HUMAN RIGHTS AND PROPERTY LITIGATION:

SOME GENERAL CONCEPTS

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1. In this talk we introduce you to some of the concepts that you need to be familiar with when dealing with human rights under the European Convention on Human Rights ("ECHR") as incorporated into our domestic law by the Human Rights Act 1998 ("HRA").

"PUBLIC AUTHORITY"

2. Public authorities are bound to act in accordance with the ECHR by reason of section 6 of the HRA. The point here is that the range of bodies that count as a "public authority" can be rather wider than one might perhaps expect. This is sometimes said to be the "vertical" application of the ECHR through the medium of the HRA – it defines when, and in what circumstances, human rights can be invoked against a public or quasi-public body.

3. Section 6 of the HRA provides as follows:

> ***6 Acts of public authorities.***
>
> *(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
>
> *(2) Subsection (1) does not apply to an act if—*
>
> *(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*
>
> *(b) 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.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) […]

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

3. The most natural area of applicability for the ECHR is the acts and omissions of a public body. This is not confined, however, to organs of central or local government ("core public authorities"). As section 6(3)(b) makes clear, it may also extend to the acts or omissions of an entity which is behaving in a way that entails exercising functions of a public nature ("hybrid public bodies"). It is therefore possible to extend the ambit of the obligation under section 6 to entities which might not, at first blush, appear to have a "governmental" public character.

4. The distinction derives from European law, and in particular from a decision of the European Court of Justice called Foster v British Gas (C-188/89) (1990) CMLR 833; see too Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley,

Warwickshire v. Wallbank & Anor [2004] 1 AC 546; Cameron & Ors v Network Rail Infrastructure Ltd [2006] EWHC 1133 (QB). It is clear that an argument that one is dealing with a "hybrid" public authority which is under a primary statutory duty in dealing with others to comply with ECHR rights will require an analysis of the nature of the entity in question, but also an examination of the functions that are being exercised which form the basis of the complaint in the instant case. A hybrid body may, as the name suggests, be a public authority in relation to some functions, but not others.

5. Perhaps the most important other point to note is that a "court" is also a public authority and bound to give effect to ECHR rights (section 6(3)(b)). This obligation is in addition to the obligation to interpret legislation in a convention-compliant manner, which arises under section 5 of the HRA, which will be gone into in more detail in the next section, and is the principal means by which "horizontality" (that is, the ability to assert ECHR rights in private litigation) is introduced.

THE INTERPRETATIVE OBLIGATION

6. The Courts are obliged to interpret, so far as possible, legislation in a manner which is consistent with Convention rights. This obligation arises under section 3 of the HRA, which provides as follows:

> 3. **Interpretation of legislation.**
>
> *(1) 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.*
>
> *(2) This section—*
>
> *(a) applies to primary legislation and subordinate legislation whenever enacted;*
>
> *(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and*
>
> *(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.*

7. The Court must also "have regard to" the jurisprudence under the Convention: see section 2; in order for this requirement to really bite, however, the Strasbourg jurisprudence must be "clear and consistent". This was decided by the House of Lords in Manchester City Council v Pinnock [2011] 2 AC 104 at paragraph [48]:

> *"This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e g R v Horncastle [2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the EurCtHR: R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in Doherty v Birmingham [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to "take into account" EurCtHR decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line."*

8. The strength of the interpretative obligation is considered by the House of Lords in Ghaidan v. Godin-Mendoza [2004] UKHL 30, still the leading authority on section 3 of the HRA. The Court has a wide power to insert verbiage to render a section compatible with the Convention – it may not overstep the line between interpretation and amendment of the legislation, and it must not insert words which are not possible in the context of the particular piece of legislation, but short of that, it is permitted to go further than the ordinary canons of interpretation. Thus words cannot be inserted which go against some fundamental feature of the legislation, or which go against the grain of what has been enacted. Further, the Courts cannot trespass into the area of making new policy for which they are not equipped. So in Ghaidan, the House of Lords was able to ignore the language used by Parliament and its original intent – that only the husband or wife of a deceased tenant should succeed to a Rent Act 1977 protected tenancy – and instead was able to read those gendered words as including partners in a homosexual partnership. Whilst Ghaidan recognises that there are limits to what

the Court can do, it is clear that section 3 gives interpretative powers which other canons of construction cannot reach. The limits of those powers remain difficult to state.

THE DECLARATION OF INCOMPATIBILITY

9. If a Court cannot render an ECHR-breaching provision compatible under section 3, it must have recourse to section 4 of the HRA, which provides for so-called declarations of incompatibility:

> ***4 Declaration of incompatibility.***
>
> *(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.*
>
> *(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.*
>
> *(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.*
>
> *(4) If the court is satisfied—*
>
> *(a) that the provision is incompatible with a Convention right, and*
>
> *(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,*
>
> *it may make a declaration of that incompatibility.*
>
> *(5) In this section "court" means—*
>
> *(a) the Supreme Court;**]***
>
> *(b) the Judicial Committee of the Privy Council;*
>
> *[…]*
>
> *(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.*
>
> *(6) A declaration under this section ("a declaration of incompatibility")—*
>
> *(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and*
>
> *(b) is not binding on the parties to the proceedings in which it is made.*

10. If there is a genuine incompatibility, then it is for Parliament to cure it under section 10 of the HRA. A declaration is only to be used if the statutory scheme means that it is impossible to cure the incompatibility using section 3. But it must be noted that a declaration of incompatibility is useless to most litigants in private litigation:

(1) It does not apply in the County Court or Tribunals, where much of our work takes place (see the definition of "court" in section 4(5) of the HRA)..

(2) It does not disapply the offending statute in the proceedings in which the declaration is sought, and therefore the declaration affords no defence (though it might give rise to a separate claim in damages against the State). For a recent illustration, see Reilly v Secretary of State for Work and Pensions [2016] EWCA Civ 413, about the retrospective effect of state benefits legislation and the imposition of retrospective penalties.

HORIZONTALITY

10. This is not a concept derived from the HRA, which is clear in that it places obligations to observe ECHR rights on public bodies and Courts. Instead, it derives from two sources: first, speculation, initially amongst academics, that the effect of the HRA would be to import ECHR rights into domestic law for all purposes and would fundamentally re-cast our private law relations; secondly, from the expansionist Strasbourg Court, which has, on occasion, delivered itself of judgments relating to issues which, to us, appear to have a purely private character (i.e. are about the private law relations between individuals) and which the Strasbourg Court really has no business in interfering with. We would suggest that, although sometimes not as carefully expressed as judgments of the English Courts, the Strasbourg cases in fact do not support the suggestion that there is any horizontality of ECHR rights beyond the limited contexts set out below.

"*Strong Horizontality"*

11. The Strasbourg Court, like the ECJ, is a Court with an expansionist mind set. This has resulted in a very confusing and, if one might say so, muddled approach to the proper applicability of Convention rights.

12. As we shall see from the wording of the relevant Convention rights - particularly when it comes to the justifications for interfering with those rights - they are drafted with state action in mind, and do not obviously relate to the acts of private individuals. Of course, sometimes, private individuals can only act because the State has facilitated that – so, for instance, the State, in introducing the Leasehold Reform Act 1967 obviously interfered with landlords' property rights, albeit that the complaint, though admissible, was justified as being in the public interest, as the Court found in James v UK (1986) 8 EHRR 123.

13. At other times, Convention rights might come into play because an organ of the state – for example, the Court - has become the forum for resolving private disputes, and it might be said that the Court is then obliged to give effect to Convention rights. It is through this medium that it is often said that strong horizontality arises, because, even if the rights cannot be directly invoked between private individuals, they must necessarily be given effect to by the Court when it adjudicates disputes.

14. Does this assertion bear scrutiny? Let us look at some of the cases. We can't look at all of them.

15. The first case we need to consider in this connection is a relatively old Commission decision on admissibility (i.e. whether the complaint was one that the Strasbourg Court should entertain at all; a form of initial jurisdiction filter). In Di Palma v UK (1986) 1 EHRR 149, the Commission had to consider whether the English law of forfeiture (of a residential flat for modest service charge arrears) violated Article 8 (home). The Court decided that the complaint here was inadmissible. It explained that "*the public authority in the shape of the County Court merely provided a forum for the determination of the civil right in dispute between the parties… since it is the function of the courts to determine disputes between parties, with the inevitable consequence that one party may ultimately be unsuccessful in the litigation in question. It would not appear that the mere fact that an individual was the*

unsuccessful party to private litigation concerning his tenancy arrangements with a private landlord could be sufficient to make the State responsible" (at 144-5). Although the State might be under a positive obligation to protect certain rights and interests, Di Palma stands for the proposition that it is otherwise not the business of the ECHR to police the terms of a purely private law contract. Following Di Palma, then, one might conclude that:

(1) The Court applies the law and contracts as they are found. It is an empty vessel into which the parties pour their dispute for adjudication.

(2) The Court applies the law as it finds it. That law might be in breach of the ECHR, or it might not be. But the Court is not itself in breach of the ECHR in applying the law as it finds it. The breach (if any) lies in the fact that the State has allowed the offending law to be passed, or, perhaps, that the State has failed to pass legislation to ameliorate the position (the so-called "positive obligations principle").

16. However, the Strasbourg jurisprudence has not stood still; nor has the Court been content to rest with the propositions set out above. Instead, a body of rather poorly-expressed and muddled jurisprudence has emanated from Strasbourg.

(1) One such case is Belchikova v Russia (App no, 2408/06), which was also an admissibility decision. The complainant had inherited her late sister's flat under a will and has a tenancy of some kind. There was a dispute with other family members about the validity of those documents – which was on the face of it of a purely private law kind. The complainant lost in the domestic courts and was evicted. This, she said, breached her Article 8 rights to a home. The Strasbourg Court determined that her Article 8 rights were engaged, but that an interference with those rights was justified on the facts of this case. The claim was, therefore, declared inadmissible on that limited basis (and not on the basis that the complainant's Article 8 rights were not engaged at all, that being a matter of pure private law).

(2) Zehentner v Austria (App No 20082/09) concerned an Austrian judgment debtor with limited mental capacity whose house was sold by order of the Court so as to satisfy her creditors. She had not played any part at all in the domestic proceedings, but then complained to the Strasbourg Court when the judicial sale was effected. The Court, on that occasion, decided that there were insufficient safeguards to protect the debtor, given the critical importance of the rights at stake – home and property. It must, of course, be borne in mind that Zehetner is principally about the procedural safeguards which the State has put in place (or failed to put in place) to protect its citizens from a judicial sale of their home, and to that extent the case may be explained as an instance of a failure to act (there being an absence of sufficient procedural safeguards) by a State under its positive obligations. On the other hand, one notes that the nature of the intervention concerned the enforcement, by private law creditors, of a civil debt.

(3) Next, we have McCann v United Kingdom (2008) 47 E.H.R.R. 40, a consideration of the Hammersmith & Fulham v Monk principle that one of two joint periodic tenants can give an upwards notice to quit determining the periodic tenancy for both of them. In this case, the upwards notice was given by the departed tenant at the behest of the local authority which wished to evict the sole occupying joint tenant. The Strasbourg Court decided that this amounted to a violation of Article 8. The Court noted that the loss of one's home was a most extreme form of interference with the right to respect for the home, and that such a right should not be lost without due consideration from an independent tribunal. The availability of judicial review (in its traditional form) did not satisfy the requirement for an independent tribunal to determine proportionality under Article 8(2). Crucially, however, this was a case involving a public authority, and not a purely private law dispute.

(4) And then we have Khurshid Mustafa and Tarzibachi v Sweden (2011) 52 E.H.R.R. 24. A tenant was evicted for installing a satellite dish on the outside of his block of flats, which was a breach of his tenancy. This, surely, has nothing to

> do with the ECHR? How wrong we are. In fact, the satellite dish was there because the tenants wished to receive programmes from their country of origin. Under Article 10 of the ECHR, they had the right to "*receive and impart information and ideas without interference by public authority and regardless of frontiers"*, and, although the restriction – on external alterations to the property under the complainant's lease – was imposed by a private law contract, Sweden was found to have a positive duty to step in and protect that particular right.

17. Although the cases mentioned above contain wide-ranging dicta, and although the Strasbourg Court seems keen to expand its jurisdiction where it can, it is suggested that it is in fact wrong to think that the above cases amount to decisions recognising that ECHR rights have horizontal effect, and that they can be simplistically deployed to support that proposition in the domestic Courts.

18. In none of those cases was the issue the decision of the domestic Court itself, and it does not appear to have been suggested that the relevant domestic Court should have decided the case differently paying due regard to the Convention. Rather, it is suggested, in those cases that really do concern only private individuals, the true failing lies with the State in failing to take positive steps to enact laws allowing the Court to decide otherwise. It is suggested that the right approach to these cases, then, is to understand them not as cases endorsing the right for private persons in civil litigation to invoke Convention rights against on another, but rather a right for the aggrieved party to complain to the Strasbourg Court that the state of the domestic law was such as to permit the outcome being complained about. However, these cases fall far short of suggesting that the private individual who was the counter-party to the domestic proceedings was in some way bound to give effect to the other party's human rights.

"*Weak Horizontality*"

18. One way of considering horizontality is to think about how, practically, issues of Convention rights might arise in relation to individual disputes. It is suggested that the Court may be required to grapple with such issues in the following ways:

(1) Statutory Law. Courts may need to take into account Convention rights when:

a. Applying statutory (including procedural) discretions; or

b. Applying (including interpreting) statutory rules.

(2) Courts may need to take account of Convention rights when:

a. Applying existing, settled common law doctrines; or

b. Developing common law doctrines; or

c. Creating new causes of action; or

d. Applying common law discretions, in particular discretionary remedies;

e. Examining the content of contracts and other binding agreements between private parties (?).

19. As we have seen above, the Courts under category (1)(b) have a well-established interpretative obligation to ensure that statutory provisions are construed, as far as possible, in line with the Strasbourg jurisprudence on Convention rights. We also consider that a Court would have to have regard, at least in theory, to ECHR rights when exercising a statutory or procedural discretion. In that regard, one might think that one or other of the more draconian manifestations of the Jackson reforms might have been open to challenge on Article 6 grounds, or under Article 1 Protocol 1, for depriving struck-out litigants of property (whether the underlying right that was lost which formed the basis of the litigation, or the right to prosecute the cause of action). One might also think that rights come into play in category 2(d) (e.g. the terms on which an equitable estoppel is satisfied). However, we have greater difficulty with the other aspects of category 2, though we recognise that these are open for debate.

"HOME"

20. The first right that is likely to be relevant is the right to respect for a home:

Article 8

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

21. It is important to note that the notion of "respect" can impose, on the State, a positive obligation to protect the Article 8 rights of its citizens: in Marckx v Belgium (1979) 2 E.H.R.R. 330, paragraph 31, the Strasbourg Court said as follows:

> "*By proclaiming in paragraph 1 the right to respect for family life, Article 8 (art. 8-1) signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2 (art. 8-2). As the Court stated in the "Belgian Linguistic" case, the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities (judgment of 23 July 1968, Series A no. 6, p. 33, para. 7). Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.*"

22. However, although it is clear that the "home" is accorded the first importance by the Strasbourg Court, it is not inviolable. In Ghaidan v Mendoza [2004] 2 A.C. 557, at page 605, Baroness Hale explained that:

> "*Everyone has the right to respect for their home. This does not mean that the state—or anyone else—has to supply everyone with a home. Nor does it mean that the state has to grant everyone a secure right to live in their home.*"

23. A person's "home" is an autonomous concept under Article 8: it was decided in Mabey v United Kingdom (1996) 22 E.H.R.R. CD 123, paragraph 30, that:

> " … *whether or not a particular habitation constitutes a "home" for the purposes of Article 8 paragraph 1 (Art. 8-1) will depend on the factual circumstances of the particular case, namely, the existence of sufficient and continuous links. It is not limited necessarily to those homes which have been lawfully occupied or lawfully established*."

24. So, for instance, in Chapman v UK (2001) 33 EHRR 18 an illegally established caravan site might be a home; however, at [102], the Court stated that: "*When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully.*"

25. Whilst the home is not inviolable, any interference must be justified. In that regard, Article 8(2) contains a series of prescribed justifications for interference, which must in any event be proportionate:

(1) *"In Accordance with the Law"*

See Sunday Times v United Kingdom, at paragraph 49:

> *"Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."*

(2) "*Necessary in a democratic society*".

- "Legitimate Aim": as specified in Article 8(2)
- "Proportionality"
  - "Pressing Social Need"
  - "Proportionate to the aim pursued"
  - Supported by
- "The Margin Of Appreciation"

  See Buckley v United Kingdom, (1996) 23 E.H.R.R.101, at paragraph 75:

  "It is not for the Court to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases (see, mutatis mutandis, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 23, para. 49). By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation."

"PROPERTY"

26. Property rights (or "possessions" in the English version of A1P1, though it might be better to use the wider original term of the original treaty, "*biens*") are protected by Article 1 Protocol 1 (A1P1). This provides that:

> *"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."*

[N.B.: Under A1P1, companies are people too ("legal person").]

27. The autonomous concept of property ("goods" might be a better term) was explained in Gasus Dosier- und Fördertechnik GmbH v.the Netherlands (1995) 20 E.H.R.R. 403 at paragraph 53:

> *"The Court recalls that the notion "possessions" (in French: biens) in Article 1 of Protocol No. 1 (P1-1) has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions", for the purposes of this provision (P1-1)."*

28. "Possessions" misleadingly connotes a physical object, but it clearly covers more than that. It has been held to cover:

(1) Anything of economic value, even if contingent (though not merely if purely arising in the future, like income expected without any entitlement to it);

(2) An enforceable claim to live in a property (Malinovsky v Russia (2008) 46 EHRR 20);

(3) The goodwill of a business (Van Marle v Belgium (1986) 8 EHRR 483);

(4) An alcohol licence (Tre Traktore Aktiebolag v Sweden (1989) 13 EHRR 309);

(5) A sufficiently enforceable cause of action (Pressos Compania Naviera SA v Belgium (1995) 21 EHRR 301);

(6) A legitimate expectation (Pine Valley Development v Ireland (1991) 14 EHRR 319);

(7) State benefits (Gaygusuz v Austria (1996) 23 EHRR 365);

(8) Rights forming part of the bundle of ownership rights, like hunting rights: (Chabauty v France [2012] ECHR 1784).

29. It is well established that there are three separate but inter-locking rules under A1P1. These were set out in James v U.K.. (1986) 8 E.H.R.R. 123 at paragraph 37:

" ... before inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable ... The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule."

30. The three rules do have some separate and individual features:

(1) Rule Two: Deprivation – this requires that something is in fact totally taken away: Handyside v United Kingdom (1979-1980) 1 E.H.R.R. 737, paragraph 62. Deprivation can mean the extinguishment of a legal right to it, or the imposition of so many controls as to rob the owner of practical use of the object (sometimes referred to as *de jure* and *de facto* expropriation). Thus a state enacted presumption of state ownership - depriving religious orders of their possessory titles acquired by long use - was a deprivation in The Greek Monastries Case (1995) 20 E.H.R.R. 1. Another *de jure* expropriation is our own enfranchisement legislation: James v United Kingdom (1986) 8 E.H.R.R. 123. The question is one of substance and not form, and the Court should look at the overall effect of what has happened. So, a take-over of a piece of land by the Navy without formal dealings with rights and titles is an expropriation, where the owner could not effectively use or dispose of the land any longer: Papamichalopoulos v Greece (1993) 16 E.H.R.R. 440. However, the line can be difficult to discern. The Grand Chamber has decided that adverse possession is not a deprivation, but a Rule 3 'control of use' resulting from the application of limitation periods: Pye v United Kingdom (2008) 46 EHRR 45 (GC). That decision does not appear to be easy to reconcile with the Court's general disapproval of legal formalism.

(2) Rule Three: Control Of Use deals with interferences which are less than a wholesale taking away (though, of course, whether there is a wholesale deprivation will depend on how the relevant "possession" is defined). Examples of controls of use are:

(1) Planning controls;
(2) Building regulations;
(3) Imposition of positive obligations on a landowner;
(4) Discharge or modification of covenants;
(5) Loss of exclusive rights over land;
(6) Revocation of liquor licences.

(3) Rule One: Residual and Exceptional - the "exceptional" residual category was considered in Sporrong v Sweden (1982) 5 E.H.R.R. 35 and deals with whatever is not within the second and third rules, such as unexecuted compulsory purchase notices which did not take anything away, and did not stop the land being used, but did "blight" the land affected. Other cases appear to classify as Rule 1 cases facts which could just as easily sit within Rules Two or Three (for example, Chassagnou, the hunting rights case).

31. How breaches are classified under the three rules affects how they can be justified. For instance, a Rule Two deprivation will almost always require compensation to strike a fair balance. It was, perhaps, for this reason that the Grand Chamber in Pye decided on appeal from the ordinary Chamber that adverse possession was a Rule Three control, and not a Rule Two deprivation. No compensation is paid to the deprived paper title owner, so that a finding that this amounted to a deprivation would inexorably lead to a breach. Subject to that, the following must generally be shown:

(1) Rule Two

a. Subject to conditions provided by law;
b. In the public interest;
c. According to the principles of International Law.

(2) Rule Three

" ... 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".

(3) The "Fair Balance" Test

See Sporrong at paragraph 69:

"the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"

DISCRIMINATION

32. Finally, a quick word about discrimination. This is regulated by Article 14 of the Convention:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

(1) Direct Discrimination
(2) Indirect Discrimination

33. The way in which discrimination works is that the Court must be satisfied that a substantive right (like Article 8 or A1P1) are engaged. There is no need for them to be breached, but there is a need for the complainant to show that the subject matter of the dispute falls within one or other Article. Once that is shown, then the complainant must demonstrate a differential treatment.