

WHAT DOES A COMMERCIAL LITIGATOR NEED TO KNOW ABOUT HUMAN RIGHTS?

Jonathan Crow QC
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STRUCTURE OF THE LECTURE

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I. HOW DOES THE CONVENTION WORK?

1. Form: the ECHR is an international treaty between governments containing a promise as to how they will treat those within their jurisdiction.¹
2. Structure:
 - (1) statement of rights;
 - (2) definition of exceptions.
3. Requirements for a lawful exception:
 - (1) legal basis;
 - (2) legitimate objective;
 - (3) proportionality.
4. ECtHR remedies:
 - (1) a victim² may petition to the ECtHR against the government;

¹ ECHR, Article 1.

- (2) ECtHR may grant ‘just satisfaction’³ – including declarations & damages – against the government.

5. Comment:

- (1) ECtHR judgments are always fact-specific;
- (2) the ECtHR allows a ‘margin of appreciation’ to the State in assessing proportionality;
- (3) the ECtHR cannot strike down national law;
- (4) the remedy it grants can never directly affect domestic law.

II. HOW DOES THE HRA WORK?

6. The HRA gives further⁴ effect in domestic law to the ‘Convention rights’ in Schedule 1: it does not make the ECHR part of domestic law as such.
7. There are two principal mechanisms under the Act for giving force to the Convention rights:
 - (1) The interpretative obligation⁵ under s. 3 + declaration of incompatibility under s. 4.
 - (a) a declaration of incompatibility does not strike down the legislation,
 - (b) but it triggers a statutory mechanism enabling the Secretary of State to make an amendment even to primary legislation in order to render it compatible:
 - (c) NB: the ECtHR’s ‘margin of appreciation’ translates into something similar in the domestic court – ‘deference’, ‘latitude’ *etc.*⁶
 - (2) The obligation on public authorities under s. 6 not to violate Convention rights + the remedies under s. 7 if they do.
8. Vertical & horizontal effect: as a result, the HRA is capable of having an effect both –
 - (1) on the legal relations between public authorities & subjects (vertical effect), but also
 - (2) on the legal relations between subjects *inter se* (horizontal effect).

² ECHR, Article 34: “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.”

³ ECHR, Article 41.

⁴ See the long title to the Act.

⁵ *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557; *Sheldrake v. DPP* [2004] UKHL 43, [2005] 1 AC 264, at §28.

⁶ *R (ProLife Alliance) v. BBC* [2003] UKHL 23, [2004] 1 AC 185, at §138; *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728.

9. What is a ‘public authority’ within s. 6 HRA?

- (1) The court.⁷
- (2) Other bodies,⁸ if and to the extent that their functions are of a governmental nature.⁹
- (3) Examples:
 - (a) a decision by Lloyd’s of London to approve minority buy-outs of 4 syndicates was not subject to HRA s. 6 duties because the relations between Lloyd’s & its members were entirely voluntary & contractual;¹⁰
 - (b) by contrast, decisions by the FCA will be subject to s. 6 because it is a governmental body.¹¹

III. WHICH CONVENTION RIGHTS ARE LIKELY TO BE ENGAGED IN COMMERCIAL WORK?

Introduction

10. The Convention rights most likely to be engaged are:¹²

- (1) A1.P1 – peaceful enjoyment of possessions;
- (2) Article 6 – fair trial;
- (3) Article 8 – private life;

⁷ HRA, s. 6(3)(a).

⁸ HRA, s. 6(3)(b).

⁹ *YL v. Birmingham CC* [2007] UKHL 27, [2008] 1 AC 95, at §25 – 26, §101 – 103, §165 – 167; *Aston Cantlow etc. PCC v. Wallbank* [2003] UKHL 37, [2004] 1 AC 546, at §7 – 12 & §88, both of which are discussed in *TH v. Chapter of Worcester Cathedral* [2016] EWHC 1117 (Admin), at §60 – 64. Relevant factors will include whether the body is publicly funded, whether it is exercising statutory powers, whether it is providing a public service, and whether it is fulfilling a function which central or local government would otherwise provide.

¹⁰ *R (West) v. Lloyd’s of London* [2004] EWCA Civ 506, [2004] 3 All ER 251, at §8 – 9.

¹¹ *Ibid* at §38. It will be interesting to see whether the concept of a ‘public authority’ under HRA s. 6 becomes aligned with the existing case-law on whether particular regulators are amenable to JR: contrast *R v. Panel on Take-overs and Mergers, ex parte Datafin* [1987] QB 815 with *R v. Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909; and see e.g. the judicial review in relation the FCA’s Independent Review of the mis-selling of Interest Rate Hedging Products: *R (Holmcroft Properties Ltd) v. KPMG LLP* [2016] EWHC 323 (Admin). See also the growing body of case-law from the Information Tribunal on ‘public authorities’ under the Freedom of Information Act 2000 and the Environmental Information Regulations 1999: e.g. *Network Rail Ltd v. The Information Commissioner* EA/2006/0061, *Smartsources v. The Information Commissioner* [2010] UKUT 415 (AAC), *Fish Legal v. The Information Commissioner* [2014] QB 521 (in the ECJ) and [2015] UKUT 0052 (AAC) (in the Upper Tribunal), *Cross v. The Information Commissioner* [2016] UKUT 0153 (AAC), and *Attorney General for the Prince of Wales v. Bruton* [2016] UKUT 0154 (AAC).

¹² Rarely, other Convention rights might also be engaged, such as Article 9 (freedom of religion / thought): see e.g. *Blackburn (t/a Cornish Moorland Honey) v. HMRC* [2013] UKFTT 525 (TC) (Seventh Day Adventist bee-keepers); *Black v Wilkinson* [2013] EWCA Civ 820 & *Hall v. Bull* [2013] UKSC 73 (Christian hotel operators). However, the likelihood in practice is relatively remote.

- (4) Article 10 – freedom of expression.

11. Under each heading, the two most important questions in the commercial context are:

- (1) What is the substantive content of the right?
(2) Can a commercial entity invoke the right?

Article 1 of the First Protocol¹³

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

12. Content of the right:

- (1) A1.P1 protects existing possessions, not the right to acquire new property.¹⁴
(2) The notion of ‘possessions’ is an autonomous ECHR concept – it is not limited to property rights recognised in national law:¹⁵ e.g. the fact of possession (without legal title) is itself capable of protection,¹⁶ as are the assets (including goodwill) of a person’s professional practice (but not the bare right or expectation of earning future income)¹⁷ irrespective of whether such entitlements are recognised under domestic law as ‘property’.
(3) A1.P1 confers a qualified right: it allows State interference – including the taking¹⁸ & even the destruction of property.¹⁹

¹³ The reason why this important provision is consigned to a Protocol is that, when the ECHR was being negotiated in 1950, the Attlee administration thought it might be used to prevent nationalisation, so its agreement was delayed. The Labour government’s concern proved unfounded, but nevertheless A1.P1 has allowed property owners whose businesses are nationalised or otherwise expropriated to demand reasonable compensation: see e.g. *Lithgow v. UK* (1986) 8 EHRR 329; *James v. UK* (1986) 8 EHRR 123.

¹⁴ *Marckx v. Belgium* (1980) 2 EHRR 330, §50; *Burden v. UK* (2008) 47 EHRR 38. An arguable claim which has not been pursued to judgment may not be sufficient (*Kopecky v. Slovakia* (2005) 41 EHRR 43), nor may a judgment on liability if it is not yet quantified (*Stran Greek Refineries v. Greece* (1994) 19 EHRR 293). A ‘possession’ must either exist already, or comprise a claim in respect of which there is a legitimate expectation that it will be realised: see *R (APVCO 19 Ltd) v. Revenue and Customs Commissioners* [2015] EWCA Civ 648, at §36 – 51.

¹⁵ *Pine Valley Developments Ltd v. Ireland* (1993) 16 EHRR 379.

¹⁶ *Holy Monasteries v. Greece* (1995) 20 EHRR 1. This might even afford protection to a purchaser in good faith of stolen goods: see by analogy *Jaroo v. AG of Trinidad & Tobago* [2002] UKPC 5, [2002] 1 AC 871.

¹⁷ See *R (Malik) v. Waltham Forest Primary Care Trust* [2007] EWCA Civ 265, [2007] 1 WLR 2092. The narrow scope of the domestic approach to possessions was recently criticised by the ECtHR in *JM v. UK* (app. no. 37060/06) 28.9.10, (2011) 53 EHRR 6. See also *Secretary of State for Work and Pensions v. M* [2006] UKHL 11.

¹⁸ *Lithgow v. UK* (1986) 8 EHRR 329; *James v. UK* (1986) 8 EHRR 123. Both were applied in *R (SRM Global Master Fund LP) v. Treasury Commissioner* [2009] EWCA Civ 788, [2010] BCC 558; [2009] UKHRR 1219,

- (4) In testing the lawfulness of State interference, a unitary test has been developed: the State can interfere if a ‘fair balance’ is struck between the private rights of the individual & the general interests of the community.²⁰
- (5) Temporary seizure (*e.g.* in the course of legal proceedings) is capable of involving an interference with possessions.²¹

13. Who can rely on the right?

- (1) A1.P1 is available to companies & unincorporated associations, as well as to individuals.²²
- (2) A shareholder *qua* shareholder can complain if the injury is to his shares as such.²³
- (3) Where a legal injury is suffered by a company, but a claim under A1.P1 is brought by a shareholder, the ECtHR’s approach to the problems posed by the principle of reflective loss has evolved over time, but it remains slightly more relaxed than that under English common law:²⁴
 - (a) The earlier case-law of the ECtHR held that, where an individual or group held a controlling interest in a company, they would have victim status under the ECHR,²⁵ but not a minority shareholder.²⁶
 - (b) However, the more recent case-law of the ECtHR adopts a stricter approach, saying that a complaint of financial injury to a company can only be brought by the company, other than in ‘exceptional circumstances’.²⁷

and the related ECtHR complaint in *Grainger v. UK* (app. no. 34940/10), (2012) 55 EHRR SE13 (the nationalisation of Northern Rock).

¹⁹ *Owen v. MAFF* [2001] EHLR 18.

²⁰ *Sporrong & Lönnroth v. Sweden* (1983) 5 EHRR 35. Any interference must be lawful as a matter of domestic law and consistent with the rule of law, although a margin of appreciation is accorded to national authorities: *NKM v. Hungary* (2016) 62 EHRR 33, at §46 – 51.

²¹ *Handyside v. UK* (1979-80) 1 EHRR 737; *R (Eastenders Cash & Carry) v. Revenue and Customs Commissioners* [2012] EWCA Civ 689.

²² See the wording of A1.P1 and also *Yarrow v. UK* (1983) 30 DR 155, 5 EHRR CD498; *R (Infinis Plc) v. Gas and Electricity Markets Authority* [2013] EWCA Civ 70.

²³ *Bramelid v. Sweden* (1982) 29 DR 64, (1983) 5 EHRR 249, and more recently *R (SRM Global Master Fund LP) v. Treasury Commissioner* [2009] EWCA Civ 788, [2010] BCC 558; [2009] UKHRR 1219 & *Grainger v. UK* (app. no. 34940/10), (2012) 55 EHRR SE13.

²⁴ As to which the leading case remains *Johnson v. Gore Wood* [2002] 2 AC 1. For a discussion in the domestic court of the ECtHR approach to reflexive loss, see *Humberclyde Finance Group Ltd v. Hicks* (unreported, 14.11.01), at §42 – 46.

²⁵ *Kaplan v. UK* (1980) 4 EHRR 64 (majority shareholder); *Pine Valley Developments v. Ireland* (1992) 14 EHRR 319, (1993) 16 EHRR 379 (sole beneficial owner, company in receivership).

²⁶ *Yarrow v. UK* (1983) 30 DR 155, 5 EHRR CD498.

²⁷ *Agrotexim v. Greece* (1996) 21 EHRR 250; *JW v. Poland* (app. no. 27917/95) 11.9.97; *Penton v. Turkey* (app. no. 24463/94) 14.4.98; *Credit & Industrial Bank & Moravec v. Czech Republic* (app. no. 29010/95) 20.5.9, (1998) 26 EHRR CD888. The Strasbourg jurisprudence on this point has recently been discussed in *Bank Mellat v. HM Treasury* [2016] EWCA Civ 452, at §22 – 31.

Article 6(1)

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

14. Content of the right:

- (1)** Express rights – these are unqualified:
 - (a)** fair trial;
 - (b)** public hearing;
 - (c)** independent & impartial tribunal;
 - (d)** within a reasonable time.²⁸

- (2)** Implied rights – these are qualified: *e.g.* the right of access to the court.²⁹

- (3)** The distinction between civil & criminal proceedings under Article 6 is an autonomous ECHR concept,³⁰ depending on:³¹ –
 - (a)** classification in domestic law,
 - (b)** the nature of the ‘offence’ &
 - (c)** the nature, severity & purpose (punitive / preventive) of the sanction.³²

- (4)** Not everything that is not criminal is necessarily civil: the concept of ‘civil rights & obligations’ started life as being confined to private law rights (not public law rights).³³

- (5)** Examples:
 - (a)** directors disqualification proceedings are civil;³⁴
 - (b)** regulatory & disciplinary proceedings –
 - do not necessarily involve disputes over civil rights & obligations, or a criminal offence;³⁵
 - where they affect a person’s ability to conduct a professional practice which is based on private client relations, they might well involve civil rights;³⁶

²⁸ *Mitchell & Holloway v. UK* (2003) 36 EHRR 52 (contractual dispute: 9½ years – violation); *Davies v. UK* (2002) 35 EHRR 29 (directors disqualification case: 5½ years – violation).

²⁹ *Golder v. UK* (1979-80) 1 EHRR 524; *Bank Mellat v. HM Treasury* [2013] UKSC 38.

³⁰ *Han v. Commissioners for Customs & Excise* [2001] EWCA Civ 1048, [2001] 1 WLR 2253; *R (McCann) v. Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787.

³¹ *Engel v. the Netherlands* (1979-80) 1 EHRR 647.

³² A heavy penalty (*e.g.* a substantial fine or disbarring order) does not of itself necessarily mean that the proceedings are criminal: *Brown v. UK* (1999) 28 EHRR CD233; *R v. FSA, ex parte Fleurose* [2001] EWCA Civ 2015, [2002] IRLR 297.

³³ *Ringeisen v. Austria (No. 1)* (1979-80) 1 EHRR 455. But see more recently cases such as *STEC v. UK* (app. nos. 65731/01 & 65900/01) 6.7.05, (2006) 43 EHRR 47, in which it was held that benefits under a non-contributory pension scheme could amount to a possession, & *Salesi v. Italy* 26.2.93 Series A no. 257-E, (1998) 26 EHRR 187, §19; *Schuler-Zgraggen v. Switzerland* 24.6.93 Series A no. 263, (1993) 16 EHRR 405, §46; & *Tsfayo v. UK* (app. no. 60860/00) 14.11.06, (2009) 48 EHRR 18, §39, in which it was held that disputes over entitlement to social security and welfare benefits fall within Article 6.

³⁴ *EDC v. UK* [1998] BCC 370; *Re Blackspur Group plc (No. 4)* [2006] EWHC 299 (Ch), [2006] 2 BCLC 489.

³⁵ *Engel v. The Netherlands* (1979-80) 1 EHRR 647, at §87.

³⁶ *Le Compte, Van Leuven & De Meyere v. Belgium* (1982) 4 EHRR 1; *Albert & Le Compte v. Belgium* (1983) 5 EHRR 533; *Brown v. UK* (1999) 28 EHRR CD233; *R v. FSA, ex parte Fleurose* [2001] EWCA Civ 2015; *R (Malik) v. Waltham Forest Primary Care Trust* [2006] EWHC 487; *Kulkarni v. Milton Keynes Hospital NHS*

- in principle, if the penalty is severe enough, they could conceivably be criminal.³⁷
- (6) Significance of the civil / criminal classification:
- (a) The requirements of Articles 6(2) & 6(3) in relation to criminal charges are more demanding than in relation to civil proceedings.
 - (b) Compelled evidence cannot be used in criminal cases,³⁸ but it can in civil.³⁹

15. Who can rely on the right?

- (1) ‘Everyone’ includes companies.
- (2) Earlier case-law indicated that even a minority shareholder could complain of a violation of Article 6 in relation to proceedings involving the company.⁴⁰
- (3) More recently, where a 90% shareholder of a company in liquidation complained about the length of proceedings in violation of Article 6, the ECtHR applied the *Agrotexim* test,⁴¹ but found that there were ‘exceptional circumstances’ allowing him to claim victim status on the facts of that case.⁴²
- (4) It has been suggested that a minority shareholder pursuing non-hostile corporate litigation should be able to rely on Article 6, in so far as it requires parties to litigation to have equal rights to access evidence & documentation, in order to obtain documents procured by the company at the instance of the controlling shareholder.⁴³ There is not an abundance of authority on this point, but the argument has been tried, & failed on the facts.⁴⁴

Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Trust [2009] EWCA Civ 789, [2010] ICR 101; *R (Puri) v. Bradford Teaching Hospitals NHS Foundation Trust* [2011] EWHC 970 (Admin); *R (G) v. X School Governors* [2011] UKSC 30, [2012] 1 AC 167; *Mattu v. University Hospitals of Coventry* [2012] EWCA Civ 641.

³⁷ But see the cases in footnote 32 above.

³⁸ *Saunders v. UK* (1998) 1 BCLC 362, (1997) 23 EHRR 313.

³⁹ *Re Westminster Property Management Ltd, OR v. Stern* [2000] 1 WLR 2230; *R v. FSA, ex parte Fleurose* [2001] EWCA Civ 2015, [2002] IRLR 297.

⁴⁰ *Neves e Silva v. Portugal* (1991) 13 EHRR 535, §39; *Ruiz-Mateos v. Spain* (1993) 16 EHRR 505.

⁴¹ See footnote 27 above.

⁴² *GJ v. Luxembourg* (app. no. 21156/93) 22.10.96, (2003) 36 EHRR 40.

⁴³ *Privileged litigants: shareholder rights, information disclosure and corporate privilege*, J Loughrey, J.B.L. October 2007, 778-806.

⁴⁴ *Harley Street Capital Ltd v. Tchigirinsky* [2005] EWHC 1897 (Ch), [2006] BCC 209.

16. Content of the right:

- (1) The notion of ‘respect’ is not clear-cut – it has a judgmental element that may be fact-sensitive.⁴⁵
- (2) ‘Private life’ is not necessarily confined to the home: it can also extend to the workplace,⁴⁶ including banking & financial arrangements.⁴⁷
- (3) ‘Correspondence’ is not confined to personal letters: it can also extend to records of financial transactions⁴⁸ & professional correspondence: in particular the confidentiality of communications between lawyer & client is protected as an important part of the right.⁴⁹
- (4) A fertile source of dispute is the balance that needs to be struck between the right to private life under Article 8 & the freedom of the press under Article 10.⁵⁰
- (5) The fact that evidence has been obtained in violation of Article 8 does not necessarily mean that its admission at trial involves a violation of Article 6,⁵¹ although it might, depending on the facts.⁵²
- (6) Evidence obtained in violation of Article 8, and which appears to have been obtained by fraud, may have to be disclosed where it would otherwise be covered by LPP.⁵³

17. Who can rely on the right?

- (1) Article 8 is most obviously available to individuals.
- (2) More controversially, companies can now rely on Article 8 as well.⁵⁴

⁴⁵ *Von Hannover v. Germany* (app. no. 59320/00) 24.6.04, (2005) 40 EHRR 1.

⁴⁶ *Niemietz v. Germany* (1993) 16 EHRR 97; *Buck v. Germany* (app. no. 41604/98) 7.5.02, (2006) 42 EHRR 21; *Aleksanyan v. Russia* (2011) 52 EHRR 18.

⁴⁷ *MN v. San Marino* (2016) 62 EHRR 19, at §51 – 55.

⁴⁸ *MN v. San Marino*, *supra*.

⁴⁹ *Campbell v. UK* (1993) 15 EHRR 137, §46-8; *Foxley v. UK* (2001) 31 EHRR 25, §43; *R (Prudential Plc) v. Special Commissioner of Income Tax* [2010] EWCA Civ 1094; *Akzo Nobel Chemicals Ltd v. European Commission* (C-550/07 P) [2011] 2 AC 338.

⁵⁰ *Von Hannover v. Germany* (app. no. 59320/00) 24.6.04, (2005) 40 EHRR 1. There has been a substantial number of recent cases on the balance between Articles 8 & 10: see *Re Guardian News and Media* [2010] UKSC 1, [2010] 2 AC 697, and the cases on super-injunctions (such as *Terry v. Persons Unknown* [2010] EWHC 119 (QB), [2010] 2 FLR 1306) which, after much public controversy, led to Lord Neuberger’s report. See also *Mosley v. UK* (app. no. 48009/08) 10.5.11, (2011) 53 EHRR 30, where the ECtHR revisited its privacy jurisdiction. For a recent high profile decision in this area, see *PJS v. News Group Newspapers Ltd* [2016] UKSC 26, which concerned the granting and continuation of an interim injunction relating to the extra-marital affair of a celebrity.

⁵¹ *Khan v. UK* (2001) 31 EHRR 45; *Perry v. UK* (2004) 39 EHRR 3.

⁵² *Allan v. UK* (2003) 36 EHRR 12.

⁵³ *Dubai Aluminium Co v. Al Alawi* [1999] 1 WLR 1964; *Kuwait Airways v. Iraqi Airways (No. 6)* [2005] EWCA Civ 286, [2005] 1 WLR 2734.

⁵⁴ *Société Colas Est v. France* (app. no. 37971/97) 16.4.02, (2004) 39 EHRR 17, at §41; *Kent Pharmaceuticals Ltd v. UK* (app. no. 9355/03) 11.10.05; *AEIHR & Ekimdzhev v. Bulgaria* (app. no. 62540/00) 28.6.07.

Article 10

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television and cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

18. Content of the right:

- (1) Freedom to receive information – this is expressly granted.
- (2) Freedom to impart information – the paradigm being the freedom of the press.⁵⁵
- (3) Freedom to obtain information unwillingly from other people? It was originally thought that this right was not conferred by Article 10.⁵⁶ However, more recently things may be changing.⁵⁷
- (4) As noted above, a fertile source of dispute is the balance between press freedom under Article 10, & the right to private life under Article 8.

19. Who can rely on the right?

- (1) Trading companies can rely on the rights guaranteed by Article 10.⁵⁸
- (2) An organisation (such as a trades union) cannot bring an *actio popularis* before the ECtHR challenging a measure on behalf of its members, but individual members of such an organisation who are directly affected by the measure can challenge it, even though it is legally directed against their employer.⁵⁹
- (3) A shareholder can bring a complaint about interference with the rights of his company.⁶⁰

⁵⁵ *Sunday Times v. UK* (1979-80) 2 EHRR 245 & (1992) 14 EHRR 229.

⁵⁶ *Leander v. Sweden* (1987) 9 EHRR 433, at §74; *Guerra v. Italy* (1998) 26 EHRR 357, at §53.

⁵⁷ First, there was Resolution 428 (1970) of the Consultative (Parliamentary) Assembly of the Council of Europe. Then came *Társaság a Szabadságjogokért v. Hungary* [2009] ECHR 37375/05, (2011) 53 EHRR 3. Cf the Supreme Court decision in *Re Guardian News and Media* [2010] UKSC 1, [2010] 2 AC 697, which did not mention *Társaság*, but did mention *Leander*. Then came the Court of Appeal, applying *Társaság*, in *Independent News and Media Limited v. A* [2010] EWCA Civ 343, [2010] 1 WLR 2262. See also *R (Guardian News and Media Ltd) v. City of Westminster Magistrates Court* [2012] EWCA Civ 420, [2013] QB 618.

⁵⁸ *Sunday Times v. UK* (1979-80) 2 EHRR 245 & (1992) 14 EHRR 229.

⁵⁹ *Purcell v. Ireland* (1991) 70 DR 262.

⁶⁰ *Groppera Radio AG v. Switzerland* (1990) 12 EHRR 321, §49-50, applied in *Monnat v. Switzerland* (2010) 51 EHRR 34.

IV. HOW ARE THOSE RIGHTS LIKELY TO HAVE ANY IMPACT IN PRACTICE?

The mechanisms by which the HRA can affect commercial cases

20. Ad hoc State intervention: where the State intervenes in the public interest (*e.g.* Railtrack, Northern Rock *etc*), it can only do so consistently with the Convention rights – *e.g.* by respecting the rights of shareholders to fair compensation for the value of expropriated shares by reference to A1.P1.⁶¹ The issues in these situations would normally be resolved by means of judicial review, rather than arising in private interest civil litigation.

21. Regulation: where the State exercises regulatory authority it can only do so consistently with the Convention rights, *e.g.* –

- (1) by ensuring a fair trial of director disqualification proceedings within a reasonable period of time by reference to Article 6;⁶²
- (2) by not imposing disproportionate penalties for defaults by reference to A1.P1;⁶³
- (3) by respecting a person's right to advertise when considering a licence application by reference to Article 10.⁶⁴

22. Contract – where one of the parties is a public authority:

- (1) The conduct of a public authority in entering into a contract may impact on someone's Convention rights.⁶⁵
- (2) The conduct of a public authority in not entering into a contract may impact on someone's Convention rights.⁶⁶

⁶¹ Recent authorities include *R (SRM Global Master Fund LP) v. Treasury Commissioner* [2009] EWCA Civ 788, [2010] BCC 558; [2009] UKHRR 1219 (compulsory acquisition by the State of shares in Northern Rock); *R (Sinclair Collis Ltd) v. Secretary of State for Health* [2010] EWHC 3112 and *Sinclair Collis Ltd v. Lord Advocate* [2011] CSOH 80 (judicial review of legislation banning the sale of tobacco from automatic vending machines); *AXA General Insurance Ltd v. Lord Advocate* [2011] UKSC 46 (challenge by insurers of legislation which would have increased its liability under contracts indemnifying employers for their negligent acts). In a similar vein, the older case of *Stran Greek Refineries v. Greece* (1995) 19 EHRR 293 involved a challenge to the Greek government's attempt to avoid an arbitration award by means of legislation: see in particular §74 – 88.

⁶² *Re Blackspur, Eastaway v. Secretary of State for Trade & Industry* [2007] EWCA Civ 425, [2008] 1 BCLC 153.

⁶³ *Bysermaw Properties Ltd v. Revenue & Customs Commissioners* [2008] STC (SCD) 322; *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728. The scheme for imposing penalties for the late filing of company accounts under s. 453 CA 2006 was held not to be an infringement of A1.P1 in *R (POW Trust) v. Chief Executive and Registrar of Companies* [2002] EWHC 2783, [2004] BCC 268, [2003] 2 BCLC 295.

⁶⁴ *Belfast CC v. Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

⁶⁵ *R (Heather) v. Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] HRLR 30, at §34.

⁶⁶ *R (Haggerty) v. St Helen's BC* [2003] EWHC 803 (Admin), [2003] HLR 69.

- (3) The HRA may impact on the interpretation of contracts to which a public authority is a party.⁶⁷
- (4) The HRA may impact on the permitted conduct of a public authority in the performance of a contract to which it is a party.⁶⁸

23. Contract – where neither party is a public authority problems will be encountered in invoking Convention rights,⁶⁹ either in relation to –

- (1) the existence of a contract,⁷⁰
- (2) the interpretation of express terms,
- (3) the introduction of implied terms,
- (4) the application of ‘norms’ in contracts,⁷¹ or
- (5) the operation of controls on contracts.⁷²

24. Statutory interpretation: where legislation impacts on contractual relations, the court should construe it in a manner that is compatible with the Convention rights.⁷³

25. Court’s discretion:

- (1) The exercise of the court’s discretion in relation to security for costs is now significantly shaped by the Convention.⁷⁴

⁶⁷ *Biggin Hill Airport v. Bromley LBC* (2001) 98(3) LSG 42 (reversed on other grounds [2001] EWCA Civ 1089). See also *Chitty on Contract* (32nd ed.), at §1-073.

⁶⁸ *Lee v. Leeds CC* [2002] EWCA Civ 6, [2002] 1 WLR 1488, at §26.

⁶⁹ There is an enormous amount of academic commentary on this: Craig on *Administrative Law* pp. 599-601; Hunt [1998] PL 423; Markesinis (1998) 114 LQR 47; Bamforth [1998] CLJ 159; Phillipson [1999] MLR 828; Buxton (2000) 116 LQR 48; Wade (2000) 116 LQR 217; McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification*, §9.28. See also *Khan v. Khan* [2007] EWCA Civ 399, [2008] Bus LR D73. There is also a closely related issue (illustrated by the recent Supreme Court decision in *Braganza v. BP Shipping Ltd* [2015] 1 WLR 1661), namely whether public law principles (such as proportionality) now have a role to play in purely private law contractual disputes, e.g. where one party is unilaterally exercising a contractual discretion which directly affects the other.

⁷⁰ It was argued unsuccessfully in *Smith v. Carillion (JM) Ltd* [2014] IRLR 344, at §64, that the ECHR & HRA required the court to abandon the usual common law rules for determining whether, in the absence of any express contract of employment, a contract should be implied.

⁷¹ For example, it might be suggested that the mutual trust and confidence required between employer & employee would be broken if the employer violated the Convention rights of the employee, even in the absence of any breach of contract: see for example *Monitoring employee communications: data protection and privacy issues* CTLR 2011, 17(8), 213-216; but see also *Pay v. UK* [2009] IRLR 139, (2009) 48 EHRR SE2.

⁷² For example, the test of ‘reasonableness’ under UCTA s.11, or the test of ‘good faith’ and ‘significant imbalance’ under regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083). See also *Braganza v. BP Shipping Ltd* in footnote 69 above.

⁷³ See for example *Wilson v. First County Trust Ltd (No.2)* [2003] UKHL 40, [2004] 1 AC 816.

- (2) Where the court has a discretion whether to grant interim relief, the impact of Convention rights may also be decisive.⁷⁵
- (3) In particular, the operation of search & seizure orders will engage Article 8, whether they are executed against domestic or business premises.⁷⁶
- (4) Where the court has a discretion to admit evidence, the fact that it was obtained in violation of a Convention right is capable of influencing the outcome.⁷⁷
- (5) Where the court has a discretion in relation to disclosure, the competing rights of the parties to a fair trial (under Article 6) & to respect for private life (under Article 8) may inform the debate.

26. Development of the common law:

- (1) Before the HRA was enacted –
 - (a) one school believed that Parliament legislates to the extent that it considers appropriate, & if it has not legislated then it is not for the courts to give effect in domestic law to the UK's international obligations;⁷⁸
 - (b) the other school was that municipal law ought always to be consistent with the UK's international obligations.⁷⁹
- (2) Since the HRA was enacted, the better view is that:⁸⁰
 - (a) where there is ambiguity or the common law is unsettled, it should be developed in light of ECHR law;⁸¹
 - (b) although the common law likes to pretend that it never does anything for the first time, the reality is that the ECHR can in effect prompt the development of entirely new torts,

⁷⁴ Can't pay = breach of Article 6 right of access to the court: *Ait-Mouhoub v. France* (2000) 30 EHRR 382. Security ordered solely on grounds of foreign residence = breach of Article 14 non-discrimination: *Nasser v. United Bank of Kuwait* [2001] EWCA Civ 556, [2002] 1 WLR 1868, & *Kazakhstan Kagazy Plc v. Zhunus* [2015] EWHC 996 (Comm), §189 – 190. For a recent review of the law in this area, see *Pannone LLP v. Aardvark Digital Ltd* [2013] 4 Costs LO 607, at §53 – 64.

⁷⁵ The heightened test in the HRA s. 12 (which protects the right under ECHR Article 10) contributed to the refusal of an injunction to restrain comparative advertising in *Red Dot Technologies v. Apollo Fire Detectors Ltd* [2007] EWHC 1166.

⁷⁶ *Bernh Larsen Holdings AS v. Norway* (2014) 58 EHRR 8. See generally *Niemietz v. Germany* (1993) 16 EHRR 97; *Buck v. Germany* (app. no. 41604/98) 7.5.02, (2006) 42 EHRR 21; *Aleksanyan v. Russia* (2011) 52 EHRR 18.

⁷⁷ *R v. Khan (Sultan)* [1997] AC 558.

⁷⁸ *Malone v. Metropolitan Police Commissioner* [1979] Ch 344; *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696; *R v. Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 QB 429.

⁷⁹ *Whitehouse v. Lemon* [1979] AC 617, at 665; *AG v. BBC* [1981] AC 303, 354; *AG v. Guardian Newspapers (No. 2)* [1990] 1 AC 109 (at 1st instance & in the CA); *Derbyshire CC v. Times Newspapers* [1993] AC 534.

⁸⁰ That was certainly the Government's intention: see Lord Irvine LC, Hansard 24th November 1997, HL col 783.

⁸¹ *DPP v. Jones* [1999] 2 AC 240; *Douglas v. Hello! Ltd* [2006] QB 125.

such as the misuse of private information (as opposed to the long-established equity-based claim for breach of confidence).⁸²

The areas of law in which the HRA can affect commercial cases

27. Misuse of private information – a potentially important consideration when it comes to monitoring internet usage *e.g.* in order to allow advertisers to tailor / target their advertisements to particular internet users.⁸³

28. Freedom of speech:

- (1) Freedom of the press *v.* right to private life.⁸⁴
- (2) Freedom of the press *v.* copyright.⁸⁵
- (3) Freedom of the press *v.* corporate defamation.⁸⁶
- (4) Commercial communications (including advertising, consumer pressure groups *etc.*) fall within the protection afforded by Article 10,⁸⁷ but the State has a much wider margin of appreciation to interfere.⁸⁸
- (5) Control of broadcasting: again, Article 10 applies, subject to a margin of appreciation in what to allow:⁸⁹ the breadth of that margin may depend on the identity of the intending broadcaster,⁹⁰ and ultimately it is always for the court to decide whether any restrictions are lawful.⁹¹
- (6) Publication of material disclosed in legal proceedings.⁹²

⁸² See *Vidal-Hall v. Google Inc* [2015] EWCA Civ 311, [2015] 3 WLR 409, §21 – 43, analysing *Campbell v. MGN Newspapers* [2004] UKHL 22, [2004] 2 AC 457 & *Douglas v. Hello! Ltd* [2006] QB 125.

⁸³ *Vidal-Hall v. Google Inc* [2015] EWCA Civ 311, [2015] 3 WLR 409.

⁸⁴ *PJS v. News Group Newspapers Ltd* [2016] UKSC 26; *Mosley v. News Group Newspapers* [2008] EWHC 687; *Mosley v. UK* (app. no. 48009/08) 10.5.11, (2011) 53 EHRR 30; *Re FI Call Ltd* [2013] EWHC 233 (Ch); *AAA v. Associated Newspapers Ltd* [2012] EWHC 2103.

⁸⁵ *Miss World Ltd v. Channel 4* [2007] EWHC 982.

⁸⁶ The Defamation Act 2013 (the impact of which is discussed in *Lachaux v. Independent Print Ltd* [2016] QB 402); *Jameel v. Wall Street Journal Europe* [2006] UKHL 44, [2007] 1 AC 359. Further, internet news portals risk becoming liable for comments posted on their websites if they do not have the correct controls in place: *Delfi AS v. Estonia* (2016) 62 EHRR 6, in particular at §112 – 117, §128 – 130 & §144 – 159.

⁸⁷ *Markt Intern Verlag v. Germany* (1990) 12 EHRR 161.

⁸⁸ *R (Core Issues Trust) v. TfL* [2014] EWCA Civ 34, [2014] PTSR 785, at §58; *Mouvement Raelien Suisse v. Switzerland* (2013) 56 EHRR 14, §61 – 63; *Belfast City Council v. Miss Behavin' Ltd* [2009] UKHL 19, [2007] 1 WLR 1420. See also *Jacobowski v. Germany* (1995) 19 EHRR 64; *Hertel v. Switzerland* (1999) 28 EHRR 534; *Casado Coca v. Spain* (1994) 18 EHRR 1 (regulation of an advocate's freedom to advertise).

⁸⁹ *Groppera Radio AG v. Switzerland* (1990) 12 EHRR 321, applied in *Monnat v. Switzerland* (2010) 51 EHRR 34.

⁹⁰ For example, the margin may be narrower in relation to a NGO drawing attention to matters of public interest: *Animal Defenders International v. UK* (2013) EMLR 28, at §100 – 105.

⁹¹ *R (Animal Defenders International) v. Secretary of State for Culture, Media & Sport* [2008] UKHL 15.

⁹² *Long Beach Ltd v. Global Witness Ltd* [2007] EWHC 1980 (QB), [2010] BCC 558; [2009] UKHRR 1219.

29. Employment: the collection & storage by an employer of information about employees & potential employees will involve an interference with Article 8, but it might be justifiable, depending on the circumstances.⁹³

30. Insolvency:⁹⁴

- (1) whether summary arrest & indefinite detention for breach of the Insolvency Act 1986, s. 364, was compatible with Article 5;⁹⁵
- (2) whether the offence of withholding books & records under the Insolvency Act 1986, s. 208, could lawfully impose a reverse burden of proof;⁹⁶
- (3) whether a voluntary arrangement under the Insolvency Act 1986, s. 260, was compatible with A1.P1;⁹⁷
- (4) whether delay in (i) the administration of a liquidation or bankruptcy⁹⁸ or (ii) the disposal of director disqualification proceedings⁹⁹ constituted a breach of Article 6 or A1.P1;
- (5) whether a reverse legal burden under the Insolvency Act 1986, s. 352 (which provides a defence of innocent intention in relation to certain bankruptcy offences) should be read down so as to impose an evidential burden only;¹⁰⁰
- (6) whether an order for the production of documents under the Insolvency Act 1986, s. 366, engages Article 8 where such documents involve business correspondence;¹⁰¹ and
- (7) whether an order to redirect a bankrupt's letters that included legally privileged material under the Insolvency Act 1986, s. 371, constitute a breach of Article 8.¹⁰²

31. Contracting out of ECHR rights:

⁹³ *Leander v. Sweden* (1987) 9 EHRR 433; *Hilton v. UK* (1988) 57 DR 108; *Home Office v. Tariq* [2011] UKSC 35; *City and County of Swansea v. Gayle* [2013] IRLR 768.

⁹⁴ See generally M. Simmon & T. Smith *The HRA 1998: The Practical Impact on Insolvency* (2000) IL&P 167; C. Gearty & S. Davies *Insolvency Practice & the HRA 1998* (Bristol: Jordan, 2000).

⁹⁵ *Hickling v. Baker* [2007] EWCA Civ 287, [2007] 1 WLR 2386.

⁹⁶ *R (Griffin) v. Richmond Magistrates* [2008] EWHC 84 (Admin).

⁹⁷ See *Bäck v. Finland* (2005) 40 EHRR 48 which concerned Finnish laws allowing for insolvency arrangements that operated to reduce debts owed by bankrupt individuals.

⁹⁸ *GJ v. Luxembourg* (2003) 36 EHRR 40 and *Luordo v. Italy* (2005) 41 EHRR 26. The question whether a claimant can recover damages for mental distress arising out of a breach of Article 6 in relation to the administration of a bankruptcy has been left open in English case-law: see *Oraki v. Bramston* [2015] EWHC 2046 (Ch), at §150 – 156.

⁹⁹ *Davies v. UK* (2002) 35 EHRR 29.

¹⁰⁰ *Attorney-General's Reference No 1 of 2004* [2004] 1 WLR 2111.

¹⁰¹ *Warner v. Vervides* [2008] EWHC 2609 (Ch).

¹⁰² *Foxley v. United Kingdom* (2001) 31 EHRR 25, *Luordo v Italy* (2005) 41 EHRR 26; *Smedley v. Brittain* [2008] BPIR 219; *Re A Bankrupt* [2012] BPIR 469.

- (1) Generally, it is difficult to contract out of the protection afforded by the ECHR.
- (2) However, a consensual submission to arbitration (thereby excluding the right of access to the court under Article 6, & limiting any right of appeal) is not incompatible with the HRA.¹⁰³
- (3) Where a person alleges duress as a basis for seeking to avoid a contract which contains an arbitration clause, even so he will be taken to have waived his Article 6 right of access to the court in relation to that dispute, unless duress was directed specifically to the arbitration clause (rather than to the contract generally).¹⁰⁴

V. CONCLUSION

32. So, the answer to the question “Does a commercial lawyer need to worry about the HRA?” is “Yes ... but only:

- (1) in order to recognise the (usually bad or unnecessary) ECHR points taken by the other side in domestic litigation,¹⁰⁵
- (2) in order to take advantage of the (usually rare) ECHR points that may be of use in domestic litigation,¹⁰⁶ and
- (3) in order to mitigate any commercial losses to the client,¹⁰⁷ or to vindicate a right that domestic law does not recognise,¹⁰⁸ by bringing a claim in the ECtHR against the State.”

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¹⁰³ *CGU International Insurance Plc v. Astrazeneca Insurance Co Ltd* [2006] EWCA Civ 1340, [2007] Bus LR 162; *Sukiman Ltd v. Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] Bus LR 1075; *Kazakhstan v. Istil Group Inc* [2007] EWCA Civ 471, [2007] 2 Lloyd’s Rep 548.

¹⁰⁴ *Nasharty v. J Sainsbury Plc* [2007] EWHC 2618.

¹⁰⁵ See for example *Hickling v. Baker* [2007] EWCA Civ 287; *Aqua Products Ltd v. Revenue and Customs Commissioners* [2013] UKFTT 340 (TC).

¹⁰⁶ See for example *Wilson v. First County Trust Ltd (No.2)* [2003] UKHL 40, [2004] 1 AC 816.

¹⁰⁷ See for example the efforts in *Pye v. UK* (2008) 46 EHRR 45 & in *Grainger v. UK* (app. no. 34940/10), (2012) 55 EHRR SE13.

¹⁰⁸ See for example *The Financial Times Ltd v. UK* (app. no. 821/03) 15.12.09, (2010) 50 EHRR 46, reversing the result in *Interbrew SA v. Financial Times Ltd* [2002] EWCA Civ 274, [2002] 2 Lloyd’s Rep 229, in relation to *Norwich Pharmacal* relief (*Norwich Pharmacal Co v. Customs & Excise Commissioners* [1974] AC 133).