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The author asserts her moral rights generally in respect to this Witness Statement.

On behalf of: Claimant
Witness: G.Downs
5th statement
Date of statement: 3rd March 2009

C1/2009/0073

IN THE COURT OF APPEAL

Secretary of State for Environment, Food and Rural Affairs v Georgina Downs

FIFTH WITNESS STATEMENT OF GEORGINA DOWNS

1 I am Georgina Downs, of "Reflections", Runcton Lane, Runcton, Chichester, West Sussex, PO20 1PT and I am the Respondent in these proceedings. I make this, my fifth statement, to respond to points made in the second Witness Statement of Kerr Wilson, on behalf of the Appellant, dated 26th February 2009, which has been submitted for the Appellant's renewed application for a stay, which is listed for oral hearing on 4th March 2009. Except where otherwise stated, I depose to the truth of the facts contained in this statement from my own knowledge.

2 I would like to start this statement by pointing out that it has been written in limited time as a result of only receiving the Appellant's new material, (including Mr. Wilson's second Witness Statement and the Appellant's Skeleton Argument), on respectively Thursday 26th February and Friday 27th February 2009. The Appellant's new material was 197 pages in total. I would like to point out to the court that I object to its late delivery, but have done my best in the very limited time available, to set out in this fifth statement my response to some of the points made by the Appellant.

3 The second Witness Statement of Mr. Wilson, still fails to put forward any solid grounds for a stay. Yet again, as in Mr. Wilson's first Witness Statement, all the arguments put forward are based on concerns relating to *alleged* financial and economic impacts if there are any changes to the current pesticide approvals system.

4 Therefore all the reasons for refusing the Appellant's application for a stay, which were fully detailed in my fourth Witness Statement, dated 3rd February 2009, **[CB4/D]**, along with the accompanying submission from my Counsel, also dated 3rd February 2009, **[CB4/C]**, remain the same. Not only that, I would submit that they are strengthened even further, by the *continued* lack of concern displayed in Mr. Wilson's second statement in relation to securing the protection of public health, following such a significant and landmark High Court ruling, that found the Appellant failing in its legal obligation to protect human health (particularly rural residents).

5 In §2[1] of his second Witness Statement, Mr. Wilson has stated that amongst other things, *"The purpose of this second witness statement is to address some of the issues raised in the Respondent's witness statement served in opposition to the Appellant's application on 3rd February 2009…."*

6 However, despite this statement, Mr. Wilson really has *not* addressed the issues raised in my fourth Witness Statement, which were all predominantly related to the material risks to human health and acute and chronic adverse health impacts of those exposed to pesticides, in particular in this case, that of residents.

7 As said in §28 of my fourth Witness Statement at **[CB4/D/2]**, the recognised failure to protect public health, particularly that of residents, is a serious public health issue. Therefore the Judgment issued by Mr. Justice Collins is of significant public importance, especially for the potentially millions of residents throughout the country who, like myself, live in the locality to pesticide sprayed fields. There is simply no recognition of this fact in Mr. Wilson's second Witness Statement, (or as I have submitted previously, in his first Witness Statement).

[1] It should be noted that §1 of Mr. Wilson's second Witness Statement contains an inaccurate date reference as he has stated that the Judgment of Mr Justice Collins was *"handed down on 14th December 2008"*. However, the Judgment was actually handed down on 14th November 2008, (and the Order of Mr. Justice Collins was handed down on 15th December 2008).

8 The Court will be aware that the Appellant's application for a stay of the Judgment below has previously been refused both by Collins J, the trial judge, and by Laws LJ in this Court (on the papers).

9 When refusing the Appellant's application to this Court for a stay, Laws LJ directed as follows (letter from Civil Appeals Office dated 5th February 2009):

> "*1. I grant expedition (but consideration is to be given as to the availability of the respondent's counsel).*
>
> *2. I do not grant a stay, but that application can be renewed in court on notice (1 Lord Justice) if, notwithstanding the grant of expedition, there is a delay of substance."*

10 The position, as the Court will be aware, is that since that direction was given, the substantive appeal hearing has been listed for four days commencing on either 18th or 19th May 2009. That date is some five and a half months before the 'hear by' date of 2nd November 2009 which would have been assigned had expedition not been ordered. The date was fixed in circumstances where the Treasury Solicitor had previously stated its position as being that (provided a stay was granted) the Appellant would not object to a hearing being listed *"by the end of May 2009, at the convenience of both sets of Counsel"* (Treasury Solicitor letter to the Court dated 5th February 2009).

11 In his statement (§4), Mr Wilson suggests that there has been a *"sufficient period of delay"* since the decision of Laws LJ (given on the 5th February 2009)[2] to *"warrant troubling the Court further."* I do not accept that this is so given the circumstances as to listing the substantive hearing set out above.

[2] It should be noted that the Appellant's renewed application for a stay was premature, as it was made the very next day after the decision by Laws LJ and before the substantive hearing had been assigned any listing date.

12 Even more importantly, however, the Appellant has not pointed to any circumstance arising now (in March 2009) warranting any need for a stay which did not exist either as at the date of hand-down of the judgment (November 2008) or the subsequent handing down of the Order (December 2008), in which the stay was refused by Collins J, or at the date of Laws LJ's decision refusing a stay (February 2009). In those circumstances, there is nothing to justify taking a different course from that taken by Laws LJ and by the trial judge.

13 In §8 of his second Statement, Mr. Wilson states, *"Collins J has pointed out that it is not for the court to specify any particular action which Ministers need take."* This is in reference to the second sentence of §70 of the judgment in which Mr. Justice Collins states, *"It is not for me to specify any particular action he* [the Appellant] *needs to take."* **[CB1/K/27]**.

14 In §2(g) of the Claimant's response to the Defendant's submissions on remedies, costs and permission to appeal, dated 11th December 2008, it was pointed out that, *"It is respectfully submitted that the Judge in §70 plainly meant that it was not for him to specify any such action beyond that set out in the Judgment – otherwise the remainder of §70 would not make sense. The Defendant is wrong to suggest that this sentence renders the orders inappropriate."* **[CB1/D/2]**.

15 The rest of §70 of the Judgment quite clearly states, *"The result of this judgment is that the defendant must think again and reconsider what needs to be done…He must take steps to produce an adequate assessment of the risks to residents. In addition, he must carefully reconsider whether the existing conditions of use are adequate. The need to inform residents of intended spraying and of the composition of the pesticides to be used is I think clear. Voluntary action is not achieving this. Equally, I think there is a very strong case for a buffer zone, such as incidentally already exists to avoid spraying too close to watercourses in order to minimise the risk of pesticides entering groundwater."* **[CB1/K/27]**.

16 Therefore the statement in §8 of Mr. Wilson's second statement that, *"…Ministers remain concerned that it remains unclear from the Judgment as to what they are*

required to do in response to it…" is without proper basis. The Judgment of Collins J (§70), and his Order of 15th December 2008, clearly set out what is required

17 In §11 of his second Statement, Mr. Wilson states, *"Secondly, if there are to be changes in policy as Collins J is indicating…the Appellant would need to take advice from the expert committees it has available, including the Advisory Committee on Pesticides (ACP), and two Department of Health Committees: the Committees on Toxicity and Carcinogenicity of Chemicals in Food, Consumer Products and the Environment (COC and COT). Those Committees would need to scrutinize existing policy in the light of the criticisms made in the Judgment currently under challenge, and give appropriate advice."*

18 However, these are the very same committees that have continued to provide the advice to the Appellant regarding its policy and approach that has been found to be in non-compliance with Directive 91/414 EEC in the respects identified in the judgment.[3] Mr. Justice Collins recognised at §62 and §64 of the Judgment that criticisms leveled at certain advisory committees, (such as the ACP), could then result in that advisory committee having an interest in supporting its (original) advice (and thus maintaining its existing position).

19 §10 to §13 of Mr. Wilson's second statement do appear to be somewhat contradictory in places. For example, §10 said that the Appellant was *"looking again"* and that a stay would not affect that process.[4] However, in §11, Mr. Wilson says that any changes to policy would need to be on the basis of advice from its expert committees and then in §12 states that, *"The Appellant should make it clear that this complex process has not been initiated."* Therefore the "*looking again*" process cannot be with the serious intent of actually doing anything if the process which the Appellant says would need to be undertaken prior to any changes in policy has not been initiated.

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[3] See **Downs 2** §154(a); footnote 224; §156 to §163 and related footnotes. **[CB1/Q/113-118]**.

[4] Also what is said in §10 is in contrast to the Appellant's previous statement when seeking permission to appeal to Mr. Justice Collins for a stay of the order until further order of the Court of Appeal, as the reasons given by DEFRA for a stay then were *"to preserve the status quo pending any appeal or application for permission to appeal."* **[CB1/C/9 §32]**.

20 §12 then states, "*If required, it is likely to be time-consuming and expensive*." This again demonstrates the Appellant's primary focus being on financial considerations and concerns[5] as opposed to the overriding primary duty imposed by Directive 91/414/EEC (and UK equivalent legislation) regarding the protection of human health.

21 In a legal framework such as this, a balancing of interests is not permitted (eg. '*balancing'* harm (or the risk of harm) to human health with cost and economic considerations), and public health protection must be paramount. As pointed out in §204 of my second Witness Statement, at **[CB1/Q/139]** this has been previously recognised by the Appellant itself as in a Joint Memorandum submitted on 20th October 2004 by DEFRA and HM Treasury to an enquiry by the Environment, Food and Rural Affairs Committee it was stated that *"If there is scientific evidence that use of a pesticide **may** harm human health, that is considered unacceptable"* and that *"the system does not trade off the benefits and risks of pesticide use. If the risks are unacceptable, approval for use is refused, whatever the benefits."* **[CB2/H/1-2].**

22 §12 of Mr. Wilson's second Witness Statement goes on to state, *"Further consultation would be required if Ministers were minded to respond to the Judgment and consequent expert advice by the promulgation of statutory instrument(s)."* This does appear to be rather unfortunate wording, as it is not whether Ministers *"are minded"* to respond to a High Court Judgement that has found their policy and approach unlawful, but that they have to respond and act on it. This is about the UK Government complying with the requirements of the Directive. Also it is not clear who the "*consultation*" referred to would be with, but as I said §38 of my fourth Witness Statement, the Appellant should not be "*consulting"* with stakeholders (eg. industry) to see what they would *accept,* but acting to protect public health.

[5] See also **Downs 2** §192 to §194 and all related footnotes, as well as footnote 247. **[CB1/Q/133-135; 122]**.

23 §13 of Mr. Wilson's second Witness Statement states, *"It should be understood that the existing system is kept under continual review in any event…"* However, irrespective of what the Appellant says it may "*review,*" its approach and policy has not changed at all, as it is exactly the same as it was when I first started to present the case over 8 years ago regarding the fundamental failure of the current system to protect residents. Even more so, §127 to §152 of my second Witness Statement set forth the evidence to show that the reports of acute adverse health effects recorded every year in the Appellant's very own monitoring system, and which are part of the Appellant's so-called "*reviewing*" process have not been proactively considered and acted upon, (as recognised in §40 to §47 of the Judgment at **[CB1/K/12 and 18-21]**).

24 §13 of Mr. Wilson's second Witness Statement goes on to state, *"In the event that this appeal is successful, valuable resources will have been wasted by the Appellant who will have started to undertake a complex policy review at this stage."* There are a number of points in response to this statement: 1) Mr. Justice Collins said that he does not think that an appeal has a real prospect of success; 2) Mr. Wilson's statement again cites financial reasons to try and justify inaction (see previous comments in §20 and §21 above); and 3) in any event, the hearing is in approximately 2 months time and therefore any policy review will not have had the chance to incur significant costs in the time there is from now until the time of the substantive hearing. Also Mr. Wilson's aforementioned statement does not appear to fit with what he has said in his previous paragraphs, as he stated at §12 that this "*complex process…is likely to be time-consuming…*"; at §11 that "*if there are to be changes in policy as Collins J is indicating…the Appellant would need to take advice from the expert committees it has available"* and that *"[t]hose Committees would need to scrutinize existing policy in the light of the criticisms made in the Judgment currently under challenge, and give appropriate advice."* Aside from the fact that, as I stated earlier in §18 above, it would not appear to be appropriate to rely on advice from the very same committees that have continued to provide the advice to the Appellant regarding its policy and approach that has been found to be unlawful, the advisory committees that Mr.

Wilson has referred to in §11[6] of his second statement only meet approximately once every 2 months.[7] (In fact in the case of the Committee on Carcinogenicity (COC) they only meet 3 times in a year). The way that the advisory committees work is that they would need to have an item on the agenda for a particular meeting to be able to discuss it, and with a significant issue such as this (ie. the outcome of a High Court Judgment) then the advisory committees would have a series of meetings to be able, as the Appellant has described it, *"to scrutinize existing policy in the light of the criticisms made in the Judgment currently under challenge, and give appropriate advice."*

25 Therefore aside from the fact that public health protection must be paramount over and above matters relating to cost considerations, I simply do not accept the Appellant's argument that there would be significant costs incurred in the time there is from now until the time of the substantive hearing in May (18th or 19th to 22nd) if the Appellent commenced its policy review at this stage.

26 It is very significant to stress that if this complex policy review were to be the time-consuming process that Mr. Wilson has stated it would be, then if the Appellant's appeal is unsuccessful then critical time would have been lost in relation to taking *any* steps to secure the protection of public health. This would mean that it would then take *even longer* for the UK Government to take the necessary action to protect public health, in particular residents living near sprayed fields, children attending schools near sprayed fields, and others exposed to pesticides.

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[6] The Advisory Committee on Pesticides (ACP), and two Department of Health Committees: the Committees on Toxicity and Carcinogenicity of Chemicals in Food, Consumer Products and the Environment (COC and COT).

[7] For the 2009 meeting dates of the Advisory Committee on Pesticides (ACP), see http://www.pesticides.gov.uk/acp.asp?id=2580; for the meeting dates of the Committee on Toxicity (COT) see http://cot.food.gov.uk/cotmtgs/cotmeets/#y2009; and for the meeting dates of the Carcinogenicity of Chemicals in Food, Consumer Products and the Environment (COC) see http://www.iacoc.org.uk/meetings/index.htm.

27 The necessary action needs to be taken immediately to bring the UK policy and approach in compliance with the Directive. This is a High Court Judgement that has found the Appellant acting unlawfully and ruled that action must be taken to rectify that, so it cannot be cast aside and dismissed. (In addition, I would like to point out that the Appellant's policy review cannot be yet more consultations and advice from advisors for maintaining the status quo and thus *to do nothing*, as that is then just more of the same and would be completely unacceptable in view of a High Court Judgment that has found the UK Government's policy and approach unlawful).

28 The Appellant's response to the judgment is, moreover, inconsistent with previous categorical statements previously made by it (or on its behalf) regarding the *immediate* action that would be taken in relation to pesticide approvals if there is a risk to human health. A number of these statements can be seen in footnote 5 of my fourth Witness Statement at **[CB4/D/8]**. I cite again the Appellant's written statement in October 2004 as referred to in §21 above that "*the system does not trade off the benefits and risks of pesticide use. If the risks are unacceptable, approval for use is refused, whatever the benefits."* Therefore the Appellant's previous statements are clear that if there is a risk to human health then immediate action would be taken and pesticide approvals would be refused. It is highly noticeable that there is no reference or mention in *any* of the statements made by, or on behalf of the Appellant as cited in footnote 5 of my fourth Witness Statement at **[CB4/D/8]** to say that *before* any action is taken consideration first needs to be given to the economic and financial impacts on pesticide manufacturers, farmers, other industry stakeholders; or the impact on agricultural productivity (nor is there any reference to undertaking consultations or having to undertake "*time-consuming…complex policy reviews*."). There is no conceivable reason why the Appellant's response to the judgment of a senior High Court Judge should be less immediate than *its stated* reaction to, for example, the findings of its own advisors that there are risks to human health.

29 §18 of Mr. Wilson's second Witness Statement states, *"The Appellant would wish to make it clear that what it seeks is full clarity as to what its obligations are in the light of the Judgment, and – in the event that there is any doubt about this – a stay of the*

Judgment pending the hearing of this appeal." As said above at §13 to §16 the Judgment is quite clear that the Appellant must amend its policy in accordance with the Judgment, to comply with the obligations imposed by the European Directive. §70 of the Judgment concludes, amongst other things, that the Defendant *"…must take steps to produce an adequate assessment of the risks to residents."* **[CB1/K/27]**. This follows on from the Judge's comments about all the exposure factors and routes that need to be included in any assessment for residents at §25, §27 to §36, §39 of the Judgment, and therefore the Judge was quite clear in relation to one of the things that must be done, (amongst other things he recommended at §70), which is that DEFRA must produce a risk assessment for a residents specific exposure scenario. In the absence of any risk assessment for residents then pesticides cannot be approved for use under the Directive.

30 §20 of Mr. Wilson's second Witness Statement states, *"First, and in answer to the Respondent's witness statement, the Appellant strongly denies that it is seeking to subordinate public health considerations to the interests of pesticide manufacturers and approval holders. The entire premise of my first witness statement is that the Appellant continue to take the view, on advice, both legal and expert, that the existing approvals system safeguards human health as the paramount consideration."*

31 I would very strongly disagree with this assertion, as neither of Mr. Wilson's two Witness Statements show any concern for the protection of human health, in particular that of residents living in the locality of pesticide sprayed fields. As already stated at §3 and §4 above, Mr. Wilson's two statements are more concerned with the alleged economic and financial impacts on pesticide manufacturers, farmers, other industry stakeholders and on agricultural productivity. Considering the 5 exhibits that accompany Mr. Wilson's second statement and that total 182 pages out of the 197 submitted in the Appellant's new material are all related to impacts on agricultural productivity if there were any changes to the current pesticide approvals system, then the Appellant's primary concern and focus on the protection of industry interests as opposed to people's health really is very clear.

32 §20 of Mr. Wilson's second Witness Statement states, *"As Collins J has noted, the UK does at least as much as its EU counterparts in this regard…"* This is not correct and is somewhat misleading, as what Mr. Justice Collins actually said in §69 of his Judgment was, *"It is said on the defendant's behalf that the U.K.'s approach is stricter than that of many other Member States. That may be so but is not of particular materiality. I have had to consider what the Directive requires. I have been persuaded that there are defects in the defendant's approach which contravene the requirement of the Directive. If that means that other Member States are not complying, that is a matter for them, their citizens and perhaps the Commission."* **[CB1/K/27]**.

33 §20 of Mr. Wilson's second Witness Statement goes on to state, *"…and as I have already made clear, policy in this domain is continually evolving."* As said earlier, the Appellant's approach and policy has not changed at all in relation to the lack of *any* protection for residents, as residents are still being exposed in the same way and no action has been taken by the Appellant to protect the health of residents and others in the countryside from exposure to pesticides.

34 §21 and §22 of Mr. Wilson's second Witness Statement refer to the statement in the Appellant's Application Notice (N244) that stated *"…There are solid grounds for seeking a stay, which includes the fact that absent a stay DEFRA will have to suspend all activity on new approval applications, as well as a reduction in agricultural productivity of over 50%: see statement of Kerr Wilson (attached)."*

35 §22 of Mr. Wilson's second Witness Statement states, *"This statement was included in an earlier draft of the Notice as part of a serious attempt to assist the Court by explaining the consequences of the revocation of all existing approvals and the immediate cessation of the approvals process. However, the statement was omitted from the final draft notice as a consequence of legal advice that the Appellant was not required to stop approving pesticides, nor to revoke pesticides approvals already granted. Unfortunately, as a result of an administrative error, the earlier draft was filed with the Court."*

36 There are a number of points that arise from what Mr. Wilson has said in §22 of his second statement. First of all, it is unsurprising that the statement was removed from the final version as there was no evidence put forward to substantiate the claim and as said in §27 of my fourth Witness Statement there was no actual mention of the point in Mr. Wilson's first Witness Statement, despite the statement in the Appellant's Application Notice referring to Mr. Wilson's statement in relation to it.

37 Secondly, what Mr. Wilson has said in §22 of his second statement does not tally with a number of statements he made in his first Witness Statement. For example, in §22 of his second statement Mr. Wilson has referred to *legal advice* that the Appellant received *before* submitting the Appellant's Application Notice form *"that the Appellant was not required to stop approving pesticides, nor to revoke pesticides approvals already granted."* The Appellant's Application Notice form was submitted to the court at the same time as Mr. Wilson's first Witness Statement (as well as the Appellant's Notice and Skeleton Argument and accompanying materials) on 12th January 2009. However, Mr. Wilson's first Witness Statement contained firm assertions such as at §10: *"Without a stay PSD will have no option but to suspend activity on new approval applications, which will have commensurate financial and significant agricultural impacts on approval holders, distributors and farmers."* That was simply inconsistent with the legal advice which the Appellant *now* says it had by then received, to the effect that it was, according to §22 of Mr. Wilson's second statement, not required to stop approving pesticides. The correct legal position is of course that as set out at §60 of **Downs 2 [CB1/Q/62]** that correctly points out that *"pesticides are not supposed to be approved for use until risk assessments have been undertaken to establish that there will be "no harmful effect directly or indirectly" on human health. In the absence of any risk assessment for residents then it cannot possibly satisfy the applicable legal duties under Directive 91/414 and the equivalent UK legislation of establishing no harmful effect."* As stated earlier at §29, the Judgment found that residents (and others) are not protected under the Appellant's existing policy and approach and therefore Mr. Justice Collins concluded that the Appellant *"must take steps to produce an adequate assessment of the risks to residents."* **[CB1/K/27 §70]**.

38 §22 of Mr. Wilson's second Witness Statement states, *"Nevertheless, it is the Appellant's view that revocation of all existing approvals and the immediate cessation of the approvals process could lead to a reduction in UK agricultural production of this order of magnitude, as well as compromise food safety in a number of respects."* The use of the word "*could*" in this context is not definitive and thus further supports the point made in §7 of my Counsel's submission, dated 3rd February 2009, at **[CB4/C/3]** in response to the Appellant's application for a stay, in which it pointed out that it appeared that the Court was being asked (by the Appellant) to proceed on the basis of *potential* (rather than certain) ramifications of refusing a stay. Also it should be noted that the aforementioned statement contained very different wording to that which was in the Appellant's Application Notice (irrespective of the fact that the Appellant has said that the wrong draft was filed as a result of an administrative error) that made the *definitive* statement that "*absent a stay DEFRA will have to suspend all activity on new approval applications, as well as a reduction in agricultural productivity of over 50%..."*

39 As said earlier, Mr. Wilson has submitted 5 exhibits to accompany his second Witness Statement which it is said (at §22 of Mr. Wilson's second statement) are *"to support its* [the Appellant's] *view"* as to the *alleged* impacts on agricultural productivity if there were any changes to the current pesticide approvals system.

40 However, contrary to the *view* that there would be a vast reduction in yield if pesticides were not used, there are various international studies that would appear to counter this and a number of these studies were set out in §214 and §215 of my second Witness Statement at **[CB1/Q/145-146]**. In addition to those previous studies I highlighted, a recent study in Africa also showed an increase in yields from using organic and non-chemical methods. The article states, *"The research conducted by the UN Environment Programme suggests that organic, small-scale farming can deliver the increased yields which were thought to be the preserve of industrial farming, without the environmental and social damage which that form of agriculture brings with it. An analysis of 114 projects in 24 African countries found that yields had more*

than doubled where organic, or near-organic practices had been used. That increase in yield jumped to 128 per cent in east Africa."[8]

41 Therefore (and as concluded in §30 of my fourth Witness Statement) the Appellant's *continued* primary concern and focus, in its application for a stay, on matters related to the financial and economic impacts of any changes to pesticide approvals, simply does not justify solid grounds for a stay, as a) the Appellant should have complied with the law in the first place and had an assessment for residents (*prior* to the approval of *any* pesticide product); b) the Appellant should be doing everything possible to secure the protection for public health (and not continuing to excuse inaction by saying that making any changes to pesticide approvals would have financial and economic impacts and so cannot do it, as this is about DEFRA complying with the requirements of the European Directive that requires it to be established that there will be no harm to human health *before* approval); and c) the Appellant's arguments continue with the inapt and improper *balancing* (utilitarian) approach which is not permitted in a legal framework such as this.

42 The significant risks and important negative effects of granting a stay were set out in §29 of my fourth Witness Statement at **[CB4/D/8-9]**.

Conclusion

43 The Appellant's application for a stay should be refused for the reasons set out above; in my fourth Witness Statement, dated 3rd February 2009, **[CB4/D]**; along with the accompanying submission from my Counsel, also dated 3rd February 2009, **[CB4/C]**.

I believe that the facts stated in this witness statement are true.

Signed:

Georgina Downs

Date:

[8] Source: http://www.independent.co.uk/news/world/africa/organic-farming-could-feed-africa-968641.html