planning Act 1990. Those affected by the redevelopment have formed an action group called Canchester Residents Against Redevelopment (CRAR).

CRAR is concerned about the effect of the redevelopment in respect of noise, dust and rights of light. The noise caused by the demolition and excavation work and the initial building stages will affect properties within a radius of ¼ mile from the site. The dust, caused largely by demolition and excavation work, will affect residential and commercial properties and the cathedral within a radius of ½ mile from the site, with variations caused by wind direction and speed, which includes the science park. At this stage CRAR has been informed that amelioration works and enforcement of planning conditions will not prevent the impact of noise and dust. In addition the actionable interference with rights of light (which includes parts of the cathedral) is very serious, and on a conventional assessment of loss (book value) amounts to at least £3m.

Move forward five years. The development is beginning to take place in terms of demolition and excavation. The worst fears of CRAR have been realised. CTC is unwilling to enforce breaches of planning conditions, or exercise its powers under s79 Environmental Protection Act 1990 as regards noise and dust. The rights of light claims have been asserted, but proceedings have not yet been issued. As regards the noise and dust claims CRAR (and property interests affected) have been advised that a clear case lies in private nuisance. As regards rights of light the threat of an injunction is present and CTC is threatening to work with Magnum to override those rights under s237. The research at the science park is in jeopardy as the effect of the noise and dust, even within protected buildings, makes the research impossible to carry out. Takings from visitors are down at the cathedral and services cannot be held in the daytime during weekdays.

It is clear that action needs to be started to protect the property interests affected, with injunction and damages

claims as required. But the legal costs to individuals are likely to be very large and Magnum is a wealthy company; CTC can also afford to defend any claims against it, including judicial review of any use of s237. Legal aid is not available to anyone seeking to enforce their private rights (although it might be available for judicial review but with very tight conditions). After-the-event (ATE) insurance is prohibitively expensive and the premium will not be recoverable. For technical reasons a group litigation order (GLO) is not feasible under CPR Part 19 r10-15. In such circumstances the potential claimants have to consider costs protection on three fronts. First, costs protection within the costs budgets approved by the court under CPR Part 3 part II, or within the costs capping provisions of CPR Part 3 part III. Secondly, a protective costs order (PCO) following *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] (*Corner House*). Thirdly, by seeking costs protection under the Aarhus Convention 1998 (full title 'UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters'), which came into force in 2001 and has been ratified by the EU and the UK.

The first course may give no direct protection as it will simply limit the costs recoverable by either party in the event of the claim being successful, or unsuccessful. It will also be of limited use to the claimant as Magnum and CTC could make out a strong claim to their predicted costs, potentially at a very high level. The second course has the advantage of protecting the claimant against an adverse costs order, either in full, or up to a defined limit. But a PCO within the Corner House criteria does require the claimant (*inter alia*) to show that they have no private interest in the claim, which must raise issues of general public importance. While the latter condition might be met here, a claimant who seeks an injunction, or damages for private nuisance, or to compensate for interference with a right of light, will fall foul of the 'no private interest' condition. However recent authority (eg *R (Marina Litvinenko) v Secretary of State for the Home Department* [2013]) has stated that the existence of a private interest in addition to an important public interest (eg the preservation of the research at the science park, or worship at the cathedral) should not prevent the making of a PCO.

The third front requires adherence to the principles within the Convention which, if applicable, can give costs protection to the claimant. This raises issues which no developer, or public body engaging in development on a large scale, where private law property rights may be unlawfully infringed, can afford to ignore.

It can be said by way of background that those seeking to protect private property rights should be expected to take responsibility for the costs of doing so. If these rights exist they are private law rights and not public law rights deserving of special public protection; see *Hunter v Canary Wharf Ltd* [1997]. The standard advice to any party in a private nuisance claim, or where a right of light (or some other easement) is actionably infringed, or where there is a nuisance or annoyance under a covenant, is that costs will 'follow the event', and the general principles in CPR Part 44 r2 will apply. But, if it is applicable, the Convention may change that starting point and may cause the costs outcome to be different.

The Convention is applicable in the English courts (indirectly as part of the UK's international obligations) as part of our domestic law. In the context of private law claims relating to property rights, recent authority of the Court of Appeal in *Austin v Miller Argent (South Wales) Ltd* [2014] establishes the following main propositions.

i) That private nuisance claims are in principle capable of constituting procedures which fall within Article 9.3 of the Convention:

> In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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.

ii) That for such claims to fall within Article 9.3 there must be significant public interest in the claim to justify conferring special costs protection on the claimant.

iii) The claim must have a close link with the particular 'environmental matters' envisaged, but not defined by the Convention. These will include air, atmosphere, noise and the state of human health and safety (see Articles 1 and 2 of the Convention). Assistance as to what is 'environmental' or 'environment' is provided by 'Aarhus Convention: An Implementation Guide' (2013) (published by the United Nations Economic Commission for Europe (UNECE) 2nd edn 2013; available on www.unece.org). The intention of the Convention is to draw its scope broadly. In addition the claim must (if successful) confer significant public benefits and not merely limited or incidental ones.

Even if the Convention is engaged (see Article 9.4) it will be a matter for the court's discretion in deciding whether to grant a PCO.

iv) Even if the Convention is engaged (see Article 9.4) it will be a matter for the court's discretion in deciding whether to grant a PCO. In judicial review claims to which the Convention applies (eg a challenge to the use of s237) CPR Part 45 r41 and PD 45 para 5 apply to limit the costs of an individual claimant to £5,000, with a limit on the claimant of £10,000 in other cases, and a limit of £35,000 on defendants ordered to pay costs.

v) A defendant to a nuisance or similar claim cannot rely on the Convention to limit its liability for costs; see

Coventry v Lawrence [2014], at para 48, per Lord Neuberger.

vi) Art 11 of Directive 2011/92/EU (the Environmental Impact Directive revised by 2014/52/EU with effect from 15 May 2014, which reflects Arts 9.2 and 9.4 of the Convention) was not applicable to private nuisance claims. Further, a private nuisance claim was not one relating to EU law. A EU right (eg under the Habitats Directive) would have to be in play before the Directive could apply.

In *Austin* the claimant sued the defendant in private nuisance. Her claim related to the noise and dust coming from the defendant's land reclamation and landscape restoration work some 450m from the claimant's home in Merthyr Tydfil. With others opposing the defendant's work, she had attempted, but failed, to obtain a GLO. The court below found that the claimant was of modest means and legal aid would not be available. The claimant wanted protection against having to pay the costs if she lost and payment of her costs if she won. ATE insurance was prohibitively expensive. The claimant's was 'reasonably arguable', and there were others who would benefit from a successful outcome to the litigation. The court below refused to grant the claimant a PCO under either the Convention or the Directive. The Court of Appeal stated the main principles set out above and upheld the court below in declining to impose a PCO. The Court of Appeal found that there was a strong element of private interest and no evidence of significant public interest in the claim, thus conflicting with principle (ii) above. Secondly, there was no evidence that the claimant had pursued her statutory rights against the local authority; eg under s79 of the Environmental Protection Act 1990. These and other matters led to the claimant's appeal being dismissed. A cost capping order of £7,500 and £40,000 as to the claimant and defendant respectively was continued.

The Court of Appeal [in Austin*] found that there was a strong element of private interest and no evidence of significant public interest in the claim.*

In the example given above one can see that there may be a strong public element in the claims; eg to protect the science park and the cathedral. It may also be a case where CTC would be reluctant (as in cases where it is in effect a partner in the development) to use its powers to abate statutory nuisances.

The decision in *Austin* is an important one for property lawyers for the following three reasons.

First, because, where the Convention is engaged, it gives an additional weapon to the hands of claimants seeking to protect rights in cases where costs protection will be vital to the ability to pursue their claim. Secondly, because developers need to be aware that such costs protection may affect their ability to defend claims in economic terms. As a consequence, they need to be aware of how to defend applications where the Convention is invoked. *Austin* provides a clear guide for this. Finally, because in judicial review cases to which the Convention applies (eg where there is a challenge to the use of the section 237 power), CPR Part 45 r41 imposes a strict limit on recoverable costs. ■

Austin v Miller Argent (South Wales) Ltd [2014] EWCA Civ 1012

Coventry & ors v Lawrence & anor [2014] UKSC 46

Hunter & ors v Canary Wharf Ltd [1997] UKHL 14

R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192

R (Marina Litvinenko) v Secretary of State for the Home Department & ors [2013] EWHC 3135 (Admin)

Extracts from the Aarhus Convention

Art 2: Definitions

3. 'Environmental information' means any information in written, visual, aural, electronic or any other material form on:

   (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

   (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

   (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

Art 9: Access to justice

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

   In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

   Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

   (a) Having a sufficient interest

   or, alternatively,

   (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

   have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

   What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

   The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.