



The Limits of Adjudication: The Impact of the European Convention on Human Rights

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INTRODUCTION – THE HUMAN RIGHTS ACT

This paper examines questions of human rights in relation to adjudication proceedings pursuant to the Housing Grants, Construction and Regeneration Act 1996 (“HGCR”). I start with a brief reminder of the legal framework by which human rights are taken into account in the United Kingdom.

The Human Rights Act 1998 (“HRA”) brought into English law what it calls “Convention rights”. These are the rights set out in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and certain protocols. The HRA sets out the text of the relevant rights and freedoms in a Schedule, so that it is not necessary to go back to the original Convention to see what they are.

By HRA s3, so far as it is possible to do so, legislation in the UK must be read and given effect in a way which is compatible with the Convention rights. The cases on s3 have shown that the possibilities of doing this go a very long way – much further than in traditional methods of interpreting statutes.

Under HRA s4 Courts can make a declaration that a statutory provision is incompatible with Convention rights. Because of s3, this is not a common event. In the first 11 years after the HRA came into force Courts made 27 declarations of incompatibility; eight of those were overturned on appeal, leaving 19 standing. In *R (Nasseri) v Home Sec* [2009] UKHL 23, the House of Lords said that the structure of the Act showed that declarations of incompatibility were intended to be a last resort.

By HRA s6 public authorities, including Courts and Tribunals, must not act in a way which is incompatible with a Convention right, unless required to do so by primary legislation.

By HRA s7 a victim or potential victim of an act which is unlawful under s6 may rely on the Convention right in any legal proceedings.

CHALLENGES TO ADJUDICATION BY RELYING ON ARTICLE 6

Early challenges to adjudication on human rights grounds were focused on Article 6 of the Convention, which is the right to a fair trial. Article 6 stipulates that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The European Court of Human Rights examined the requirements of article 6 in an important case from the Netherlands: *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213, ECtHR. If you think English or Scots law is sometimes crazy, comfort yourself with the thought that we are by no means the worst, as this case shows.

In *Dombo Beheer* there was a dispute between a Dutch company and a Dutch bank over an oral agreement. The agreement was alleged to have been made between the managing director of the company and a branch manager of the bank. Dutch law at the time prohibited parties to proceedings being heard as witnesses. When the matter came to court, the managing director had been replaced and was no longer employed by the company. The branch manager of the bank, on the other hand, was still in post. One might wonder in that situation how the rule against parties being witnesses could be applied in a way that was fair to both sides. What the Dutch court did was to refuse to allow the company's former managing director to give evidence, because of the rule against parties being witnesses. Because he used to be the managing director, his testimony could not be received on behalf of the Company. But the court received the testimony of the bank's branch manager, because he was only a branch manager: because of his lowly capacity, he did not count as a party, so his evidence was admissible. Having received only the bank's witness evidence, and not the company's, the Dutch court found in favour of the bank's version of events. The company complained to the European Court of Human Rights.

The European Court first held that the word 'everyone' in Article 6 includes corporate bodies, such as the company. A limited company is entitled to human rights under this Article. The Court also held that a fair hearing requires equality of arms, and that this principle was breached by the imbalance as to witnesses. So the Dutch proceedings did not meet the standards of Article 6.

The adjudication process, like those Dutch proceedings, does not meet the standards of Article 6. The shortfall is in four respects. (1) Adjudication is capable of being unfair. It does not meet the requirement of equality of arms, because the referring party can prepare at leisure, while the responding party has only a matter of days to respond. This inequality is compounded by the fact that the referring party has a one-sided veto over whether 14 days may be added to the timetable¹. (2) The hearing is not in public. (3) The adjudicator is not required to be independent but only impartial. (4) The adjudicator is probably not a 'tribunal established by law' (although there is room for argument on that point).

However, it has been held in the English courts that the adjudication process is not required to meet the Article 6 standards, because Article 6 does not apply to it. The adjudicator's decision is only provisional and temporarily binding, and thus is not determinative of the right in question: *Elanay Contracts Ltd v The Vestry* [2001] BLR 33. Moreover, an adjudicator is not a public authority, so is not under a duty to comply with art 6: *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] BLR 272. This is firstly because he is not a 'tribunal in which legal proceedings may be brought' within the definition in HRA s21, and secondly because he is not a public authority on any other basis. Since under HRA s6 the obligation to act

¹ See *Emden's Construction Law* [24.28], [24.33], [24.34].

compatibly with the Convention rests on public authorities only, an adjudicator is not bound to act in accordance with Art 6 or any other convention right.

A1P1

So we see that Article 6 does not apply to the adjudication process. But this does not mean that no human rights challenge can be mounted to adjudication, as the Scots have recently shown us in *Whyte and Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd* [2013] CSOH 54.

The new whisky bottling hall at Grangemouth was finished in 2006. Whyte and Mackay spent £15 million building the plant. They employed Blyth and Blyth as consulting engineers. Cracks appeared in the bottling hall and elsewhere, attributed to defective foundations. Whyte and Mackay formulated a professional negligence claim against the engineers and took it to adjudication.

The circumstances of the case were unusual. The claim was pursued in adjudication a number of years after the completion of the project. The defects did not prevent the use of the premises. Whyte and Mackay were leaseholders of the premises on a long lease. The majority of the claim was for the cost of future remedial works and associated losses which would be incurred just before the end of the lease in the years 2035-2036. In other words, Whyte & Mackay would have to reinstate the floor of the bottling hall in time to hand the property back to the freeholder in 2036.

The engineers relied on a causation defence, which went like this. At the design stage there was a value engineering exercise. As part of that exercise the engineers removed piling from the design in various areas, on instructions from Whyte & Mackay. The engineers admitted that they had never put piles in the design for the bottling hall in the first place, but they contended that, if they had put them in the design, Whyte & Mackay would have insisted that the piles be taken out again in the value engineering exercise.

The adjudicator awarded nearly £3 million, but on his own findings, because of the saving of the costs of piling other areas, it would be many years before Whyte & Mackay were out of pocket.

Having received the adjudicator's award, the engineers contended that there would be an unjustified interference with their possessions contrary to what human rights lawyers call 'A1P1', which is article 1 of the first protocol to the Convention. A1P1 provides:

“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.”

A1P1 is not something that we normally come across in the field of construction law. The only time I have ever previously had to consider it in detail was when sitting in the Upper Tribunal in the case concerning Northern Rock, the failed Building Society. The shareholders were challenging the terms on which the Government took their shares into public ownership without paying compensation. That, of course, had nothing whatever to do with construction law. It is perhaps of interest to note that in the *Whyte and Mackay* case the Scottish QC who raised the A1P1 argument, James Wolffe, is not specifically a construction lawyer; as is not unusual in Scotland, he has a wide practice in both commercial law and public law.

The human rights challenge which he mounted was not to the legal provisions under which the adjudicator acted; instead, he advanced a more subtle argument. He said that because of A1P1 the court should not enforce the decision in the particular circumstances of the case.

Logically the first question² was whether enforcing the decision would deprive the engineers of their possessions, to the tune of nearly £3M. Whyte & Mackay argued that it wouldn't, because the engineers were insured. The Scottish Judge, Lord Malcolm, decided that the engineers' professional indemnity insurance was irrelevant, and had to be ignored. That was so, even though insurance was required by the engineers' terms of engagement. He also pointed out that, even if the insurance were taken into account, there could be no guarantee that Blyth & Blyth's assets would 'remain wholly unaffected'. Blyth & Blyth's PI policy had an excess, there could be an impact on future insurance arrangements, and problems could emerge as to the validity of the cover or the solvency of the insurers themselves. So Lord Malcolm held that forcing the engineers to pay the award would be an interference with the engineers' possessions.

The main question for the court was whether this interference was a breach of A1P1. Based on the authorities interpreting the Convention, especially a Supreme Court case called *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, the question for the court was whether the interference with the engineers' possessions was in accordance with the law, and whether it pursued a legitimate aim by means that were reasonably proportionate to the aim. The question of proportionality involved consideration of whether there was a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, in other words, between public interests and private rights.³

Lord Malcolm asked himself whether enforcement of the adjudicators' decision would require Blyth and Blyth to bear an individual and excessive burden, keeping in mind that in the adjudication process there had been no identification of the parties' true rights and obligations. He held that none of the public interest justifications which underpin the compulsory statutory scheme set out in the 1996 Act applied in the unusual circumstances of the case. To proceed by way of adjudication was unnecessary and inappropriate. The adjudicator was presented with a next to impossible task in the time allotted.⁴ To enforce the

² In the decision the Court did not in fact take this question first. See *Whyte* [2013] CSOH 54 at [50]-[54].

³ See in particular *Axa* [2011] UKSC 46 at [108]-[109] and [126], and *Whyte* [2013] CSOH 54 at [42] and [44].

⁴ The referral was made on 2 March 2012 and the adjudicator's decision issued on 9 April 2012.

award would result in an unfair and excessive burden being placed upon the engineers. The interference would not be justified by any process which identified the parties' true legal rights and obligations, because adjudication was not such a process.

It followed that it would be disproportionate and wrong to enforce the award, especially in the absence of any security for repayment in the event that the engineers were ultimately successful when the true merits of the claim came to be decided.

(As an alternative ground of decision, Lord Malcolm held there was a breach of natural justice because the adjudicator, who was not legally qualified, did not deal with the causation defence in his decision. One might add that the adjudicator also does not appear to have discounted the amount awarded to allow for present receipt in respect of a sum that would not be incurred for more than another twenty years.)

Reading the full decision, one gets the impression that there were two central points that impacted decisively on the view taken by the Court. First, it was a complicated professional negligence claim which it was pretty clear the adjudicator, as a non-lawyer, had found very challenging to deal with. Secondly, the circumstances of the claim had absolutely nothing to do with the central statutory objective, under HGCRA, of regulating cash flow for the project.

I should draw attention to one point of particular interest in the reasoning. Lord Malcolm said:

“The court's power to refuse enforcement is an important part of the overall scheme, though obviously one to be used sparingly, so as not to undermine the intended benefits of compulsory adjudications in construction contracts.”

In support of that remark, he cited a variety of dicta, including from the English Court of Appeal, and from the Inner House of the Court of Session. I suspect those words may be found useful and pressed into service in other cases where things go badly wrong.

I add a footnote. Blyth and Blyth's website has a description of the project. It states that because the underlying soils were alluvial, all the buildings needed to be piled. I do not know whether that is an example of the publicity people not talking to the legal people, and unwittingly admitting negligence on behalf of the firm, or whether it is a clever stratagem in support of the causation argument that their client was insistent on not having piles anywhere, however unsuitable the soils.

ASSESSMENT

How has the decision in *Whyte & Mackay* been received? At the time of writing, it has not been reported in the Building Law Reports, in the Construction Law Reports, or in the Construction Industry Law Letter. I do not know why. I wonder if it might be because the editors regarded the decision as a Scottish aberration which was best not publicised.

A Scottish solicitor, Neil Kelly, wrote about it in Construction Law Journal. He judiciously expressed no definite view:

“Some will argue that this decision may give referring parties cause to pause for thought when considering the timing and suitability of a reference to adjudication. Others will still argue that any perceived need for that type of analysis does not, perhaps, sit easily against the backdrop that a party to a construction contract is entitled to refer a dispute, however complex, to adjudication at any time.”

The only definite comment I have found was in *Building Law Monthly*, which said:

“It would ... appear that, as a consequence of this decision, the referral of certain types of dispute to adjudication will become more difficult. In particular, the referral of complex, high-value cases to adjudication would now seem to be vulnerable (particularly in the case where the dispute is one that relates to a project that has been completed).”

As far as I have been able to discover, the *Whyte and Mackay* decision has not yet been considered in detail in any subsequent case, whether here or in Scotland. So how do matters stand? I suggest that if the issue comes up again, there will be three important areas to consider.

(1) HGCRA s108(2)(a): “to give notice at any time”

As recognised by Neil Kelly, some have suggested that the reasoning in *Whyte and Mackay* is contrary to HGCRA s108(2)(a), by which the construction contract has to provide for the ability to give a notice of adjudication at any time. The thought is that, if Parliament has said an adjudication can be commenced at any time, how can it be right to rely on circumstances of timing as part of the basis for saying that there was an unlawful breach of A1P1?

This seems to me to be a weak argument. Its weakness can be illustrated by making a comparison with the question whether s108(2)(a) is compatible with the Limitation Act.

Consider the impact of the phrase “at any time” in relation to the Limitation Act. It cannot seriously be argued that the statutory provisions for adjudication, because of the phrase “at any time”, were intended to override the provisions of the Limitation Act. If an adjudicator finds that a claim under consideration is statute barred, because the limitation period has expired without legal or arbitral proceedings being commenced, he or she will rightly dismiss it⁵. So s108 is compatible with the Limitation Act. The phrase “at any time” is too slender a basis on which to conclude that s108 was intended to override the Limitation Act. Similarly, it seems to me, the phrase “at any time” would be a very slender basis for saying that s108 was intended to rule out the possibility of a Court exercising a discretion as to enforcement, based considerations of timing and of human rights.

(2) HGCRA s108(3): “binding until the dispute is finally determined”

As we all know, the effect of adjudication is only interim, that is, only until the dispute is finally determined. In general, the potential to obtain a final determination prevents human rights challenges to the interim decision of the adjudicator. The existence of the opportunity of final determination would usually prevent a breach of any Convention right. But in the

⁵ See *Emden’s Construction Law* [24.26].

meantime the statute says that the adjudicator's decision is binding. Can the Court go against that statutory provision by not treating the adjudicator's decision as binding?

We come back to the obligation in HRA s3 to read and give effect to legislation in a manner consistent with Convention rights if possible, and to the obligation of Courts under HRA s6 to comply with Convention rights. It is perfectly possible to read HGCRA s108 as leaving to the Court a discretion on the question of enforcement. By reading it in that way, a Court is complying with its obligation under HRA s6 to act in accordance with Convention rights and its obligation under HRA s3 to read HGCRA s108 in a manner consistent with A1P1. If on particular facts enforcement of an adjudication decision would produce a breach of A1P1, on the grounds that the interference with possessions is not justified by the public interest purposes of the adjudication procedure, the discretion not to enforce makes s108 compatible with the Human Rights Act.

The discretion on enforcement has been relatively uncontroversial up to now. In England⁶ a Court can give judgment recognising the validity of an adjudicator's decision but go on to grant a stay of execution on the grounds that the receiving party appears unlikely to be able to repay the amount awarded by the adjudicator⁷. Given that the discretion exists to decline enforcement, why cannot it be exercised on human rights grounds? I see no good reason.

Article 6 could also arguably come back in here. In human rights terms, the stay of execution, which an English court sometimes grants, can be justified as preserving the paying party's right to have a proper hearing that is compliant with Article 6. Enforcement, in a situation where the other party would pocket the money and then become insolvent, would effectively prevent the paying party taking the matter to court for full determination. This would arguably be a breach of Article 6.⁸

(3) The big picture

It is worth taking a step back to consider the nature of adjudication. What is this system that Parliament has imported into construction contracts? In essence, it is a system for interim relief. Its purpose is to provide quick temporary answers.

In *Whyte and Mackay* the claimants had no need of a quick temporary answer. On the adjudicator's findings it would be many years before the claimants would be out of pocket. In my view, therefore, the decision of the Scottish court should not be regarded as an aberration. On the contrary, it fits comfortably into a correct understanding of the nature and purpose of adjudication.

⁶ But not, I understand, in Scotland. I am not qualified in Scots law; what I have been told is that circumstances which would dictate a stay of execution in England dictate the refusal of judgment in Scotland.

⁷ See *Emden's Construction Law* [24.138]-[24.139].

⁸ Note, however, that this line of argument was expressly rejected by Lord Malcolm: see *Whyte* [2013] CSOH 54 at [55]-[65].

CONCLUDING REMARKS

There are other issues which are likely to arise. Courts may have to grapple with defining more precisely the statutory purposes of HGCRA in the general interest of the community, and relating those purposes to particular sets of facts, in order to make the judgment on proportionality which is required when A1P1 is under consideration. In addition, the topic of waiver is likely to be important, since it is possible for human rights to be waived. Particular difficulties may arise under forms of contract which make an adjudication decision a prerequisite to a full determination in arbitral proceedings⁹.

I cannot say what future courts will decide. But my personal view is that the principle of the *Whyte and Mackay* decision is correct, and it ought to be upheld. Had we glasses of Whyte & Mackay whiskey in our hands, I would propose a toast to Lord Malcolm for what I suggest is a sound decision.

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⁹ When might waiver occur? Could it only be after an adjudicator's adverse decision, when there is a direct threat of interference with possessions? Or is there already an interference with possessions when a party is put to unavoidable expense in dealing with an adjudication proceeding which is started? Can voluntary agreement to a particular form of contract which makes adjudication an essential step in dispute resolution amount to waiver?