Tenants locked out from their human rights

Do business tenants prevented from trading have a remedy under the Human Rights Act 1998?

Introduction

On 20 April 2020, the Hospitality Union wrote a letter to the Chancellor of the Exchequer asking for a "National Time Out" under which there would be a nine-month national payment pause granted to business tenants. This would be "a crucial period of payment postponement when commercial rents, and the debt and interest payments secured on those premises, are pushed to the back end of leases and term loans."

The letter (which can be read here) supported the proposal on the ground that it was needed by the businesses affected by the lockdown. In this paper, we consider whether there may be an obligation in law on the UK Government to provide relief to tenants of premises forbidden to use them, but still liable to pay the rent.

The legal authority for the lockdown

The legal authority for the lockdown which has forced thousands of businesses to close derives from the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 in England, and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 in Wales.

The Regulations were made under sections 45C, 45F and 45P of the Public Health (Control of Disease) Act 1984, which confer sweeping powers to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere).

The Regulations provide in essence that:

- a person responsible for carrying on certain types of business – essentially restaurants, cafés, bars or pubs - must during the "emergency period" close any premises, or part of the premises, in which food or drink are sold for consumption on those premises, and cease selling food or drink for consumption on its premises; and
- a person responsible for carrying on a business or providing a service of a specified kind must cease to carry on that business or cease to provide that service during the emergency period. The list of specified businesses includes leisure businesses such as cinemas and theatres, health and beauty businesses such as hair salons and gyms, car showrooms, hotels and other holiday accommodation.

The "emergency period" started on 26 March 2020 and will end when specified by the Secretary of State or Welsh Ministers. There must be a review of the need for restrictions and requirements imposed by the Regulations at least once every 21 days, with the first review being carried out by 16th April 2020. As a result of that review the emergency period was not ended, and the Government announced it would continue for at least three further weeks to 7

May 2020, when we can expect a second review. So far, neither the Secretary of State nor the Welsh Ministers have given any indication of when they think the emergency period may end.

Article 1 of the First Protocol to the European Convention on Human Rights is engaged, and that means that a proportionality test will apply

The Regulations make no provision for the abatement of rent of those businesses that hold leases of their premises.

As explained by Jonathan Karas QC and James Tipler in their article here, and by Mark Galtrey and Imogen Dodds in their article here, this means that tenants have to go on paying their rent in full even though they are barred by the Regulations from using them. So the whole of the losses caused by the forced closure fall on the tenant.

There have been some imaginative articles written suggesting arguments that a tenant could possibly deploy – see e.g. Nat Duckworth's ingenious discussion in his article here of a possible implied term; but Kester Lees in his article here explains the difficulties with that and other possible arguments that a tenant might raise.

In reality, there is no doubt that a tenant under a standard commercial lease is required to pay the rent in full despite being barred by the Regulations from using the premises. A standard commercial lease includes a rent abatement clause which provides that if the premises are incapable of use due to damage by an insured risk, the rent will cease to be payable until they can be used again. But a standard property all risks insurance policy does not provide cover against the risk of a Government ordered closure of the premises because of a pandemic virus. Nor do many business interruption policies cover that risk.

Some landlords have been willing to agree to a suspension of the rent, but not all by any means.

That being so, Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1") is plainly engaged i.e. capable, in principle, of being relevant. It 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."*

Although Contracting States have the ability, in times of emergency, to derogate from their obligations under the Convention, relying on Article 15, and although several States have done so in the present pandemic – see the list here - the UK has not so far done that. Accordingly, the UK remains bound to respect the rights protected by A1P1.

In the case of statutory provisions that fall within the second paragraph of A1P1, because they "*control the use of property in accordance with the general interest*" without depriving the owner of the property, there must exist a reasonable relationship of proportionality between the

means employed and the aim sought to be realised: *Pye v UK* (2008) 46 EHRR 45 at [52-55]. If not, there will be a breach of A1P1.

How the Court will approach the proportionality requirement under A1P1

If the Regulations were to be considered by the Courts, they would apply a four stage test in deciding if that proportionality requirement is satisfied: see *R (Steinfeld) v Secretary of State for International Development* [2018] 3 WLR 415 at [41].

The four stages are:

(1) is the legislative objective sufficiently important to justify limiting a fundamental right;
(2) are the measures which have been designed to meet it rationally connected to it;
(3) are they no more than are necessary to accomplish it; and
(4) do they strike a fair balance between the rights of the individual and the interests of the community?

When applying the four-stage test, it has been said that the Court must carry out an exacting analysis of the factual case advanced in defence of the measure, to identify whether the specific interference with the Convention right is justified: see *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] A.C. 700 at p.p.770-771 para 20.

At stages 1-3, it is clear that the question is whether the legislature's decisions were "manifestly without reasonable foundation".

It is less clear whether that test applies at stage 4, an issue where the law is not yet settled. In our view, the law remains as stated by Lord Mance in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] A.C. 1016 at [52]:

> "*… the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of "manifest unreasonableness". In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker*".

The Supreme Court has held that the "manifestly without reasonable foundation" does apply to the fourth stage of the proportionality test in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits under articles 8 and 14 – there, the sole question is whether it is manifestly without reasonable foundation: see *R. (on the application of DA) v Secretary of State for Work and Pensions* [2019] 1 W.L.R. 3289. And recently, the Court of Appeal has said, albeit obiter, that the manifestly without reasonable foundation test applies to stage 4 in an article 14 challenge

to a local authority's home to school transport policies: *R. (on the application of Drexler) v Leicestershire CC* [2020] EWCA Civ 502.

However, in *Gilham v Ministry of Justice* [2019] 1 WLR 5905, at paragraph 34, Baroness Hale said that the "manifestly without reasonable justification" test was only applicable to cases relating to the welfare benefit system. And even in welfare benefit cases, the position is not clear. In November 2019, in *J.D and A v United Kingdom* (unreported, app.s 32949/17 and 34614/17), the European Court of Human Rights ("ECtHR") said that the manifestly without reasonable foundation test applies only "where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality".

In our view, Lord Mance's approach in the *Asbestos Diseases* case remains applicable to an evaluation of proportionality under A1P1.

The "fair balance" test in the landlord and tenant context

There have been a number of cases where the European Court of Human Rights ("the ECtHR") has held that legislation which was enacted to protect tenants was incompatible with A1P1 because it imposed an unfair burden on landlords.

The most important is *Hutten-Czapska v Poland* (2007) 45 EHHR 4, a decision of the Grand Chamber. It concerned Polish legislation similar to the Rent Acts, which restricted landlords from increasing the rent and terminating tenancies.

The applicant owned a house and a plot of land in Poland, and she complained that the implementation of these laws amounted to a violation of A1P1. She argued that the legislation went beyond mere "control of the use of property" and practically extinguished essential elements of her property rights, meaning she was an owner only "on paper". The Grand Chamber rejected that argument, and held that the measures taken only amounted to a means of State control of the use of her property: they could not be considered an expropriation. They therefore fell within the second paragraph of A1P1.

The Grand Chamber held that the scheme had a legitimate aim in the general interest. The scheme originated in the continued shortage of dwellings, the low supply of flats for rent and the high cost of acquiring a flat. It was implemented with a view to securing the social protection of tenants and ensuring – especially in respect of tenants in a poor financial situation - the gradual transition from State-controlled rent to a fully negotiated contractual rent during the fundamental reform of the country following the collapse of the communist regime.

However, the Grand Chamber held that the legislation failed the fair balance test, which it expressed as follows at [167-8]:

> "*Not only must an interference with the right of property pursue, on the facts as well as in principle, a "legitimate aim" in the "general interest", but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights…*

> *In assessing compliance with Art.1 of Protocol No.1 , the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions for reducing the rent received by individual landlords and the extent of the State's interference with freedom of contract and contractual relations in the lease market but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable. Uncertainty—be it legislative, administrative or arising from practices applied by the authorities—is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner*."

The Grand Chamber carried out a detailed analysis of the justification and effects of the legislation, over the course of some 9 pages of discussion. It acknowledged that the Polish State, which inherited from the former communist regime the acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of landlords and tenants, but held that it had failed to strike a fair balance:

> "*Nevertheless, the legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. This burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group of the community as a whole*": [225].

In reaching that conclusion, the Court put weight on the levels of rent chargeable, as well as on the defective provisions on the determination of rent, the restrictions on the landlords' rights to terminate leases, and the statutory financial burdens imposed on landlords and the absence of any legal ways and means making it possible for them either to offset or mitigate the losses incurred in connection with the maintenance of property or to have the necessary repairs subsided by the State in justified cases. The Court agreed with the applicant that, although limitations on the landlord's rights had been found to be justified and proportionate in other cases, in none of those cases had the limitations been so severe: [224]. In the instant case, the applicant had never entered into any freely negotiated lease agreement with her tenants. The landlord's rights to terminate were more seriously limited than in other cases. And the levels of rent were (unlike in those other cases) set below the costs of maintenance of the property, with landlords unable to increase the rent in order to cover the necessary maintenance costs. This had made it impossible for landlords to keep their property in proper condition. There were no procedures for maintenance contributions or State subsidies, thereby causing the inevitable deterioration of the property for lack of adequate investment and modernisation. [224].

In sum, the legislation placed a disproportionate burden on the applicant, which could not be justified in terms of the legitimate aim pursued by the authorities in implementing the relevant remedial housing legislation. The State was, in effect, placing the main burden of the sacrifices that society had to make for tenants on landlords.

That decision was then applied to rent control legislation in Malta, in *Gauci v Malta* (2011) 52 E.H.R.R.25, *Aquilina v Malta* (unreported, 11.12.2014) and *Zammit v Malta* (2017) 65 EHRR 17. In those cases, the ECtHR held that Maltese legislation which gave security of tenure to residential tenants and controlled the rent payable breached the A1P1 rights of the landlords. The Court held that interference occasioned by the application of the legislation pursued the legitimate social policy aim of protecting tenants, but it failed the fair balance test. A disproportionate and excessive burden was imposed on the landlord as a result of the low rental value (which was far below the market value of the property), the fact the applicant was unable to predict with any certainty when he would ever be able to recover possession, the lack of procedural safeguards in the application of the law and the rise in the standard of living in Malta over the past decades. The State had failed to strike a fair balance between the interests of the community and the applicant: instead, "the latter was requested to bear most of the social and financial costs of supplying housing accommodation" to the tenants – see *Gauci* at [63] and *Aquilina* at [67].

In *Lindheim v Norway* (2015) 61 EHRR 29, the same approach was applied to Norwegian legislation providing for the renewal of long leases of building plots under which a ground rent was payable. It applied to long building leases used to build homes or holiday homes, under which a ground rent was payable. The legislation gave the lessee the right to renew the lease at the passing rent, with provision for increases in line with general inflation. The ECtHR, disagreeing with the Norwegian Supreme Court, held that this legislation contravened A1P1, as it took from the landlord and gave to the lessee the whole benefit of the increase in the value of the land above general inflation. It was too one sided to satisfy the fair balance requirement inherent in A1P1.

An example of A1P1 providing protection in the UK courts

The Supreme Court considered the question of fair balance in *R (Mott) v Environment Agency* [2018] 1 WLR 1022. Mr Mott was a long-standing salmon fisherman, operating in the Severn Estuary, who required an annual license from the Environment Agency under s.25 of the Salmon and Freshwater Fisheries Act 1975. Due to later amendments to that legislation, from 2011, the Agency was able to grant licenses subject to conditions limiting the number of fish taken, as it considered necessary to protect any fishery. Mr Mott was duly limited to 30 salmon in 2012, and 23 and 24 in 2013 and 2014 respectively. No compensation was paid. Before the limits were introduced his average catch was 600 salmon per year. Mr Mott claimed that the Agency's conditions made his fishery wholly uneconomic to operate and his lease worthless, and the decisions were in breach of his property rights under A1P1: they required him to shoulder an excessive and disproportionate burden, which breach could only be prevented by payment of compensation: [31].

The Supreme Court agreed. Although environmental protection was of special importance (as emphasised in the ECtHR jurisprudence), it did not detract from the need to draw a fair balance, nor from the potential relevance of compensation: [33]. In this case, the Agency had given no consideration to the particular impact on Mr Mott's livelihood, which was severe [36]. The Court acknowledged that national authorities have a wide margin of discretion in the imposition of necessary environmental controls, and noted that A1P1 gives no general expectation of compensation for adverse affects. However, this was an exceptional case, because of the severity and disproportion (as compared to others) of the impact on Mr Mott [37].

In its judgment, the Court also considered the distinction between expropriation and control in connection with Mr Mott's argument that the effect of the conditions was to nullify the practical use of his lease and thus amounted to de facto expropriation. The Court found that the ECtHR case-law on this point was not clear cut, but nor was it crucial to the Court's analysis, since in both cases it was necessary to consider whether the effect on the particular claimant was excessive and disproportionate [32]. However, the fact that the conditions were closer to deprivation than to mere control in this case was clearly relevant to the fair balance [36].

The proportionality test applied to public health measures

The issue of proportionality, albeit primarily in the context of EU law, has also been discussed in the UK courts in the context of public health measures.

In *R v Secretary of State for Health (ex p. Eastside Cheese Co)* [1999] 3 C.M.L.R. 123, the Secretary of State made an "emergency control order" under s.13 of the Food Safety Act 1990 in response to an outbreak of e-coli, a very dangerous organism which can cause severe illness and death. The order prohibited the carrying out of any commercial operation in relation to cheese supplied by Ducketts. So long as the order remained in force it paralysed their cheese making business, as well as the businesses of those processors and maturers who depended upon its supply of cheese, including the Eastside Cheese Company. The latter applied for judicial review of the emergency control order and succeeded before Moses J, but the Court of Appeal allowed an appeal by the Secretary of State.

It was common ground that exercise of the powers under s.13 interfered with the operation of Article 34 of the EC Treaty, and that such exercise therefore had to be justified under Article 36 of the EC Treaty on the ground that it was " justified on grounds of …the protection of health and life of humans…". Eastside argued, among other things, that the Secretary of State could not rely on Article 36 of the EC Treaty since the making of the s.13 order violated their fundamental rights guaranteed by A1P1. Lord Bingham CJ, giving the judgment of the Court of Appeal, doubted that argument was open to Eastside, as it had not been raised before Moses J. He then proceeded to briefly explain why he did not accept the argument.

He said that this was a control of use case, not one where there was a deprivation of possessions. He explained the fair balance test which applies to such cases. He then said that "while the court must never abdicate its duty of review, it will accord a margin of appreciation to the decision-making authority. Particularly must this be true, in our view, where the decision-making authority is responding to what it reasonably regards as an imminent threat to the life or health of the public.": [59]. Although the Secretary of State must have appreciated the order might lead to the destruction of cheeses belonging to Ducketts, and to Eastside, they were reasonably regarded as unsafe. On the facts of the case, the Court saw no room for an argument that the emergency action taken by the Secretary of State involved an unjustified violation of fundamental rights.

R (Sinclair Collis Ltd) v Secretary of State for Health [2012] QB 394 was another public health case. It concerned the sale of tobacco from automatic vending machines, which were to be completely banned pursuant to ss.22 and 23 of the Health Act 2009 and the Protection from Tobacco (Sales from Vending Machines) Regulations 2010. The effect of the ban (which sought to promote public health) would be to wipe out the tobacco vending machine industry. There would also be effects upon suppliers to the industry. The legislation was challenged,

unsuccessfully, on the grounds that it violated the principle of proportionality, which the law required to be respected by virtue of Articles 34 and 36 of the EU Treaty and A1P1.

In the Court of Appeal, Lord Neuberger MR and Arden LJ both held that the legislation satisfied the proportionality test under EU law and for the purposes of A1P1. Laws LJ dissented.

Both Lord Neuberger and Arden LJ considered it was unnecessary to consider A1P1 separately. Lord Neuberger addressed this point at [192-4]. He explained that, while A1P1 and Article 34 of the EU Treaty are concerned with rather different issues: "the identity and weight of the factors relevant to the question whether the ban is justifiable under article 36 are, as I see it, very similar to those relevant under A1P1". He observed that there is a greater overlap in the jurisprudence of the European Court of Justice and the ECtHR in this field, though there was more guidance to be had from the ECR jurisprudence: [193-194]. Arden LJ agreed with this approach at [147].

However, although Lord Neuberger and Arden LJ both arrived at the conclusion that the legislation satisfied the proportionality test, they arrived there by different routes, as Arden LJ said at [181]. Laws LJ dissented. Accordingly, it is not straightforward to extract any clear ratio from the case.

What is clear, both from *Eastside Cheese* and *Sinclair Collis,* is that challenging public health legislation on the ground that it interferes with the rights guaranteed by A1P1 is difficult. The Courts are, understandably, reluctant to find that public health measures are disproportionate even though they cause substantial economic harm to specific businesses.

Do the Coronavirus Regulations satisfy the fair balance test?

There is no doubt that the Regulations satisfy the first three stages of the proportionality test. The legislative objective – saving lives and protecting the NHS – is clearly sufficiently important to justify limiting a fundamental right. The measures which have been designed to meet it are rationally connected to it. And it is very difficult to argue that the assessment made by the Government that the Regulations do no more than is necessary to accomplish the objective is manifestly without reasonable foundation.

The same cannot be said of the fourth stage of the proportionality test – the need for a "fair balance". It is far from obvious that the Regulations do strike a fair balance between the rights of tenants required to close their businesses and the interests of the community, given that they make no provision at all for the sharing of the burden between the landlord and the tenant of the premises required to close.

In Australia, things have been done differently. On 7 April 2020, the Australian government announced a new mandatory Code of Conduct, building on draft codes submitted by landlord and tenant representative bodies in the commercial property sector – see the press release here, under the heading "Commercial Tenancies".

The press release explained that the purpose of the new Code is to impose a set of good faith leasing principles for commercial tenancies (including retail, office and industrial) where the tenant is a medium sized business with an annual turnover of up to AUS $50 million, and is eligible for the government's JobKeeper programme. The press release said: *"National*

Cabinet agreed that there would be a proportionality to rent reductions based on the tenant's decline in turnover to ensure that the burden is shared between landlords and tenants. The Code provides a proportionate and measured burden share between the two parties while still allowing tenants and landlords to agree to tailored, bespoke and appropriate temporary arrangements that take account of their particular circumstances."

In addition, the press release said that the Australian Government is also acting "as a model landlord by waiving rents for all its small and medium enterprises and not-for-profit tenants within its owned and leased property across Australia".

Some European countries have introduced legislation suspending specified obligations to pay rent during the pandemic: there is a helpful summary of the position as it stood in early April here.

The Coronavirus Bill was accompanied by a lengthy memorandum on human rights issues, available here. There is not a word in it about the position of tenants forced to close their premises but obliged to go on paying the rent. There is nothing to indicate that the Secretary of State gave the matter any thought before enacting the Regulations, or since.

Protection from eviction

Tenants are, temporarily, protected from eviction. S.82 of the Coronavirus Act 2020 (in force from 25 March 2020) prohibits forfeiture of business tenancies for non-payment of rent for the period between 26 March and 30 June. S.82 is discussed by Martin Dray in his article here.

There is also a general stay on possession proceedings, discussed in articles by Julia Petrenko here, and by Martin Dray here, and, in relation to a recent amendment to allow proceedings against some trespassers, by Cecily Crampin and Julia Petrenko here.

However, this does not meet the point that business tenants are contractually liable to pay their rent, and can be sued to recover it, despite being barred by the Regulations from using the premises they are paying for.

Is the financial support provided to businesses an answer to an A1P1 challenge?

If a tenant, or group of tenants, were to instruct a solicitor to write a pre-action protocol letter to the Secretary of State or Welsh Ministers putting forward the argument that the Regulations infringe their A1P1 rights, what would the response be? There can be little doubt that the Government lawyers would argue that there is a raft of measures providing financial support for businesses affected by the Regulations which ensures that a fair balance has been struck.

At the date of writing this article, the following have been announced:

- The Coronavirus Job Retention Scheme which allows the furloughing of employees with 80% of their salary up to £2,500 per month paid out of public funds.
- An equivalent Coronavirus Self-employment Income Support Scheme allowing a self-employed person to claim a taxable grant worth 80% of their trading profits up to a maximum of £2,500 a month.
- Tax payers are entitled to defer VAT payments and payments on account of income tax and CGT.

- In the case of certain types of properties – shops, restaurants, cafés, bars and pubs, cinemas or live music venues, sports clubs, gyms, spas, hotels and other holiday accommodation, no rates will be payable.
- There are two grant funding schemes - a Small Business Grant Fund providing up to £10,000 and a Retail, Hospitality and Leisure Grant Fund of up to £25,000. Neither apply to a businesses occupying a rateable hereditament with a rateable value of £51,000.
- There is a Coronavirus Business Interruption Loan Scheme intended to support small and medium-sized businesses, with an annual turnover of up to £45 million, to access loans, overdrafts, invoice finance and asset finance of up to £5 million for up to 6 years, supposed to be delivered through commercial lenders.
- There will be a Coronavirus Large Business Interruption Loan Scheme which the Government says "We expect it to launch before the end of April 2020." It will support large businesses, with an annual turnover of between £45 million and £500 million, to access loans of up to £25 million.
- There is a COVID-19 Corporate Financing Facility under which the Bank of England will buy short-term debt from large companies.

It is far from obvious, however, that those measures provide a practical solution for many businesses who remain obliged to pay their rent in full without being entitled to use their premises. The ECtHR has said on many occasions that the State must provide protection for Convention rights in a way that is not theoretical or illusory but rather practical and effective. For example, a loan scheme operated by banks is not much use if, in practice, the bank does not reply to an application for a loan.

The remedies for an affected tenant

If the Regulations do infringe the right of a tenant of commercial premises under A1P1, the first question is whether they could be interpreted so as to avoid such an infringement. Under s.3(1) of the Human Rights Act 1998: "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*".

In *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, the House of Lords gave guidance on how that section should be applied. The House held that, if legislation interpreted according to its natural meaning produced a result incompatible with the Convention rights, then the Courts should, if necessary, read words into it so far as necessary to secure the protection of those rights, provided that this did not produce a result which went "*against the grain*" of the legislation; the interpretation must not be incompatible with the "*underlying thrust of the legislation being construed*", and must not "*change the substance*" of the legislation: see paras 32, 33, 41, 44, 49, 50, 107, 108, 109, 110.

We do not think it is possible to read in words into the Regulations which provide for the total or partial abatement of rent under a commercial lease. That would be to change the substance of the Regulations.

That being so, the next question is whether an affected tenant could claim damages for breach of the statutory duty imposed by s.6 of the 1998 Act. S.6(1) provides: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right" although under s.6(2), that does not apply to an act if, as the result of one or more provisions of primary

legislation, the authority could not have acted differently; or in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

It is not clear whether the power to make regulations under s.45C of the 1984 Act is wide enough to entitle the Secretary of State or Welsh Ministers to make regulations equivalent to the proposed Australian Code.

S.45F(2) contains a long list of things that regulations made under s.45C may do, including creating offences (although not one punishable with imprisonment), enabling a court to order a person convicted of any such offence to take or pay for remedial action in appropriate circumstances, providing the execution and enforcement of restrictions and requirements imposed by or under the regulations, permitting the levy of charges, and permitting or requiring the payment of incentive payments, compensation and expenses. It is questionable whether that power is sufficient to authorise regulations which provide for the abatement of rent under a commercial lease.

If the Secretary of State and Welsh Ministers had no power to direct the abatement of rent, the only remedy for an affected tenant would be to claim a declaration of incompatibility under s.4 of the 1998 Act, which should be sufficient to lead to the enactment of remedial legislation. The tenant might also be able to secure compensation from the UK in the ECtHR, which has the power under article 41 of the Convention to award "just satisfaction" to those who have suffered violations of their Convention rights.

Conclusions

We consider that:

- A1P1 is clearly engaged by the Regulations.
- Unless they strike a fair balance between the rights of the businesses affected and the interests of the community, they infringe A1P1.
- The Court is likely to carry out an exacting analysis of the factual case advanced in defence of the measure, to identify whether requiring premises to be closed with no provision for abatement of the rent is justified. It is unlikely that the Court will only consider whether the measure is manifestly without reasonable foundation, but it will probably afford the Government a substantial degree of latitude in making the assessment of whether the Regulations fail to strike a fair balance.
- In making that assessment, the Court will take into account the financial measures which have been announced to assist businesses, but would consider whether they afforded sufficient assistance in practice to ensure a fair balance was achieved.
- It is not possible to interpret the Regulations so that they provide for an abatement of rent.
- It is uncertain whether the Secretary of State or Welsh Ministers had power to direct an abatement of rent; if not, they would not be liable for damages under s.6 of the 1998 Act.
- However, if the Regulations were held to infringe A1P1, the Court would probably make a declaration of incompatibility which ought to lead to the enactment of remedial legislation. It may also be possible to secure compensation from the UK in the ECtHR.

In considering any A1P1 challenge, it would be important to try and put together an action group, with a number of different tenants carrying on different businesses, each of whom could explain in detail why none of the financial measures come close to protecting them from the disastrous impact of the Regulations.

Any such challenge should ideally be brought before 26 June 2020, because otherwise there is a danger that the Secretary of State/Welsh Ministers could argue that the 3 months time limit for starting judicial review proceedings under CPR r.54.5 applies. It seems unlikely that this is the case, but it would be better not to take the risk.

It is possible that even the threat of such a challenge would be sufficient to persuade the Secretary of State and Welsh Ministers to consider whether a rent abatement measure, such as that in Australia, should be introduced.

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23 April 2020

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