

DOES THE HUMAN RIGHTS ACT AFFECT CONSTRUCTION DISPUTES?

Judge Anthony Thornton QC

**A Report on the Meeting of the Society of Construction Law on
5th October 1999 at the National Liberal Club, Whitehall Place, London**

Report by Anna Laney of Keating Chambers

A full capacity and somewhat curious crowd were present to hear His Honour Judge Anthony Thornton QC deliver his speech on 'The Human Rights Act ('HRA') and Construction Disputes', eager to discover the link between these two seemingly unrelated topics.

Before revealing the answer, His Honour began with a disclaimer, highlighting that all would be entering a 'brave new world' asking many questions the answers to which, until the Act comes in to force on 1 October 2000, can only be examined hypothetically. On the other hand, the opportunity to become Kings and Queens of that brave new world was there for all to seize.

The attainment of that sovereign state was, however, subject to three interrelated problems. First the novel nature of European Convention Rights, secondly the complexity, vast and opaqueness of the source materials and finally the fact that the way in which the Act will be interpreted is unknown. His Honour continued by explaining that whilst the relevant 'Convention Rights' were held by everyone able to invoke the jurisdiction of the English courts many of the rights in question can only be invoked by natural persons. Equally many of the Convention rights may not be capable of being enforced due to a lack of standing or remedy.

The focus of the evening was the core right provided by Article 6(1), the right to a fair trial, which has been regarded as having a position of pre-eminence. It should be noted, however, that the Court of Human Rights has stressed that the Convention must be read as a whole. Further, as it is a document which 'seeks to lay down an enduring scheme of government in accordance with certain moral and political values'¹ its contents are to be regarded as enshrining principals that are to be applied in a modern context, and not as a commercial document.

The rights the HRA embodies in English Law are stand alone rights. It is regarded as axiomatic that a citizen is provided with all the ingredients of a fair trial, the question is how far that de facto right is interfered with. The answer relates primarily to proportionality; whether any interference with the right in question is necessary in a democratic society with the legitimate aims of the Public Body whose acts have been questioned. This is complicated by a blurred distinction between the public bodies who must comply (who are defined simply

¹ Per Lord Hoffman in *Matadeen v. Pointu* [1998] 3 WLR 18, 35 G-H

as public authorities) with individuals protected rights and a private person who cannot be sued following infringement of such rights.

Whilst Section 2 of HRA provides what at first sight appears to be helpful guidance as to the sources to be considered when considering the width of Article 6, the reality is that there are many hundreds of judgements of the Court of Human Rights and thousands of opinions of the Commission which could be relevant. The best thumbnail summary of the weight to be given to such materials is as follows:

The older the decision, generally the less reliable a guide it is; A judgement of the Court is more authoritative than a decision of the Commission, which are more authoritative than those of individual members, which in turn supersede dissents; Particular attention should be paid to the reasons for a finding of no jurisdiction or no violation of the Convention.

The Human Rights Act 1998

The HRA, strictly speaking does not incorporate the Convention, instead it defines the procedures that must be used, and the bodies who are bound to adopt that procedure, if a Convention right is sought to be enforced.

Public bodies must not act in a way that is incompatible with the Convention, unless primary legislation requires that body to act in that contrary way. In deciding how to act a public body must do two things:

To take into account the relevant body of Strasbourg jurisprudence; To read and give effect to primary and subordinate legislation in a way that is compatible with relevant Convention rights.

An aggrieved person who complains his Convention rights have been infringed by a public body may seek a remedy against that public body from a court or rely on his convention rights in any legal proceedings. The court may grant such relief, remedy or make such order, as it considers just and appropriate. However, damages can only be awarded if the court has that power and considers such award necessary to afford satisfaction to the person whose rights have allegedly been infringed.

Preliminary Considerations

There are two primary preliminary considerations. Firstly, the interpretation of a Convention Right, should seek to place the alleged infringed right in the broad overall reality of the applicant's situation. Secondly, the exercise of the Convention right is subject to the principle of proportionality. In this context, as any limitation of a convention right may be justified on the grounds that such limitation is necessary in the interests of the community, it is also necessary to consider whether that limitation strikes a fair balance between the needs of the applicant and the needs of the community.

Three criteria must be satisfied before a limitation is capable of being justified: the legislative objective must be sufficiently important to justify limiting a fundamental right; the measures designed to meet the legislative objective must be rationally connected to that

objective; and the means used to impair the right or freedom must be no more than is necessary to accomplish the legitimate objective. Many of the questions arising in an English domestic context under the HRA will never have been addressed in a Strasbourg context. It is the overriding objective of the Convention, the open textured approach to interpretation and the inevitable considerations of proportionality, that will still have to be grappled with.

The Detail

His Honour went on to examine in enormous detail the provisions of Article 6. This is not the place for such a review, suffice to highlight the following:

Article 6 is concerned with civil rights and obligations. Where any such right is in question, the applicant is entitled to: access to a court that is both realistic and effective; to private contact with their legal representative; to a fair public hearing within a reasonable time: to a fair public hearing which embodies both equality of arms and a reasoned decision; and to a hearing that is by an independent and impartial tribunal that has full jurisdiction to examine the merits of the matter.

In the construction field these considerations will arise in considering whether adjudication, arbitration, compulsory ombudsman and other compulsory procedures are either subject to or, indeed, satisfy the requirements set out above. The exact requirement of each of these headings was then in turn considered the detail of which will appear when the full text is produced.

It is however possible for parties to waive their Article 6 rights, which is why, in 1980, the Court accepted that, ordinarily, the right to access to the courts is not infringed by arbitration proceedings. However, this waiver should be subjected to thorough review to ensure that the applicant was not subject to restraint, that recourse to arbitration was voluntary and was part of a contractual relationship to which the applicant could be considered to have agreed. In view of section 9 of the Arbitration Act, if a person had no option but to accept an arbitration clause (for example as a result of the tendering process or because an NHBC contract was used), then section 9 would, arguably, deprive that person of an entitlement to access to the courts.

The equality of arms is also likely to have a substantial impact in construction disputes. Each party must have a real opportunity of presenting his case and commenting on that of his opponents. For example, a situation where one party has no effective means of commenting on the others expert report is likely to put that party at a substantial disadvantage. This is especially so once civil legal aid is replaced by community legal service funding, and in the light of conditional fee arrangements in arbitration and adjudication.

The position relating to adjudication is particularly tricky. Even if not technically a tribunal, an adjudicator may well be said to be fulfilling functions of a public nature or is in the nature of an administrative decision-maker. This will result in the process having to provide the parties to an adjudication with Convention rights, which bearing in mind the nature of adjudication (for example that it is neither a public hearing or decision), may result in breaches of the convention. As regards failures to comply, there are three different types of failure:

Failures that arise from compliance with the HGRCA itself;

Failures that arise as a result of the adjudicator using powers provided for by the statutory scheme; and

Failures that arise as a result of the adjudicators own method of conducting the arbitration in question.

The appropriate remedy returns us once again to the principle of proportionality.

The Strasbourg jurisprudence available suggests that the state should provide limited scrutiny of arbitral award. It may be that the extremely limited rights of appeal provided by the Arbitration Act 1996 may be challenged for breaching the Convention.

Whilst there was insufficient time to examine the CPR in detail, His Honour felt it likely that the CPR, for the most part is likely to be immune from a general attack on their validity from a HRA standpoint, but many of them are capable of being attacked in relation to particular applications which have led to a failure to provide a fair trial. It is likely to reduce down to Proportionality Woolf style versus Proportionality Strasbourg style.

Conclusion

There are many topics where the HRA and the heady world of Construction Disputes converge, ranging from enforceability of final certificate provisions, particularly when of a procedural form which prevents the calling of evidence to show satisfactory completion of the works, to obligations of public bodies when seeking tenders for public works projects. The unknown is how judges, arbitrators, advocates, construction professionals and practitioners will answer these questions. His Honour concluded that the only certainty was that construction litigation would undoubtedly be affected by the Human Rights Act.

Debate

The variety of the questions asked in the following lively debate session proved how thought provoking the lecture had been and established there was undoubtedly a link between the HRA and Construction Disputes. Indeed, there was evidence of those seeking to conquer that brave new world immediately.

ANNA LANEY
Keating Chambers
10 Essex Street
Outer Temple
London WC2R 3AA