Human Rights and BSC Modifications

Mr Graham has supplied a paper in response to our note concerning the application of the Human Rights Act to the Balancing and Settlement Code.

Mr Graham groups his points into 10 areas and I give brief preliminary comments on them below.

1 The question of whether generators (utilities generally) can claim status of "victim" under human rights legislation.

This is not a new question. It has been recognised for some time that there appeared to be an incongruity about a situation where an organisation which is a recognised public authority could not (under Strasbourg jurisprudence) bring a claim to defend its own human rights.[1]

The issue here is that it has been argued that utilities might themselves be public authorities in certain circumstances (as Thames Water was in *Marcic v Thames Water Utitlities Ltd*) and so might find themselves in this bind. As it has been put by one author:

> "It may be anticipated that utilities companies [footnote in the text: subject to the all-important risk that utilities which are public authorities may conceivably not be able to invoke the European Convention on their own behalf] will seek to invoke the European Convention … in connection with licence modifications and revocations, which can have a material effect on the value of businesses."[2]

It is accepted that utilities are likely to be public authorities only where they exercise a function of a public nature and it is a moot question as to whether a generator complying with its licence conditions and operating in accordance with the BSC is indeed acting as a public authority. Cases on public authorities have so far concerned housing associations, care homes and the like, as mentioned in the report quoted by Mr Graham, and are unhelpful in this respect.

But In any case this would not be a comfortable position[3] and it is best to proceed as if a generator could bring a claim, subject to the caveat that the position is unclear.

It is not disputed for these purposes that the operation on the BSC would be the act of a public authority.

2 Mr Graham notes "The issue at hand is is that interference disproportionate?" And asserts that "In this respect the Courts look to whether the interference strikes a 'fair balance' between the 'general interest' and the rights of the property owner"

See the comments below (in 3) in relation to "control" of use of property.

3 Whether compensation is payable and whether it needs to be "at full value".

Our previous note did not go into a dissection of the Article 1 First Protocol right and it might be worth elaborating in this regard. This was done for instance in the landmark case of *Sporrong* which Mr Graham quotes, where the right was identified as being made up of three "rules". The first rule is the entitlement to peaceful enjoyment and the second rule concerns the conditions for a person being deprived of his possessions. The third rule states that "the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest."[4]

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[1] There is discussion on this in the book "Judicial Review and the Human Rights Act" by Richard Gordon QC and Tim Ward (paras 2.58 onwards)

[2] "Business and the Human Rights Act 1998" by Michael Smyth, page 316 on "Utilities as claimants under the Act".

[3] Smyth says "there is no indication that the legislation was intended to place privatised utilities... in a straight-jacket of this sort...".(para 3.142)

[4] As described in the later case of *Allegemeine Gold-und Silberscheideanstalt v UK* (1987).

Although the three rules are inter-related, when looking at issues of compensation, it is important to know which rule is "in play". The cases Mr Graham quotes from are concerned mainly with deprivation of possessions (although it is not always clear in such cases). A regulatory system is likely to be seen instead as a "control" under the third rule. In such cases there is no automatic entitlement to compensation and any proportionality test is likely to be applied more strictly.

Instead a Court will first focus on whether there is a justification on public interest terms. It might look at whether there is a compensation mechanism as part of examining the balance of public interest but it does not imply that there need be "full" compensation.

As expressed in the leading practitioner's work:

> "The availability of compensation may also be relevant in assessing whether the requisite fair balance has been struck in relation to an interference which falls short of being a taking of property, ie an interference which falls within the first or third rule of art 1 of the first protocol."[5]

4 "The key issue is that some compensation should be made by the public authority … to the Party whose property has been disproportionately interfered with".

For the reasons given above, the key issue in cases where a State imposes a control over property is likely to be the justification for that control in the general interest.

However, proportionality will be an issue i.e. is there a way on which the State could have effected the control with a "lighter touch":

> "Whichever of the three rules of art 1 of the first protocol applies, an interference with property must not only be in the public or general interest, but must also satisfy the requirement of proportionality, that is, that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[6]

It is worth including this to emphasise that the question of proportionality is primarily one of whether the same aim could have been achieved another way, rather than being directly linked to compensation.

In passing it is noted that the *Marcic* case referred to involved contamination of a person's property by overflowing sewage and is not comparable with a "control" scenario. The principle quoted from *Guillemin v France* appears to refer to a deprivation of property which would fall under rule 2 of Sporrong.

The specific points about the P173 methodology are considered below (in 10).

5 Whether all costs are included in the P173 cost calculation.

Again, the specifics of the P173 methodology are considered below (in 10).

6 That "the aim should be to ensure" that there is no infringement of the human rights of any BSC Party, not just a generator.

It seems to be accepted in principle that the State has the right to control the enjoyment of the possessions of a generator in the general interest. If there might be alleged breaches of the human rights of others then these will have to be set out more fully in order to assess whether these might be acceptable within the terms of the Convention and the 1998 Act. In particular:

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[5] "Human Rights Law and Practice" by Lester and Pannick, para 4.19.21/
[6] "Human Rights Law and Practice" by Lester and Pannick, paragraph 4.19.18.

"In order to rely on art 1 of the first protocol an applicant needs to establish that he enjoys some right or interest as a matter of domestic law, which may be regarded as a property right from the Convention perspective."[7]

7 That a system of regulation is subject to legal challenge.

The original note set a benchmark We think it very unlikely that a Court would find that having a system of regulation *per se* whereby a generator is licensed and must comply with the conditions of its licence is itself challengeable on human rights grounds.

8 The Article 1 right is a highly-qualified right. The State is allowed a wide scope of control of the use of possessions in the public interest and the Courts are not likely to interfere.

The first point is self-evident. The second point has been made by commentators in similar terms[8].

9 An interference which arises by reasons of public emergency, is temporary and applies to all equally can be argued to be within the State's scope.

"It is well-established that the national authorities have a wide margin of appreciation in implementing social and economic policies, and that their judgment as to what is in the public or general interest will be respected unless that judgment is 'manifestly without reasonable foundation'.[9]

Our assertion is that interference which arises by reasons of public emergency, is temporary and applies to all equally is not manifestly unreasonable.

10 The meaning of compensation and "cost neutrality".

There are various legal definitions of compensate and compensation depending on the circumstances but they include "a sum of money designed to repair or make good the loss that the victim has suffered" and "in theory, compensation makes the injured person whole".

In other words, one approach to compensation is to put a victim back in the position they would have been had they not suffered a loss.

We have taken the view that a mechanism that puts a person in no better or worse position is one which compensates them. The phrase "cost neutral" is used as short-hand for this.

An "overview" of how this is assumed to work is as follows:

- In a "normal" scenario a generator would have received revenues for electricity generated but would have incurred costs in producing that electricity
- in an Emergency situation a generator is required to supply less electricity; this is treated as an acceptance of a lesser volume of electricity but the generator is still credited with the revenues for that amount of electricity. However, because the generator did not actually have to generate the electricity it will have made savings, notably on fuel costs.
- Without accounting for the saved costs an operator would have the benefit of a "windfall" arising from the emergency scenario (because of the arguably-generous practice of crediting the generator for electricity not generated). For this reason it would be wrong to look at the accounting for saved costs in isolation when looking at whether the *net effect* gives the generator reasonable compensation.

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[7] Ibid para 4.19.4
[8] See "Business and the Human Rights Act 1998" by Michael Smyth, para 9.8 and 9.9.
[9] "Human Rights Law and Practice" by Lester and Pannick, paragraph 4.19.16.

Mr Graham's further points on the proposed mechanism are that

- Only a limited set of unavoidable costs may be claimed;
- The time for which costs may be claimed are less than that for which the generator must "switch off";

These certainly seem reasonable issues to try and get right but the general tenor of our view is that, even where the proposed mechanism is not perfect, so long as it is done in a transparent non-arbitrary way, the latitude given to States in controlling the use of possessions in the public interest (especially in an emergency situation) is likely to mean that there would not be an infringement of the Article 1 First Protocol right.

Indeed, hypothetically lit could be that a mechanism which simply required a generator to switch off in the event of a danger to safety of the public electricity system without guaranteeing them any payment for lost revenue could also be within the latitude given to States. This is postulated to put the proposed mechanism in perspective (we have not looked at it expressly).

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