Possession, Property Law and Human Rights Issues

1. This paper examines briefly recent developments relevant to property law practitioners in relation to Human Rights issues in the context of possession proceedings. It does not aim to set out how each Article of the Convention operates, but rather aims to flag those developments most likely to be of interest to a property law practitioner. This is not only Article 8. Indeed it may surprise some practitioners of the degree to which the European Convention on Human Rights and the Human Rights Act has impacted on property law, and – perhaps more importantly - may impact in the future.

2. The rights examined here (in the following order) are:
   (i) Article 8 – right to a private and family life
   (ii) Article 6 – right to a fair trial
   (iii) Article 1, Protocol 1 - protection of property
   (iv) Article 11 – freedom of assembly and association
   (v) Article 14 – prohibition of discrimination

3. Human rights issues, and in particular Convention-based defences, generally only arise where the landowner / landlord is a public body or the State's legislation is in issue. The relevant principles were set out in *R (on the application of Weaver) –v- London & Quadrant Housing Trust*[1]. The majority held that the key question in determining whether an applicant's human rights were engaged was whether the act of termination was a private act, and in this case the act of termination was so inextricably linked with the provision of social housing that once the provision of social housing was recognised as a public function, those acts involved in that function were also public acts. Factors which led the Court to decide the Trust was carrying out a public function were the act of management and allocation of housing, the reliance on public finance and the very close relationship with local government. It also acted in the public interest and had charitable objectives. It was made clear that not every Registered Social Landlord would necessarily be in the same position as the Trust. Elias LJ noted that "*arguably*" those Registered Social Landlords that do not receive any public subsidy at all could be in a different position. However, generally, registered providers of social housing have not chosen to challenge whether or not they are a (hybrid) public body.

Article 8

4. Article 8 is currently the most topical of the Convention rights relevant to property practitioners. Article 8 protects:

[1] [2009] EWCA Civ 587

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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.**

5. Article 8 has been described as "*the least defined and most unruly of the rights enshrined in the Convention"* (*Wright v Secretary of State for Health*)[2]. Lord Bingham observed in *Qazi v London Borough of Harrow*[3] that "*few things are more central to the enjoyment of human life than having somewhere to live*" and as is well known, the "*home*" protected in Article 8 need not be held as the property of the individual.

6. Whilst it is uncontroversial and unsurprising that in those circumstances, a possession order made by a Court will usually engage Article 8, the question of whether this is justified and how that is to be decided has proved extremely difficult for the Courts. There is no denying that the current state of the law is confusing and difficult to apply. The Court of Appeal recently explicitly recognised this in *Mullen v Salford City Council*[4] (judgment attached).

7. This is no doubt partly why the Supreme Court has convened a 9 Justices bench to hear the appeal in *Pinnock v Manchester City Corporation*[5] in July, which will be the fourth time in well under a decade that the Supreme Court (formerly the House of Lords) has addressed the issue. As Lord Justice Waller commented in *Mullen,* "*the size of the panel would indicate that the guidance in Kay and Doherty will be looked at again..."* The Court of Appeal in *Mullen* granted leave to appeal to the Supreme Court in two of the five appeals before it.

8. It is not a happy procedural history, and for the purposes of this paper I need only set it out extremely shortly. Pending any reformulation by the Supreme Court in *Pinnock*, the principles in relation to possession were set out in *Kay v Lamberth; Leeds v Price*[6] as reformulated by *Doherty v Birmingham City Council*[7].

9. In *Kay,* a 7-member House of Lords agreed that *Qazi* required modification in light of the Strasbourg Court's decision in *Connors*[8]. The decision in *Kay* is not straightforward, which led to confusion about what the House of Lords had decided. The Court of Appeal attempted to give guidance to the County Courts, faced with numerous applications for possession hearings, in *Doherty v Birmingham City Council* [2006] EWCA Civ 1739. *Doherty* was

[2] [2006] EWHC 2866 (Admin)
[3] [2003] UKHL 43
[4] [2010] EWCA Civ 336
[5] [2009] EWCA Civ 852
[6] 2006] UKHL
[7] [2008] UKHL 57
[8] (2004) EHRR 189

subsequently appealed to the House of Lords [2008] UKHL 57 and further guidance was given, which also took into account *McCann*[9].

10. Lord Hope held in *Kay* that:

> 110. But, in agreement with Lord Scott, Baroness Hale and Lord Brown, I would go further. Subject to what I say below, I would hold that a defence ***517** which does not challenge the law under which the possession order is sought as being incompatible with article 8 but is based only on the occupier's personal circumstances should be struck out. I do not think that *McPhail v Persons, Names Unknown* [1973] Ch 447 needs to be reconsidered in the light of Strasbourg case law. Where domestic law provides for personal circumstances to be taken into account, as in a case where the statutory test is whether it would be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented. But if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these: (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8, the county court in the exercise of its jurisdiction under the Human Rights Act 1998 should deal with the argument in one or other of two ways: (i) by giving effect to the law, so far as it is possible for it do so under section 3, in a way that is compatible with article 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable: *Wandsworth London Borough Council v Winder* [1985] AC 461. The common law as explained in that case is, of course, compatible with article 8. It provides an additional safeguard.

11. Essentially the outcome of this process was two "gateways" (as they have come to be known). Lord Hope commented that the challenge ought to be "seriously arguable".

12. Gateway (a) is when it is contended that a particular statutory provision or common law rule was per se incompatible with Article 8. The Court would then either seek use its interpretative obligation under s.3 of the Human Rights Act to read the legislation in a Article 8 compliant manner, or it would seek a Declaration of Incompatibility. So long as the decision in *Kay* stands, the scope for a gateway (a) challenge is extremely limited.

13. However, there has been one recent challenge that I am aware of, and whilst it was refused, the Court granted permission to the occupier (Mr Coombes) to appeal to the Court of Appeal (*Coombes v Waltham Forest LBC* [2010] EWHC 666 (Admin)). In that case, the applicant (Mr Coombes) applied for a declaration that the Protection from Eviction Act 1977 s.3 was incompatible with Article 8. The possession proceedings were stayed and an application was brought in the High Court. Mr Coombes argued that the Protection from Eviction Act did not allow him to argue in the county court that his personal circumstances would justify his

[9] McCann v United Kingdom [2008] LGR 474

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remaining in the property and that this was incompatible with his Article 8 rights and that the possession proceedings were incompatible with Article 6(1) of the Convention. The application was refused on the basis that section 3 of the 1977 Act did nothing more than prohibit a property-owner like the local authority from repossessing property without first seeking a possession order in court. The requirement to seek a possession order rather than to recover possession without any supervision by a court could not be incompatible with Article 8. Coupled with the other relevant legislation, s.3 did not fall within the exceptional category of cases that the House of Lords had identified as gateway (a) cases. Further, the availability of gateway (a) and gateway (b) to challenges against possession proceedings was sufficient to render those proceedings compatible with Article 8, and there was nothing in the wording of s.3 of the 1977 Act and other relevant legislation that made it impossible for a county court to consider a defence based on Article 8. The Court further held that there was no breach of Mr Coombe's rights under Article 6(1) arose as he had full access to the High Court and to the county court for a determination of his claims. However, the Court granted Mr Coombe permission to appeal to the Court of Appeal given the matters of public importance raised by the case.

14. Gateway (b) could arise in circumstances where the landlord or landowner – if it were a body susceptible to judicial review, which has been held to include not only local authorities, but also registered social landlords – could be argued to have acted unlawfully in a public law sense. In *Kay*, Lord Hope (and the majority) indicated that this was a *Wednesbury* challenge.

15. The Court of Appeal subsequently delivered a number of judgments in post-Doherty cases on the intensity of review in gateway (b) cases. *Liverpool County Council v Doran* (a gypsy case), *McGlynn v Welwyn Hatfield District Council* (a homelessness case), and *Central Bedfordshire Council v Taylor* (a trespasssers case). *Pinnock,* due to be heard in July by the Supreme Court, involves a demoted tenancy.

16. The European Court of Human Rights has also delivered a further judgment, approximately a year ago, in *Cosnic v Croatia*. The case concerned Ms Cosnic's flat which she leased from a local authority school board, which they leased from central government. The central government sought possession when the local authority's lease expired. Under Croatian law, Ms Cosnic had no right to remain in occupation and a possession order was granted on that basis. The Strabourg Court quoted at length from its judgment in *Connors* and then stated:

> 21... the present case, the Court notes that when it comes to the decisions of the domestic authorities, their findings were limited to the conclusion that under applicable national laws the applicant had no legal entitlement to occupy the flat. The first-instance court expressly stated that while it recognised the appellant's difficult position, its decision had to be based exclusively on the applicable laws. The national courts that confined themselves to finding the occupation by the applicant was without legal basis, but made no further analysis as to the proportionality of the measure to be applied against the applicant. However, the guarantees of the Convention require that

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> the interference with an applicant's right to respect for her home be not only based on the law but also be proportionate under paragraph 2 of Article 8 to the legitimate aim pursued, regard being had to the particular circumstances of the case. Furthermore, no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia's obligations under the Convention....
>
> 22. In this connection, the Court reiterates that the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be have to have the proportionality and reasonableness' of the measure determined by an independent tribunal in the light of relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end."

17. The Court of Appeal has recently (2 weeks ago as I write this) attempted once again to give guidance on five co-joined appeals involved introductory tenancies and homelessness cases. I attach a copy of the recent judgment in *Mullen v Salford City Council*[10] to this paper, as it is the most recent of the authorities. It is not the most straightforward of judgments to read.

18. The Court of Appeal expressly recognised the forthcoming appeal hearing in *Pinnock*, but declined to stay the appeals. The Court explained that:

> "Rather than stay these appeals pending the decision in Pinnock, the Court of Appeal was persuaded that it might assist in the resolution of the problems if the Supreme Court had before it occupiers other than a "demoted tenant." It follows that it is important that we produce a judgment with some urgency. A further purpose of the judgment is to provide guidance as quickly as possible to the courts dealing with these cases on a regular basis to assist them with the many cases that they will have to deal with in the period between now and such time as the judgments of the Supreme Court are available."

19. The Court of Appeal granted permission to appeal in two of the five cases before it.

20. In summary, in my view, the Court of Appeal has held that:
    (i) unless the Supreme Court decides otherwise, the gateway (b) defence could be run in the County Court unless a particular statutory scheme excludes that right
    (ii) Gateway (b) does not contemplate a full ECHR proportionality review
    (iii) Separate steps taken by a local authority to obtain a possession order after a notice to quit has been served can be characterised as separate "decisions" amenable to public law review.

21. In relation to introductory tenancies, the Court of Appeal has held:
    (i) The gateway (b) defence in introductory tenancy regime cases must be run by way of judicial review in the Administrative Court. This was the effect of s.127 of the Housing Act 1996, provided the procedure in s.128 had been complied with.

[10] 2010] EWCA Civ 336

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(ii) The question for the County Court in relation to introductory tenancy regime cases is whether to adjourn for administrative court proceedings

(iii) The question is whether there was some "*highly exceptional circumstances"* to suggest that *"it was arguable that no reasonable authority with the duties it had to perform in relation to managing its social housing could have taken the decision".*

(iv) Guidance as to what is a "highly exceptional circumstance" was given:

> ..."Circumstances personal or otherwise which Parliament must have contemplated would be likely to be present in the context of such a scheme could not be considered as 'exceptional' never mind 'highly exceptional'.
>
> .... Likely circumstances include "difficult questions of fact as to whether anti-social behaviour had occurred" and thus "a Local Authority would not have to conduct a full inquiry to establish the truth or otherwise of such allegations, knowing that those are just the situations in which getting witnesses to attend and give evidence would be difficult'

22. In relation to homelessness cases, the Court of Appeal has affirmed that the gateway (b) public law defence can be run in the County Courts, applying the earlier decisions of Barber v London Borough of Croydon[11] and McGlynn v Welwyn Hatfield District Council[12]. Where a notice to quit has been served on a non-secure tenant occupying accommodation as a homeless person it will take "highly exceptional circumstances" for there to be a gateway (b) defence.

23. However, the following particular guidance was given when assessing the reasonableness of the decision to seek possession:

(i) It will be highly relevant if the Local Authority has accepted that an occupier will continue to be owed a homelessness duty (under s.193 of the 1996 Act) after possession has been recovered. For instance, if possession is sought because the premises are larger than the occupier needs. It would be a "highly exceptional case" for a gateway (b) defence to be successful in such circumstances.

(ii) Where the Local Authority considers that an occupier will no longer be owed a homelessness duty, that decision will be subject to an internal merits review as provided for in the statutory scheme[13] which also provides for an appeal to the Court on any point of law[14].

(iii) The same applies if it is said the accommodation is unsuitable.

(iv) Regard should be had to the purpose of the homelessness legislation, "*under which a person has no right to a particular dwelling as home and is the subject of temporary arrangements under which the Local Authority must on the whole be free to regain possession, so as to be able to manage its accommodation ion the interests of the*

[11] [2010] EWCA Civ 51
[12] [2009] EWCA Civ 285
[13] S.202-203, 1996 Act
[14] S.204, 1996 Act

homeless, as a group. If a person is homeless the Local Authority is bound to provide accommodation but not necessarily that which the homeless person occupiers under the homeless scheme."

24. Note that one example was given of a "highly exceptional" circumstance; if a Local Authority was unaware when it served a notice to quit of the mental illness of an occupier being such as to be a risk to his life if he was moved. The Court commented "*anything less than that kind of risk would be unlikely to qualify as so exceptional as to provide an arguable gateway(b) defence in the context of the homeless legislation."* (This is effectively the facts of *Barber).*

25. What to do now? We will all have to apply the latest guidance in *Mullen,* and wait for the judgment of the Supreme Court in *Pinnock.* Until then, Landlords and land owners may often be best advised in these cases to try and get the court to deal with this part of the defence summarily, by way of a preliminary question on whether the defence is "seriously arguable".

Article 6

26. Article 6 would have been a natural, if not obvious, starting point for this paper[15]. The Strabourg Court has referred to the "*prominent place*" that Article 6 has in a democratic society. It is also the most commonly cited article in applications to Strasburg, and is one of the most commonly cited articles of the Convention since the coming into force of the Human Rights Act 1998[16]. Property law rights are, of course, civil rights, and thus protected by the first limb of Article 6. This provides:

> **1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.**

27. Article 6 has been placed in issue in *Mullen v Salford City Council*, which is a very recent decision of the Court of Appeal[17]. Article 6 is not the key issue in *Mullen* by any means. It is important to understand the statutory differences between the introductory tenancy regime (relevant to 3 of the cases before the Court of Appeal in *Mullen)* and the demoted tenancy regime (relevant in *Pinnock).* In essence, in a demoted tenancy procedure, an order must first

[15] Some of this section is drawn from the article I co-wrote with James Maurici, "Focus on Article 6" in [2007] JR 56

[16] Of the 6,373 Articles relied on in the period 1999 – 2005 before the Strasbourg Court, Article 6 was relied on 3,998 times. Research carried out by the Department of Constitutional Affairs showed that Article 6 was the most commonly cited article in the magistrates court. (2001), however Article 8 may have now overtaken Article 6 (2003 research by the Public Law Project).

[17] [2010] EWCA Civ 336

be gained from a Court demoting the tenancy. (The full judgment in *Mullen* is attached to this paper as it is the most recent guidance from the Court of Appeal).

28. Mr Luba, acting for the tenant (Hall) against Leeds City Council, sought to argue that *Pinnock* should be distinguished because whilst under the demoted tenancy regime, possession proceedings are preceded by a demotion order, and therefore in gaining such an order, it would only be granted by the Court – an independent and impartial tribunal – if it concludes that it is reasonable to do so. In contrast in an introductory tenancy, there is no such safeguard.

29. Although Mr Drabble QC had raised concerns with Article 6 in *Pinnock* and argued that the process was not compliant with Article 6, the Court of Appeal in *Pinnock* considered (and Mr Drabble QC accepted) that because of *Gilbory*[18], which was binding on them, this point was not open to them. Mr Drabble QC reserved the right to argue that it was incorrectly decided if the case went further.

30. The Court of Appeal in *Mullen* agreed that this was a distinguishing feature but rejected that the central reasoning in *Pinnock* relied on such a factor, as it turned on the precise statutory wording, rather than the Court's power to grant a demotion order.

31. We may also hear further on the debate that took place in the Court of Appeal in relation to the homelessness regime. Tenancies granted subject to the homelessness duty are not secure (unless a local authority specifies otherwise). Parliament deliberately decided to exclude such tenancies from the procedural and substantive protections that apply in the case of secure tenancies. As the Court in *Mullen* summarised the policy reasons for this position as because "*local authorities need to be able to recover possession of homelessness accommodation in a swift and simple manner so as to be able to make efficient and cost effective use of their limited resources in the housing field".*

32. When a local authority decides to seek possession of a property occupied by individuals pursuant to its homelessness duty, the local authority is not required by legislation to make out the grounds required for the termination of a non-secure tenancy when seeking possession. There is a right to a review if the local authority decides that its homelessness duty has ceased. The only procedural protections provided by statute are those contained in the Protection from Eviction Act 1977, and in particular the requirement to obtain an order of the Court in order to obtain possession[19].

[18] [2009] QB 609
[19] S.3(1), Protection from Eviction Act 1977

33. The Court of Appeal records that "*some debate took place before us as to whether a local authority was bound to give reasons when serving a notice to quit and we were referred to the Notices to Quit etc (Prescribed Information) Regulations 1998, setting out what needs to be contained in a notice to quit and there is no reference to giving reasons".*

34. Indeed not. Where, however, does that leave the (incrementally ever-increasing duty on public authorities (at least) to give reasons for their decisions, particularly where an applicant's human rights are engaged? It will be interesting to watch developments.

Article 1, Protocol 1

35. The more obvious starting point is Article 1, Protocol 1. This provides the only express protection for property rights to be found in the Convention. It provides that:

> **"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession 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."**

36. The degree of interference is classified as (a) a deprivation (b) a control of use, (c) a measure to secure the payment of taxes, contributions or penalties or (d) an interference in peaceful enjoyment. A deprivation attracts a right to compensation; a control of use does not.

37. The adverse possession case of *Pye v. United Kingdom*[20] will be well-known to everyone here and I do not spend any time on it. At "first instance" in the Strabourg Court, this loss was held by a Chamber (the Fourth Section) to have constituted a deprivation of property for Article 1 purposes and a breach of the Article[21]. The case was subsequently heard by the Grand Chamber. The outcome was that no breach of Article 1, Protocol 1 had taken place[22].

38. There have been few developments of substantial interest to practitioners interested in regaining possession since *Pye.* The most noteworthy is probably *Austin v Southwark LBC*[23] where the Court held (somewhat unsurprisingly) that a tenant's right to apply to revive a tenancy under the Housing Act 1985 s.85(2) after an order for possession had been made ceased upon his death. The fact that it ceased upon his death did not amount to a deprivation of his possession under the Convention.

[20] (2008) 46 EHRR
[21] (2005) 43 EHRR 43
[22] see (2007) 46 EHRR 1083
[23] [2008] EWHC 499 (QBD)

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39. The Strabourg Court has occasionally been willing to find a property right, where it is not clear that the right exists in domestic law. In *Oneryildiz v Turkey*[24], the Court accepted that the applicant has a proprietary interest in a dwelling, notwithstanding that it had been unlawfully erected on public land. The editors of the relevant chapter in Human Rights Practice[25]also comment that in *Papastravrou v Greece*[26], the Strabourg Court was willing to presume "ownership" by virtue of the fact that the applicant had standing to challenge a re-afforestation order in respect of the land, even though no such finding had been made by the domestic courts.

40. Lord Scott recently criticised the development of the jurisprudence under Article 1, Protocol 1 in "Property Rights and the European Convention on Human Rights" (2009)[27]. He considered that the concept of "possessions" under Article 1, Protocol 1, has been widened beyond the scope of the Article, criticising the developments in *Pine Valley Developments v Ireland*[28], where the Court had held that there was an interference with property rights in a situation where the Supreme Court had held the grant of planning permission to be void, and *Stretch v United Kingdom*[29], where a disappointed lessee was unable to exercise an option for a lease of a further 21 years after the expiry of the first lease for 22 years as the option had been held to be ultra vires. Lord Scott wrote that:

> I confess to finding the *Pine Valley* case and the *Stretch* case profoundly unsatisfactory. In neither case had there been any deprivation of property. In each case there had been a disappointed expectation associated with the ownership of property. The disappointment had been caused by the operation of domestic law. In neither case had there been anything that could be described as arbitrary executive interference with possessions. In both cases local authorities had purported to provide benefits that it was not within their power to provide. In neither case had the error been made knowingly. In neither case was there any examination of whether the local authority, or any of its officials, had acted negligently. What can be the justification for treating Article 1 as a springboard for the grant of compensation for a misrepresentation of law not made knowingly and not found to have been made negligently?

41. It remains to be seen whether domestic law will, as Lord Scott advocates, read down the Strasbourg jurisprudence more narrowly in relation to the concept of "*possessions*". It seems to me likely that, in the tradition of the common law, there will be further cases before the English courts and before Strasbourg which will refine the concept of "possessions" in light not only of the criticisms Lord Scott makes, but also the particular factual situations before the Court and that the Convention is a "*living instrument".*

[24] (2004) 39 EHRR 12
[25] Claire Weir and Richard Moules
[26] App. No.46372/99, Judgment of April 10, 2003
[27] http://www.propertybar.org.uk/library/publications_2009
[28] (1991) 14 EHRR 319
[29] (2004) 38 EHRR 12

Article 11

42. The right to freedom of assembly and association have a long and distinguished provenance in other national legal systems, but is a relative latecomer to English law[30]. In Dicey's Introduction to the Study of the Constitution he explained how "*at no time has there in England been any proclamation of the right to liberty of thought or to freedom of speech" (*10th ed, 1959). Lord Bingham has more recently described the approach of the English common law to freedom of expression and assembly as "*hesitant and negative, permitting that which was not prohibited"* (*R (Laporte) v Chief Constable of Gloucestershire)*[31].

43. The right was codified in the ECHR under Article 11, which provides:

> **1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.**
>
> **2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.**

44. There are two aspects to Article 11. It protects the right to peaceful assembly, which includes the freedom to hold public or private meetings and demonstrations without interference from the State. Article 11 also protects the freedom to associate with others, including the right to form or join a political party or other group or association, and the right to belong to a trade union. I do not address this second aspect here.

45. There is also a historically high failure rate for cases arguing a violation of Article 11 before the Strabourg Courts. Research by David Mead shows that of all the "peaceful protest" applications made, only half past the admissibility stage, and of those that do, only half again are found to have violated Article 11[32].

46. The difficulty in overcoming the proportionality hurdle is reflected in English case-law. There has been only one high-profile assembly case where the challenge has succeeded, in the case of *Laporte.* The relevant principles and the margin of discretion was recently set out in

[30] I have drawn useful assistance from Thom Dyke's recent article, "Focus on Article 11", in [2009] JR 185 in analysing Article 11 in relation to property rights. For freedom of assembly in other national contexts, see e.g. inter alia, the First Amendment to the Constitution of the United States; Art 431-1 of the Nouveau Code Penal in France; Basic Law s.27 in Hong Kong; and Art 40.6.1 of the Constitution of Ireland.

[31] [2006] UKHL 55

[32] David Mead, "Strasbourg discovers the right to counter-demonstrate – a note on Ollinger v Austria (2007) E EHRLR 133.

a challenge to the Hunting Act 2004. In *R (Countryside Alliance) v Attorney General*[33], Lord Bingham argued that the appellants had to pass a three-stage test. First, interference must be "*prescribed by law"*. In *Countryside Alliance*, the interference came about as a result of the Hunting Act, and so this test was cleared. The second stage required the law to be directed towards the specific objects identified in Article 11(2). The test was passed, as Lord Bingham held that it was "*for the protection of... morals".* The final condition required the necessity of the interference in a democratic society. Lord Bingham held that:

> "The degree of respect to be shown to the considered judgment of a democratic assembly will vary according to the subject matter and the circumstances. But the present case seems to me pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament".

47. From a properly-law perspective, perhaps the most interesting of the potential arguments in relation to Article 11 is the possible scope to protecting protests conducted in a private forum. The origin of this argument is found in *Platform "Artze fur das Leben" v Austria* (1988) 13 EHRR 204, where the Strasbourg Court held that "*genuine, effective freedom of peaceful assembly cannot... be reduced to a mere duty on the part of the state not to interfere; a purely negative conception would not be compatible with the object and purpose of Article 11... Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals if need be".*

48. The Court considered whether a positive obligation extended to protecting protests conducted in a private forum in *Appleby v United Kingdom*[34]. The Court noted that the US Supreme Court had rejected the federal constitutional right to free speech in a privately owned shopping mall, albeit that as a matter of State law in other States there were wider rights. The Court agreed, and held that restrictions on the appellants from campaigning in a private shopping mall did not amount to a breach of Article 11, as it did not prevent an effective exercise of freedom of expression. As a general rule, *Appleby* is commonly cited in support of the proposition that there is not a positive obligation on the State to ensure that the right to peaceful assembly is protected on private property.

49. However, there remains some room for argument, as is clear from closer consideration of the arguments in *Appleby.* The Strasbourg Court left open whether it could be possible to bring Article 11 into play in a private forum:

> "where... the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights"

[33] [2007] UKHL 52
[34] (2003) 37 EHRR 38

50. The example given by the Strasbourg Court was "*a corporate town where the entire municipality is controlled by a private body might be an example".* It remains to be seen if any enterprising protest group run this point in due course. For example, it should perhaps sound a (mild) note of caution to those who gain broad injunctions around a wide area of their land when seeking to protect against the encroachment of (peaceful) activists, if to do so left no other area in the vicinity where a demonstration could take place.

Article 14

51. Article 14 – the right to freedom from discrimination - has in a handful of cases also become relevant. It provides that: "*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".*

52. As is well known, Article 14 is not a free-standing right not to be discriminated against. It provides protection against discrimination in your enjoyment of the rights and freedoms set out in the European Convention on Human Rights. For there to be a breach of Article 14, one of the other Convention articles has to be engaged. This does not mean, however, that there has to be a breach of that other article. A claimant must show that they have been treated differently to someone in an analogous situation.

53. There have been no recent significant examples of reliance on Article 14 in recent years in property law cases, that I am aware of. The classic example relevant to property law was *Ghaidan v Godin-Mendoza*[35], where a gay man who was only entitled to succeed to his deceased partner's flat on less favourable terms than a surviving heterosexual partner would have done relied on Article 14 because he was discriminated against on the basis of his sexual orientation and Article 8 was engaged, as the discrimination concerned his home.

54. Article 14 did play a small role in the argument in *Malekshad v Howard de Walden Estates Ltd* before the Court of Appeal[36], where it was accepted that Article 8 alone would not succeed, so Article 8 was relied on in conjunction with Article 14, arguing that section 2 of the 1967 Act should be construed in a way which was not arbitrary and disproportionate. The Court accepted that Section 2(2) of the 1967 Act does discriminate against tenants of flats or other premises which overhang or undershoot other units of accommodation in the same building. But if that discrimination is objectively justifiable and proportionate it is compatible with Convention rights. There is no mention of Article 14 in the judgments of the House of Lords.

SASHA BLACKMORE 13 APRIL 2010

[35] [2002] EWCA Civ 1533
[36] [2001] EWCA Civ 761

180 Fleet Street, London, EC4A 2HG | DX:1042 (LDE) | t.020 7430 1221 | f.020 7421 6060 | e.clerks@landmarkchambers.co.uk