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ARTICLE 1 PROTOCOL 1 AND THE INSURANCE INDUSTRY – LESSONS FROM AXA AND THE WELSH REFERENCE CASE

Like Mount Everest, perhaps, Article 1 Protocol 1 ('A1P1') of the European Convention on Human Rights ('ECHR') is a tough nut to crack. Victories are rare; damages for breach are rarer still.

But, there are rays of sunlight here and there. One of the most interesting developments has been the use of A1P1 by the insurance industry in recent years. In two recent Supreme Court cases (both concerned with asbestos legislation) AXA General Insurance Limited and Others v. The Lord Advocate and Others [2011] UKSC 46 ('AXA') and Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales [2015] UKSC 3 ('the Welsh Reference Case') insurance companies raised important issues in relation to the scope and application of A1P1.

Although the outcome of each case was different (in AXA the insurers lost; in the Welsh Reference case they won) insurers secured important principles/outcomes in each.

In AXA it was held that the amount of money that insurers would be required to pay to satisfy their obligations under the insurance policies as a consequence of legislation - creating claims for victims of pleural plaques - challenged under the ECHR that would give rise to increased personal injury insurance claims against employers was a possession for the purposes of A1P1 (see, eg: Lord Hope at paragraph 28). That ruling in itself has significant implications for insurers and others for the future development of A1P1.

First, it means that the distinction between existing and future possessions (the latter not being actionable under A1P1) is blurred in the case of insurers. The Advocate-General had argued that there was no relevant interference with any existing possessions of insurers. The best articulation of why this argument failed was given by Lord Reed at paragraph 114 ('Legislation which has the object and effect of establishing a new category of claims, and which in consequence diminishes the fund, can accordingly be regarded as an interference with that possession').

Secondly, it had the contingent effect that insurers facing new claims of that kind were necessarily victims so as to be enabled to bring an A1P1 claim; the victim status of the insurers had been strongly contested but the Supreme Court held that it was beyond doubt that a very large number of claims

would be established against employers and that there was, therefore, the necessary direct effect for victim status.

Despite winning the battle and establishing significant rulings for future cases brought by insurers under A1P1, the insurer claimants (Appellants) in AXA lost the war in the sense that their claims failed on proportionality. The legislation in question was retrospective but even with the caution with which retrospective legislation is viewed by courts the Supreme Court held that the law was proportionate and so justified.

A stark contrast in terms of outcome was reached in the Welsh Reference Case. There, the Counsel General for Wales referred the Recovery of Medical Costs for Asbestos (Wales) Bill to the Supreme Court for a ruling as to its legality. The Bill sought to make those responsible for compensating asbestos victims (most notably employers) to pay the costs incurred by the Welsh NHS in treating those victims; it also sought to place the liability to make such payments on the relevant employer's insurers.

In part the new Bill operated retrospectively and the ABI, who intervened, submitted that A1P1 was breached as it would result in the re-writing of insurance contracts entered into long before the Bill was enacted.

The gateways in AXA (victim status and the existence of a relevant possession) were easily surmounted. Here, the Supreme Court went further and the majority rulings held that no special justification for the legislation has been shown. It distinguished AXA where there was special justification in that there was a perceived injustice directly affecting the victims of asbestos diseases. Here, by contrast, the legislative aim was simply to transfer a cost burden from the Welsh NHS to compensators and insurers.

It seems clear that at least in the context of insurance A1P1 has real 'teeth' in relation to retrospective legislation. The Welsh Reference Case suggests that the strongest justification will be needed for retrospective laws that for underlying commercial reasons seek to transfer financial burdens to insurers.

Richard Gordon QC

WHEN IS AN INTEREST IN PROPERTY A 'POSSESSION' FOR THE PURPOSES OF A1P1?

R (BREYER) V DOE [2014] JPL 1346 (COULSON J, JULY 2014), UPHELD BY THE COURT OF APPEAL, [2015] EWCA CIV 408, 28TH APRIL 2015.

The claimants in Breyer were in the business of installing solar photovoltaic panels (PV). In April 2010 the DOE introduced a scheme to encourage the low-carbon generation of electricity, including by solar PV, by which electricity companies made payments (a Feed-In Tariff (FIT)) to small-scale producers of low-carbon electricity. The incoming coalition government deemed these payments to be too generous and announced that the cut-off date for installations to be completed to qualify for the full FIT was to be brought forward, after which payments were to be drastically reduced. Hundreds of installations were abandoned at various stages of the formation of contracts, causing the claimants losses of £295 million. Coulson J held, as a preliminary issue, that contracts signed by both the supplier and the consumer by the cut-off date (although the installation was not complete) were 'possessions' under A1P1 because they were part of the marketable goodwill of the claimants' companies. However, unsigned contracts were not a 'possession' despite unchallenged evidence that a significant majority of these would have been signed and therefore had a commercial value to the claimants' business. The Court of Appeal agreed. Why?

The Strasbourg Court interprets the term 'possessions' as applying to vested interests in property but only to some interests that have not, or cannot for some reason, vest. A signed contract creates vested rights but one which has not yet been signed does not: its performance is contingent on further steps being taken that cannot be legally enforced.

The claimants argued that the unsigned contracts were part of the capitalised value of their businesses and therefore 'marketable goodwill', which the Strasbourg Court recognises as a 'possession'. Here they fell foul of the distinction the Strasbourg Court draws between marketable goodwill in a company, which is a 'possession', and an expectation of future income, which is not. The Court of Appeal recognised the force of the claimants' submission which was "grounded in sensible economic theory and the realities of commercial life", but still rejected it. The unsigned contracts constituted no more than a hope of future income. Goodwill was to be understood as the "product of past work … the present value of what has been built up. It is to be distinguished from the value of a future income

stream. From an accountant's point of view, this distinction may make little practical sense. But it is the distinction that has been clearly drawn by the ECHR for the purposes of A1P1." The unsigned contracts represented the value of a future income stream, not the value of what had been built up in the past, so were not a 'possession'.

The claimants argued, in the alternative, that they had a 'legitimate expectation' the FIT scheme would have continued to the original cut-off date, by which time the contracts would have been signed and they would have secured the benefit of the full FIT, and that this was sufficient to constitute a 'possession'. Legitimate expectation is a well-recognised concept in the A1P1 case-law: for example, in Stretch v United Kingdom, an option to renew a lease from a local authority was a 'possession' notwithstanding the grant of the original option was ultra vires the local authority's powers. The local authority had acted throughout as if the option was lawful and, having built on the land, the applicant had a legitimate expectation that the lease would be renewed.

However a legitimate expectation does not constitute a 'possession' in its own right; the underlying interest to which it attaches must itself be capable of constituting a 'possession'. Even if the claimants in Breyer had a legitimate expectation, there would be no 'possession' unless the unsigned contracts were capable of constituting a 'possession'. Because the unsigned contracts represented only a hope of future income, not marketable goodwill, there was no underlying property right to which a legitimate expectation could attach.

If there is an appeal I doubt that the Supreme Court will depart from the case-law that distinguishes between 'goodwill' and 'expectation of future income', but they may yet prefer the claimants' interpretation of what amounts to a 'marketable goodwill'. Watch this space.

Paul Bowen QC

THE DISTINCTION BETWEEN DEPRIVATION AND CONTROL OF USE

1. Article 1 of Protocol No 1 draws a distinction between a measure which deprives a person of their property and one which controls the use of that property. The distinction is an important one for claimants because a deprivation of property generally requires fair compensation to be paid to the owner. It is only in exceptional cases that a deprivation of property absent compensation will be held to be proportionate.

2. Indeed, the EU version of A1P1- Article 17 of the EU Charter of Fundamental Rights–expressly states that no one may be deprived of their property unless fair compensation is paid in good time for their loss. That provision does not appear to admit of any exceptions.

3. Where a measure leads to the transfer of ownership, there will always be a deprivation of property. This will be the case, for example, where land is expropriated.

4. But a transfer of ownership is not a necessary requirement. The question whether there has been a deprivation of property is one of substance and not form, to be assessed in light of the practical effect of the relevant measure. In Sporrong and Lönroth v Sweden (1983) 5 EHRR 35, the Court held as follows at para 63:

> *In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants.*

5. In Papamichalopoulos v Greece (1993) 16 EHRR 440, the Greek navy had, for many years, occupied the applicants' land, although it did not fomally deprive the applicants of their ownership. Nevertheless, because the applicants had not been able to use, sell, bequeath, mortgage or make a gift of the land during that period, the Court held that there had been a de facto deprivation without compensation and so Greece had violated A1P1.

6. The practical effects of a measure are therefore important. In Leonard Kelsall v Secretary of State for Environment, Food and Rural Affairs [2003] EWHC 459 (Admin), the Government conceded that the Fur Farming Prohibition Act 2000 resulted in the deprivation of the claimant's mink farming business. The business had not been expropriated but was rendered useless in practice.

7. A key question in cases where there has been no transfer of property will be the extent to which the measure permits the property to be used. The courts have tended not to characterise a measure as a de facto deprivation where elements of property use remain, albeit for different or less attractive uses. Thus, in Sporrong, the Swedish Government subjected the applicants' land to expropriation permits and construction prohibitions in the expectation that the land would be used for city centre regeneration. In the event the properties were never expropriated. The applicants claimed that they had been subject to a deprivation of their property because they had been unable to sell their land or build anything on it while the measures were in force. The Strasbourg Court held, however, that there had been no deprivation because, although the applicants' "right lost some of its substance, it did not disappear".

8. But this assessment will be one of fact and degree. In R (Mott) v Environment Agency [2015] EWHC 314 (Admin), the claimant owned a lease to fish salmon in an estuary. The Environment Agency served a notice restricting his annual catch to 30 salmon per year. The Court held that the claimant's property right was largely but not entirely extinguished because it could still be exploited and would have some small value. The measure had elements both of deprivation and of control but "given the extent of the restriction imposed... it is to be considered as closer to deprivation than mere control". Accordingly, the measure was unlawful because it did not provide the claimant with any compensation.

Marie Demetriou QC

SIMILARITIES AND DIFFERENCES BETWEEN A1P1 AND THE COMMON LAW RIGHT TO PROPERTY

1. As is well known, over recent years the Supreme Court has emphasised that claimants should rely on their common law rights, even where Convention rights also apply (see R(Osborn) v Parole Board [2013] 3 WLR 1020, paras 55-61 and A v BBC [2014] 2 WLR 1243, para 56). In Kennedy v Charity Commission [2014] 2 WLR 808, in particular, the Supreme Court held that "the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene" (per Lord Mance, with Lord Clarke and Lord Neuberger agreeing). This was reinforced by Lord Toulson (with whom Lord Clarke and Lord Neuberger also agreed), who stated that "there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary" (para 133).

2. With those words ringing in our ears, how does the common law apply to interferences with property rights? In particular, what are the similarities and differences between A1P1 and the common law right to property?

3. First, the right to property has a long heritage in the common law. It was included in the Magna Carta and recognised in strong terms in Blackstone's Commentaries. Over the centuries there has been no shortage of judicial endorsements of the importance of the right to property. In itself, this elevated treatment of the right to property (in theory at least) might be something of a difference compared to the A1P1 position. Whereas in Strasbourg there can be the sense that A1P1 is less important than other fundamental rights, the same is not so obviously apparent from the common law.

4. Secondly, under the common law there is a need for statutory authority in order for the State to interfere with property rights. Thus, for example, in Prest v Secretary of State for Wales (1982) 81 LCR 193, Lord Denning MR said that "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands; and then on condition that proper compensation is paid."(emphasis added) This principle has been repeatedly stated and endorsed by the courts. This is obviously different from the position under A1P1, which – provided the law is of sufficient quality – would be content with, for example, a common law power to take property.

5. Thirdly, as indicated in the passage from Lord Denning's judgment in the preceding paragraph, the common law right to property includes the presumption that compensation will be paid where the owner is deprived of his property by the State. This mirrors the importance of compensation in A1P1. In terms of statutory construction, the presumption of compensation is considered separately from the question of the interference with property rights: as is said in Bennion on Statutory Interpretation, p.751; "Although the intention to interfere with property or other rights may be plain, there may still be a doubt as to whether adequate compensation is intended. A denial of this must be clearly stated."

6. Fourthly, both A1P1 and the common law take a substance over form approach to interferences with property rights. Just as Strasbourg has repeatedly held that, in order to guarantee rights that are "practical and effective", it must "look behind the appearances and investigate the realities of the situation complained of" (Sporrong and Lönnroth, at [62]-[63]), so too the common law has emphasised that it looks at substance not form (see eg Lord Hoffmann in Grape Bay v Attorney General of Bermuda [2000] 1 WLR 574). In taking this real-world approach, the common law and A1P1 march in step.

7. Fifthly, and obviously, the main weakness of the common law is in the relief it offers. Common law property rights can be overridden by express statutory words; if this test is met, then the fight is over.

Victoria Wakefield

ASSESSING JUSTIFICATIONS FOR INTERFERING WITH PROPERTY RIGHTS: CONCEPTUAL CONFUSIONS

A deprivation, restriction or control of property rights can be justified in the public interest. So far so good. But how are courts to assess whether the justifications advanced by decision-makers for such interferences are acceptable ones?

This question has long-been – and in light of recent developments will continue to be – the subject of heated debate.

The issue was most recently addressed by Lord Mance (giving the judgment of the majority) in Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales [2015] UKSC 3 (the "Welsh Reference case").

It is settled law that a justification is to be assessed by reference to a four-stage test: (i) whether there is a legitimate aim which could justify a restriction, (ii) whether the measure adopted is rationally connected to that aim, (iii) whether the aim could have been achieved by a less intrusive measure and (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction.

Nevertheless, this test has not been easy to apply in practice.

First, the utility of this division is itself debatable, as it may be argued that it overcomplicates what is really a quite simple question: ie is there a relationship of proportionality between the legitimate means employed and the aims sought to be realised?

Next, the question of the standard of review to apply when assessing these stages appears to be different. The first stage is – Lord Mance explains – to be determined by asking whether the aim is "manifestly inappropriate" or not. This is probably true of the second and third stages as well (although as there is an express requirement for "rationality" in the second stage, it is unclear why this need be so). But it is not true of the fourth: [46]. Here, one does not ask whether the approach of the legislature is "manifestly inappropriate", but whether a "fair balance" has been struck between the various competing interests: [47], [51].

On this analysis, the legislature is apparently more equipped to decide what aims should be pursued in furtherance of the public interest than it is to assess the balance between those and other interests in deciding whether or not to proceed with the measure in question. Why this should be so is not explained.

What, then, is the test? The adjective "fair" has been smuggled into the phrase "fair balance" such as to afford some evaluative latitude. But fair how, and on whose measure? Lord Mance accepts at numerous points that appropriate deference (or "significant respect") must be given to the legislature: [46], [52]. However he does not articulate any test that might allow the legitimacy of the measure to be assessed.

It is, of course, generally true that the level of deference to be afforded to a decision-maker must vary with the context: see Neuberger LJ (as he then was) in R (Sinclair Collis Ltd) v Secretary of State for Health [2011] 3 CMLR 37 at [200]. But that truism should not obviate the need to establish what the actual and practical test should be for assessing any particular justification, a point made with force by Green J in Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media and Sport [2015] 1 CMLR 28 at [99]. This will only encourage subjectivity, inconsistency and unfairness in judicial decision-making.

Finally, Lord Mance also eschews any reliance on the concept of "margin of appreciation" on the basis that this is a concept applied by European courts to reflect the independence of State parties to their international obligations: [44]. There is nothing wrong with this approach if this is to be the new taxonomy; but that is not the way in which the language of "margin of appreciation" is often used. It is often used to connote a degree of deference to be afforded to the legislature in making decisions that may affect protected rights (see, for example, Green J in GBGA); that is, exactly the sort of deference with which the concept of margin of appreciation is contrasted by Lord Mance in the Welsh Reference case.

The present position is unsatisfactory from the point of view of legal clarity and certainty. It is nevertheless ripe to be exploited by parties on all sides in future proceedings.

Oliver Jones

INHERENT LIMITATION – INHERENTLY UNCLEAR?

When bringing an A1P1 claim, logically prior to the question of what type of interference has taken place (deprivation, control of use etc.) is the question of whether or not there has been an interference at all. This is often a neglected question.

The most difficult issue that can arise at this stage of the inquiry is the notion that there will be no interference where the putative restriction simply picks up on an "inherent limitation".

In simple terms, a right will be inherently limited when it was qualified at the point in time when it was acquired. The key question is whether the complained-of interference is in fact simply that ab initio qualification coming to fruition, or whether it is instead a supervening event. So, for example, there will be no interference with person A's lease of a field when person B walks along the footpath that cuts through that field if that right of way existed before person A leased the field. The right conferred in the lease is inherently limited. If, however, the local council creates the footpath during the term of person A's lease then it would seem that that is, at least prima facie, an interference with the lease.

A case that recently made use of this distinction is Sims v Dacorum Borough Council [2014] UKSC 63. Although not discussed in terms of inherent limitation, the Supreme Court felt it important that the appellant had lost his property right (a tenancy) according to the contractual terms of the lease - ie as a "result of the bargain that he himself made".

However, unfortunately it is not that always that simple. Two key decisions illustrate this. In Aston Cantlow Parochial Church Council v Wallbank, [2004] 1 AC 546 it was held that chancel repair liability attaching to a property amounted to an inherent limitation on the property right and so there was no interference when the owner was asked to repair the chancel. In contrast, in Pye v United Kingdom (2008) 46 EHRR 45 the Grand Chamber of the European Court of Human Rights found that the laws of adverse possession, which had in that case permitted squatters to take title over the original owners, were not an inherent limitation upon the possession of the applicant.

It is not clear why it should matter that the ab initio limitation is one that emanates from a legal regime (such as the laws of adverse possession) rather than, say, from a contract. Indeed, that

distinction breaks down all too easily when it is taken into account that some contractual and property rights that could interfere with a possession might come about not through express acceptance but rather through the operation of a legal regime. What if, for example, the right of way in the field example above came about as a result of an implied easement?

Perhaps the crucial difference is that in Aston Cantlow the chancel repair liability attached specifically to that property and that was known from the outset; whereas, in Pye, the laws of adverse possession applied across the board and only happened to operate on that owner because the persons to whom he had given a grazing right over his land continued to use it after the agreement expired (ie as squatters). It might have been different had he bought the property with the squatting situation already occurring.

However, there are so many legal regimes that can come to bear upon possessions (such as laws of compulsory purchase, consumer protection, environmental protection and possession proceedings) that it would cease to be sensible to ask which the owner knew in advance were likely to operate to his detriment. On the other hand, to accept that these legal regimes are inherent limitations on the right to property could be said to allow the doctrine of inherent limitation to become problematically wide. It is true that this would radically reduce the scope for A1P1 to operate. However, that does not mean that the distinction as it is currently drawn is logically sound. Whilst we may have to accept that the concept of inherent limitation is intrinsically slippery, that is somewhat concerning when it is operates so as to shut the applicant off entirely from relying upon A1P1.

Emily MacKenzie

1. DAMAGES FOR BREACH OF A1P1
2. RECENT CASES IN THE DOMESTIC COURTS

1. Damages are not customarily awarded for breaches of Convention rights. The Human Rights Act 1998 provides for a discretion to do so if it is "just and appropriate" (s8(1)) and in all the circumstances "necessary to afford just satisfaction" (s8(3)). Courts have stressed the importance of a finding of a violation and emphasised that compensation is "of secondary, if any, importance" (Anufrijeva v Southwark LBC,[1] [50],[53]).

2. However, courts will award damages if there has been significant pecuniary loss, clearly caused by a breach of a Convention right (Anufrijeva, [59]). Commercial A1P1 claims are particularly likely to fall into this category. A number of recent domestic cases have set out the approach in principle to such cases:

a) In GEMA v Infinis,[2] the Court of Appeal agreed with Lindblom J that damages based on the actual loss suffered by a company could be awarded in relation to accreditations for certificates for renewable energy.

b) In Breyer Group v DECC,[3] Coulson J's reasoning was cautiously approved by the Court of Appeal, such that damages were available in respect of a cut-off-date being brought forward for tariffs for installing solar panels.

c) In Bank Mellat v Her Majesty's Treasury,[4] Flaux J accepted that the claimant bank could claim damages for all its losses that had been (properly speaking) caused by a breach of A1P1 identified by the Supreme Court.[5]

3. These cases emphasise that domestic courts will follow the approach of Strasbourg, and award damages on the "basic principle" of restitutio in integrum. They give some indication of how far this will extend:

a) Difficulties in assessment will not preclude the award of damages (Coulson J, Breyer, [155]).

b) Damages are awarded for the actual loss suffered, which claimants will have to mitigate (Lindblom J, Infinis, [107]).

c) Damages are only granted for the loss suffered by the claimant itself, which will not include, for example, claims for reflexive loss by shareholders (Bank Mellat, [48]).

1 [2003] EWCA Civ 1406; [2004] QB 1124.
2 [2013] EWCA Civ 70: [2013] JPL 1037 (CA); [2011] EWHC 1873 (Admin) (HC).
3 [2015] EWCA Civ 408 (CA); [2014] EWHC 2227 (QB); [2014] JPL 1346 (HC).
4 [2015] EWHC 1258 (Admin).
5 Bank Mellat v HM Treasury (No. 2) [2013] UKSC 39; [2014] 1 AC 700.

d) Loss caused by the breach will be recoverable, including non-pecuniary and consequential loss, unconstrained by whether what is claimed as loss is itself a possession (Bank Mellat, [67],[78]).

e) The courts appear unconcerned by matters such as the impact of other claims for damages (Lindblom J, Infinis, [106]).

4. The domestic courts also appear to follow the Strasbourg approach to causation, such that the loss must have been "demonstrably and directly" caused by a breach of A1P1 (Coulson J, Breyer, [152]). This entails two elements:

a) There must be evidence to show the loss in question. In Strasbourg, lack of evidence has led to significant reductions in damages.[6]

b) The courts will apply tests of causation to claims of damages for loss. This is primarily a matter of fact (Court of Appeal in Breyer, [107]; Bank Mellat, [78]), although it will include commercial decisions taken in light of the decisions of public authorities (Coulson J, Breyer, [128],[157]-[158]).

5. These recent cases give useful guidance as to the approach the courts will take in principle. However, as the Court of Appeal emphasised in Breyer, individual cases will turn on their own facts ([107]). As none of the above decisions determined the precise damages available, it remains to be seen exactly how generous courts will be when applying these principles. Caution may be wise, as the Strasbourg caselaw has often fallen back on the "equitable approach" in cases of difficulty (see Anufrijeva, [66]), leading to large reductions in damages awarded in comparison to those claimed.

6. This is an area in which further development is likely. Yet these recent cases indicate A1P1's potential not only as a prospective tool to prevent a decision from taking effect, but also in providing some redress to those who have already been adversely affected by a breach.

Jennifer MacLeod

6 In East/West Alliance Ltd v Ukraine (19336/04), lack of evidence led to a grant of €5m for a claim of over €166m. In Centro Europa v Italy (38433/09), €10m was awarded to a claim for almost €130m.

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