

# The Human Rights Act and business: friend or foe?

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*Prior to the introduction of the Human Rights Act 1998 there were those who predicted with some trepidation that the Act would have adverse, perhaps dire, consequences for business. Twelve years after the commencement of the Act, this article examines whether those fears were justified. Key requirements of business are identified, and the impact of the Act (in respect of its influences on both public and private law) is assessed in relation to those requirements. The conclusion is that in general the Human Rights Act has not been detrimental to business and, perhaps more surprisingly, that sometimes it has led to identifiable advantages for that sector.*

## A. INTRODUCTION

The Human Rights Act (“HRA”) received the Royal Assent on 9 November 1998. It was one of the earliest manifesto commitments to be delivered by the then new Labour Government, and would have been earlier still had it not been for the intervention of other, more pressing, Parliamentary business. As the idea of human rights made its way from political theatre to enacted law, so it found itself scrutinised by a range of parties whose interest in the term had up to then been either tokenistic or non-existent. Into the latter camp fell the world of business, populated by actors for whom the acronym HR conjured up the hiring and firing of people, not the search to make their lives better. So, when Government delayed the date for the measure’s implementation in order to prepare the public sector for the rights revolution it had seemingly almost accidentally wrought,<sup>1</sup> the business community went about its own due diligence, half scared, half excited about what lay in store.

By the time of its enactment, everybody had become aware that the HRA was no ordinary Act of Parliament. Its embedding in UK law of the general rights to be found in the European Convention on Human Rights (“ECHR”)<sup>2</sup>, its partial mapping into UK law of the judgments of the European Court of Human Rights (“ECtHR”),<sup>3</sup> and its insistence that all laws henceforth be interpreted consistently with such rights so far as this was “possible” to do,<sup>4</sup> was a break with a long British tradition of highly particularist

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1. J Croft, “Whitehall and the Human Rights Act 1998” [2001] EHRLR 392.

2. Human Rights Act 1998, Sch.1.

3. *Ibid.*, s.2.

4. *Ibid.*, s.3.

legislative law-making: here was a law that might not have been out of place even in France. There were all those Strasbourg decisions that suddenly enjoyed honorary status in UK law, not law exactly but required influences on law making. To scare people even more, Professor Sir William Wade of Cambridge came down to London and in a famous lecture pronounced the common law effectively dead, superseded by a clause in the new Act to which hitherto few people had given any attention.<sup>5</sup> By the time Government was finally persuaded (increasingly against its better judgment) to implement the measure, on 2 October 2000,<sup>6</sup> it was not only the judges, the police, the local authorities and central government departments that had been “trained” in its terms, but the top commercial law firms as well—the Freshfields, Clifford Chances, Linklaters and other members of the magic circle.<sup>7</sup> Troops of civil libertarian types had been in and out of their offices, expatiating on the breadth of the rights of (among others) due process, privacy, property and free speech and on the HRA’s potentially deep reach into the world of business: competition law enforcement officers would be affected; the law on arbitration would be greatly restricted; legislative interference with property would be sharply inhibited; due process would throttle Government’s regulatory role; and much else besides.<sup>8</sup> One over-enthusiastic commentator even pronounced that the ban on slavery would come to the rescue of the embattled “managing agent” and “average underwriter” at Lloyds.<sup>9</sup>

This article is about what happened in the business sector after the HRA came on stream. How has the Act impacted on business? Has it been damaging to the goals of commerce? Has it inhibited capitalist enterprise? Or has it perhaps worked to the private sector’s advantage, tying interfering officials up in knots? To answer these questions we need to review the court record, since it is through judicial interpretation of the vague rights in the HRA that the document takes on its true legal shape. The issue is not the same as that of the impact of the HRA on private law, though of course there is overlap between the two.<sup>10</sup> As will become apparent, our view is that the impact of the HRA on business has rarely been negative, has sometimes been beneficial, and has most often been neutral. Even where the impact has been adverse, we would argue that this has been largely in the public interest.

Before we start, however, there is a preliminary matter that needs to be addressed. We must be clear about what business means in the context of our discussion and, crucially, what business regards as its key requirements. Only when we have addressed these two points shall we be able to move on to our detailed assessment of how the HRA has affected this field.

5. H W R Wade, “Horizons of Horizontality” (2000) 117 LQR 217.

6. For the reminiscences of a key political player, see J Straw, “The Human Rights Act: Ten Years On” [2010] EHRLR 576.

7. An expenditure of effort to which one of us can testify directly, having been involved in many such talks between 1997 and 2000.

8. A very good and balanced early study of the whole field was M Smyth, *Business and the Human Rights Act 1998* (Bristol, 2000).

9. N Jordan, “The Implications for Commercial Lawyers in Practice”, ch.10 of B S Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (Oxford, 1998), 135.

10. For an excellent recent study, see D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge, 2011) (hereafter “Hoffman”). Early treatments of the same issue include R English and P Havers QC, *An Introduction to Human Rights and the Common Law* (Oxford, 2000) and D Friedmann and D Barak-Erez, *Human Rights in Private Law* (Oxford, 2001).

## B. THE REQUIREMENTS OF BUSINESS

If we start by describing business as the activity of those engaged in trade or commerce, it is immediately clear that it takes place within a variety of legal structures. There are sole traders, partnerships (limited and unlimited) and a range of corporate vehicles (public and private companies, companies limited by guarantee or shares and so on). In the usual case the central objective of such enterprises is to engage in business with a view to profit and it is in this sense that the term “business” is understood in this article. In saying this, of course, we acknowledge that sometimes profit is not the aim of business activity, as is the case with “not for profit” companies (usually companies limited by guarantee), where the constitution either prohibits the distribution of profits to its members or where the company is not in fact operated to make a profit, although it may do so from time to time. We do not address here business activity in this more limited sense.

Given that the central purpose of business is profit-making, business people will not surprisingly tend to take the view that the law should be shaped so that this goal is facilitated and supported and also that the legal impediments to achieving this purpose are as few as possible (although in the context of our present political culture and economic climate this is not often asserted in such blunt terms). There are two particular aspects to this that require emphasis.

The first is that the range of commercial enterprises is such that the challenge to identify the requirements of the law so far as profit-oriented business is concerned is significant. There is inevitable variety here; the concerns of some will not be the concerns of others. So a sole trader may pay limited attention to the law of employment and probably takes a very different view of the most desirable tax regime to that of a multinational corporation. Indeed the legal needs of different types of business may be in conflict. In terms of the contractual regime governing business dealings, smaller business enterprises may favour a more interventionist approach (either by Parliament or by the courts) in order to prevent the imposition by more economically powerful corporations of contractual terms which may be unduly onerous or allocate the risk unfairly. For example, suppliers to supermarket chains may fall into this category.

The second preliminary matter to note is that the pursuit of profit may be the primary but it is not the only objective of business activity. Both law and a sense of ethics have already intervened to impose other purposes on business. The Companies Act 2006, s.172(1) (and indeed modern corporate theory<sup>11</sup>) now demands that company directors, in promoting the company for the benefit of its members, should consider a variety of other matters, including the impact of its decisions on company employees, its customers, its standards of business conduct and the environment. Although s.172(1) does not specifically make reference to human rights, larger corporate entities are on record<sup>12</sup> as emphasising that they endeavour to incorporate human rights’ considerations into their business practices and indeed (in some cases) that they are central to the core values of the business. There is less evidence of this view from small businesses, however, and it may

11. See, generally, M Emberland, *The Human Rights of Companies* (Oxford 2005), esp. 10–13.

12. Joint Committee on Human Rights, *Any of our Business? Human Rights and the Private Sector* (HL 5–1, HC 64–1, First Session 2009–2010, HMSO 2009), paras 43–47, esp. para.45 (the evidence of Tesco and BP).

be that in this sector there is less enthusiasm for a voluntary embrace of human rights principles.<sup>13</sup>

Whilst the matters just addressed make generalisations about what business requires difficult, we believe that it is possible nevertheless to identify certain key elements—what we can usefully call core business needs—which most commercial organisations would support. There are the obvious fundamental requirements. First, business will hope that the law protects its assets (from state and other interferences) while at the same time, secondly, facilitating the profit-oriented exploitation of assets on fair and equitable terms (for instance, in obtaining necessary approvals and consent where these are required to deploy assets in a desired way). Thirdly, business will look to the law to minimise the restrictions that the state and others may impose on the profit-oriented utilisation of their assets. Business wants flexibility in respect of its work practices and tends to view with hostility policies that are regarded as not sufficiently responsive or flexible and as involving the imposition of what is perceived to be over-regulation by the state over a range of issues (such as employment law; environmental controls; matters pertaining to health and safety; company reporting requirements; and the like). Sometimes the complaint will be the opposite one, that the state does not do enough to protect business from hostile third parties. All these are seen as increasing costs, thereby reducing profits. Less obviously, but probably of equal importance, there is, fourthly, the need for legal certainty. Business plans are increasingly driven by the requirements of shareholders and financiers, and their drafters will not want to be undermined by legislative (or indeed judicial) developments (for example, in respect of planning or employment law) that are not reasonably foreseeable. This kind of predictability is also important in terms of a business's contractual rights and liabilities as well as its liabilities to third parties. Fifthly and finally, if things do not turn out as planned, business seeks remedial options and dispute resolution procedures which are effective, expeditious and inexpensive. And by the same token and related to this, if the business itself is to be the subject of legal proceedings it will seek to ensure that the case against it is conducted as fairly as possible.

## C. THE IMPACT OF THE HRA

### 1. Protecting business assets

All businesses have significant commercial assets upon which their profitability depends. These will vary from enterprise to enterprise but will invariably include capital reserves, property, intellectual property rights and confidential information. The most relevant rights in the Convention for these purposes are Art.1 of the First Protocol (“A1P1”) (the right to property) and Art.8 (the guarantee of respect for privacy). The first of these is in the following terms:

“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.

13. This is significant. See *ibid.*, para.34 (citing evidence that 99 per cent of UK business is either small or medium-sized); and see further *ibid.*, para.36 (the evidence of the CBI).

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.”

Commercial enterprises clearly and uncontroversially come within its terms as each is by definition a “legal person”, so it is not surprising that (in so far as they considered the HRA) such organisations viewed the provision with great optimism, seeing in it a potential protection against state (and indeed other) interference. Traditional human rights lawyers and activists, on the other hand, have never been enthusiastic about this right, fearing that the application of the Article would favour private capital and limit the ability of national governments to implement their economic and social policies. Indeed it had been concerns about just this potential which had made the right to property so controversial when the European Convention was being drafted in the late 1940s, not appearing at all in the original catalogue of rights in the Convention proper (agreed in 1950) and only being included in the heavily diluted form (as set out above) in a 1952 Protocol.<sup>14</sup> With these different philosophical battle lines drawn, how have matters unfolded for business?

We should remind ourselves again that the case law of the ECtHR is a strong influence on the domestic law which is the primary focus of this essay, since this Strasbourg jurisprudence is required to be taken into account by the UK courts in their development of the meaning of the Convention rights.<sup>15</sup> The term “possessions” has been widely defined by the ECtHR as “including claims in respect of which the applicant can argue that he has at least a legitimate expectation of obtaining effective enjoyment of a property right”<sup>16</sup> (including, for example, leases, shares, planning permissions, choses in action and intellectual property rights<sup>17</sup>). The ECtHR has also taken a liberal approach to the determination of those persons who have *locus standi* to bring an application before it, that is, those persons with victim status as required by Art.34. The well-established case law of the court has inhibited (indeed almost prohibited) states from seizing property without compensation and has also restrained them from imposing such restrictions on the use of assets so as effectively to amount to a taking.<sup>18</sup>

To this extent this provision undoubtedly protects business from anti-capitalist state actions. Yet, for business, there has been a sharply qualifying sting in the tail, in the form of other developments in European jurisprudence which made it plain that governments should have a wide discretion in implementing legislation which they regard as being in the public interest. This is where the very attenuated nature of the guarantee in the First Protocol has restricted the potential of the measure from the business point of view. As the ECtHR put it in *James v United Kingdom*,<sup>19</sup> “the Court, finding the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is in the ‘public interest’ unless that

14. A W B Simpson, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention* (Oxford, 2001), ch.15.

15. Human Rights Act, s.2.

16. *Stretch v United Kingdom* (2004) 38 EHRR 12, [32].

17. See, in particular, *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 36, where it was held that even a trade mark application came within the Article.

18. *Lithgow v United Kingdom* (1986) 8 EHRR 329; *Papastavrou v Greece* (2003) 40 EHRR 361.

19. (1986) 8 EHRR 123, [36].

judgment be manifestly without reasonable foundation". Similarly, in determining the amount of compensation to be paid by the state when confiscating assets, the existence of "legitimate objectives of public interest" may justify payment of less than the full market value, and sometimes no compensation at all.

The general approach of the ECtHR has been carried forward into UK law post-2000. The recent Supreme Court decision of *AXA General Insurance Ltd v Lord Advocate*<sup>20</sup> is a compelling recent example of the interaction and application of these elements of the ECHR property right in the British context. Insurance companies sought to challenge the legality of the Damages (Asbestos-related Conditions) (Scotland) Act 2009, which made pleural plaques and other asbestos-related conditions actionable for the purpose of claims for damages for personal injuries. These conditions are benign and do not result in physical harm, so that (prior to the statute's introduction) they were not actionable. This result had arisen from the House of Lords' decision in *Rothwell v Chemical & Insulating Co Ltd*,<sup>21</sup> which had held that the existence of actual harm was a prerequisite for an action for personal injuries. Looking at the matter from a business perspective, the difficulty faced by the insurers as a result of this legislation, which in substance imposed a retroactive liability, is obvious. The companies had set aside capital assets to meet expected liabilities only to find that these reserves (post the legislative change) were now wholly inadequate. More funds needed to be found, thereby forcing a reallocation of assets within the petitioners' businesses. (The ability to implement the corporate forward business plans was also undermined, so what was involved here was not merely the need of business to preserve property but also the imperative of certainty.<sup>22</sup>)

In the Supreme Court it was accepted that the insurance companies had *locus standi*, since they were "directly affected" by the legislation even though, formally, any claim would be made not against them but against the companies that were primarily liable. This had been an important issue in the lower courts but did not figure as greatly in the Supreme Court as might have been expected, perhaps because, as Lord Brown put it, the Scottish scheme came at "enormous cost to insurers, estimated overall perhaps in billions of pounds".<sup>23</sup> The court was also clear that the capital resources of the insurance companies were "possessions" within the meaning of the First Protocol and that this kind of retroactive interference was something which needed to be justified if it was to survive human rights scrutiny.<sup>24</sup> So far so good for the insurance companies. But then, as so often happens in the Strasbourg property cases, the final hurdle proved insurmountable. The eight-judge Supreme Court was unanimous that, in all the circumstances of the case, the interference had been justified for HRA purposes. The aim of the legislation was legitimate—reducing social injustice.<sup>25</sup> The legislature had been entitled to recognise a social need for those who had been negligently exposed to asbestos (and had developed pleural plaques) to be able to claim damages for such exposure, even though they manifested no demonstrable health problems. Assessing the weight and validity of any alleged grounds of criticism was a matter of political judgement, "not so much an attitude

20. [2011] UKSC 46; [2011] 3 WLR 871.

21. [2007] UKHL 39; [2008] AC 281.

22. The fourth of the business objectives that we earlier identified, discussed further *post*, xxx.

23. [2011] UKSC 46, [71].

24. See Lord Hope's review of the Strasbourg case law in the case: *ibid.*, [21–22].

25. *Ibid.*, [29–30].

of deference, more a matter of respecting, on democratic grounds, the considered opinion of the elected body by which these choices are made”.<sup>26</sup> Here it could not be said that such political judgment was “without reasonable foundation or manifestly unreasonable”.<sup>27</sup>

The general pattern of judicial analysis evident in this decision (albeit with somewhat different technical arguments from case to case of course) has been repeated in a range of decisions,<sup>28</sup> both historic and recent, involving other types of legislation which have attempted to interfere with business assets. There is something of a repetitive refrain emerging from our review of the cases: the court recognises the status of the applicant to sue and that it has been deprived of a “possession” (thus, in the jargon of HRA litigation, “engaging” A1P1), but then concludes that the decision to introduce the relevant measure “is not manifestly without foundation”. Unsurprisingly, the applicant is unable to show otherwise, since it is a heavy evidential burden to satisfy, tougher even than the traditional *Wednesbury*<sup>29</sup> criteria for mainstream judicial review. Many (including the authors) will see this as the proper approach to the implementation of A1P1, since it means private capital assets cannot impede the introduction of socially relevant legislation.

Business, in terms of the theme and title of our article, may be inclined to see in this line of cases a new friend that is always promising to be of assistance but actually disappoints whenever called upon to help, other than in extreme situations that rarely if ever arise. The sword that the HRA appears to be—capable of being wielded to strike down unwanted laws—is more apparent than real. Yet business should not be too despondent. HRA, s.3 requires that all legislation be interpreted “[s]o far as it is possible to do” in a way that is compliant with the Convention rights. And A1P1 has also conferred upon business a substantive right to challenge legislation when previously it was limited to procedural challenges through judicial review. True, it was only the particular mechanics of devolution that allowed the frontal challenge to the Scottish legislation in *AXA Insurance*, which is all that is available against legislation enacted by the UK Parliament (as opposed to any of its devolved arms).<sup>30</sup> But these declarations carry weight in the political sphere: they force a reply from Government, or at the very least a crisis if no response is forthcoming.<sup>31</sup> This is an extra weapon that can be wheeled out on to the legal battlefield if the state intervention is considered by business legal advisers to be plausibly egregious. It imposes on the state a duty of explanation for legislation for which, prior to the HRA, no such explanation was required either before or after the Royal Assent. And there will undoubtedly be some cases where the challenge will be successful

26. *Ibid.*, [32].

27. *Ibid.*, [33], *per* Lord Hope. *Cf* Lord Brown, who, though more sceptical of the Scottish legislation, nevertheless felt constrained to accept it (“ill-judged though many might regard it to be”) on account of “the wide margin of appreciation properly accorded to a democratically elected body determining the public interest by reference, as here, to political, economic and social considerations”: *ibid.*, [83].

28. See, eg, *Sinclair Collis Ltd v Secretary of State for Heath* [2010] EWHC (Admin) 3112; [2011] UKHRR 81; *SRM v HM Treasury* [2009] EWCA Civ 788; [2009] UKHRR 1219. See further in relation to taxation matters, even involving retrospective legislation, where the approach is similar: *R (Robert Huitson) v Her Majesty’s Revenue and Customs* [2011] EWCA Civ 893; [2011] STC 1860; *R (Federation of Tour Operators) v Her Majesty’s Treasury* [2008] EWCA Civ 752; *National and Provincial Building Soc v United Kingdom* (1995) 25 EHRR 127; and generally P Baker, “Retrospective Legislation and the European Convention on Human Rights” [2005] BTR I.

29. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

30. See Human Rights Act, s.4.

31. See P Sales and R Ekins, “Rights-consistent Interpretation and the Human Rights Act 1998” (2011) 127 LQR 217.

because the state cannot offer any real justification at all for the deprivation of property; as we have seen, this will be especially likely if it has been effected without compensation. Furthermore, we can never know (but some businesses might) the extent to which the Convention right to property has inhibited Government from actions which it might otherwise taken. A glimpse of such a “might have been” was the discussion of whether or not to compensate shareholders in RailTrack when their property was taken back into public ownership: the political leaders involved knew that their hands were to some extent at least tied by the HRA.<sup>32</sup> HRA, s.19 undoubtedly plays a part here, since it insists that promoters of bills before Parliament declare in advance their view of the human rights compatibility of the measure they are asking parliamentarians to enact.

Aside from providing for the possibility of challenging state legislation which purports to interfere directly with business assets, the HRA has a wider ambit which is also relevant here, since it is capable of application to disputes between two commercial enterprises or to disputes between a commercial enterprise and a private individual. In the parlance of the HRA, the measure has a degree of “indirect horizontal effect”. This is for two reasons. First, the robust s.3 mandate on interpretation of statutes is not restricted to cases involving only state actors. The courts are instructed by the leading cases on this provision to strive for a construction that avoids incompatibility (and a consequential declaration of incompatibility) even though “it is not a meaning that [the words] would be given in a non-Convention interpretation”.<sup>33</sup> Secondly, even where a statute is not involved in any given case between private parties (corporate or non-corporate), there is the spectre of the HRA’s rights nevertheless determining how the judge in such a piece of litigation should apply the common law: under s.6(3)(a), the court is itself designated a “public authority” in these as in all cases and so has a duty to apply HRA rights just as though it were an “ordinary” public body—even where there is neither a statute informing the adjudicative process nor any other public agency in the room. (This is the clause that led to Professor Wade’s incendiary remarks about the end of the common law.<sup>34</sup>) It is clear from the case law that has sought to understand these Delphic utterances in the HRA that developments in the common law should at very least be informed by the Convention rights where the issue for adjudication (and on which the common law is being asked to pronounce) is within the ambit of some or other of the Convention rights.<sup>35</sup>

The effect of this twofold horizontal impact (via s.3(1) and s.6(3)(a)) is that the HRA has had an impact on real property law (where there is a strong statutory framework) and on the law relating to confidential information (which is largely governed by the common law). As regards the first of these, property law, some muse that the HRA (through A1P1 and the right to respect for one’s home in Art.8) may in the future radically reform property law, so as to create “human property rights”.<sup>36</sup> For the moment business will be

32. See *Weir v Secretary of State for Transport* [2005] EWHC 2192 (Ch), esp. [287–298]. The claimants withdrew their claim that there had been a *de facto* expropriation.

33. *Wilson v First County Trust Ltd* [2001] EWCA Civ 633; [2002] QB 74, [42]. See also *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 .

34. See *supra*, fn.5.

35. See R Brownsword, “Contract Law and the Human Rights Act 1998”, in M Furmston (ed), *The Law of Contract* (London, 2010) (hereafter “Brownsword”), [1.223]. Brownsword robustly states that, since legislation has to be read down to equate with Convention rights, it “surely follows” that common law principles should be similarly interpreted.

36. K Grey and S F Grey, *Elements of Land Law*, 5th edn (Oxford, 2009), 116.



pleased that, as a result of s.3(1), the HRA is clearly capable of being invoked to prevent interference with their property assets, even where it is not the state that is doing the interfering—just so long as there is a statutory peg upon which s.3(1) can then hang one or more of the Convention rights. Thus, in *PW & Co v Milton Gate Investments Ltd*,<sup>37</sup> Neuberger J (as he then was) very much envisaged a positive role for the HRA in the context of construing provisions of the Property Law Act 1925 in accordance with the Convention. He said:<sup>38</sup>

“If one approaches the question by reference to fairness it does not appear to me to be unfair that the [HRA] should be capable of being invoked to produce the result which the parties clearly intended at the time when they entered into their contracts . . . ”.

On the facts the HRA was influential in the court’s decision, which avoided the palpably unjust consequence of a landlord’s being unable to recover either possession or any rent whatsoever in respect of a significant part of its premises (occupied by another business) for a period of up to 13 years. Similarly, it has been held in an influential Strasbourg decision that A1P1 was violated when a council (acting in a private capacity and therefore in this instance for HRA purposes not a public authority under s.6) refused to permit a tenant to exercise the option to renew a business tenancy.<sup>39</sup> More controversially, the relevant provisions of the Limitation Act 1980 and the Land Registration Act 1925 were initially held by the ECtHR (by a bare four to three majority, sitting as a Chamber) to be incompatible with A1P1 in so far as they operated to deprive the registered owner of title to the land as a result of occupation by squatters. This ruling, which overturned a considered House of Lords opinion on the issue, was however set aside on appeal, with the Grand Chamber finding the UK’s squatters’ laws to be justified, given the wide margin of appreciation accorded the authorities in circumstances such as these.<sup>40</sup>

This reassertion of deference by Strasbourg in the squatting case was not at all surprising—it was the activist Chamber ruling which had been the shock. Generally speaking, both the European and UK judges have been sensibly limited in the interventions they have made. The intuition for human rights has been counteracted by a similar intuition against too much interference in a field that seems to the judges (rightly, we would suggest) far from the core of what human rights should be about. Balancing a commitment to human rights, therefore, has been an understandable concern to preserve a stable and coherent system of property rights. This is something that is also, of course, in the interests of business, the need for certainty as we earlier described it. In *Pennycook v Shaws (EAL) Ltd*,<sup>41</sup> where a failure to serve the correct statutory notice led to loss of a right to renew a business tenancy, it was nevertheless held to be in the public interest, and with “obvious economic benefits to both landlord and tenant”, to have certainty in the procedural mechanisms governing renewal. There are other similar cases.<sup>42</sup> Clearly, rulings in particular cases may favour one section of business rather than another, and views may differ in particular cases as to whether the adjustment of property rights

37. [2003] EWHC 1994 (Ch); [2004] Ch 142.

38. *Ibid.*, 174.

39. *Stretch v United Kingdom* (2004) 38 EHRR 12.

40. See *J A Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 1093 (Grand Chamber). Note especially the court’s view of the margin of appreciation, at [71].

41. [2004] EWCA Civ 100; [2004] Ch 296, esp. at [41].

42. Eg, *C A Webber (Transport) Ltd v Railtrack Plc* [2003] EWCA Civ 1167; [2004] 1 WLR 320.

through the application of the HRA is appropriate. Yet the overall impression is that the impact of the HRA in respect of property law as it affects business has been sensible, pragmatic and has led to equitable outcomes. There is no sign—yet anyway—of the radical revolution anticipated by some. “Human property rights” remain for the future, if at all.

Turning now to the law of confidential information, legal developments in respect of the judge-made law relating to the protection of business information have been eye-catching. Here the predominant driving force has been Art.8 and the work has been done through s.6(3)(a), there being no statute in the background upon which to hang the rights’ analysis. Many businesses are understandably concerned about their ability to protect their confidential business assets (such as technology, marketing plans, client lists and so on) from being obtained by their competitors. For some businesses their very existence will depend on their being able to do so. The traditional protection (absent the influence of Art.8) for preserving confidentiality was based upon an express or implied contractual right or the equitable duty of confidence. The common law cause of action rooted in the duty of confidence (as set out in *Coco v AN Clark (Engineers) Ltd*<sup>43</sup>) requires proof: first, that the information has the necessary quality of confidence, that it is “relatively secret” or inaccessible to the public; secondly, that the information must have been imparted to another in circumstances importing an obligation of confidence; and finally, that there has been an unauthorised use or disclosure of the information.

Astute businesses will put in place policies which require employees and persons with whom they negotiate to enter into non-disclosure agreements. Efforts are also made to ensure that information retains a quality of “relative secrecy” and when disclosed (in the absence of a non-disclosure agreement) that it is being done on a confidential basis. But procedures tend not to be comprehensive because, as Megarry J observed in *Coco v AN Clark (Engineers) Ltd*,<sup>44</sup> “business men [and women] naturally concentrate on their business and very sensibly do not constantly take legal advice before opening their mouths or writing a letter, so that business may flow and not stagnate”. There is also the deterrent of cost in devising and implementing appropriate policies. So there are clearly potential gaps in the traditional common law framework.

Here the HRA may well lead to improved protection for confidential business information. In respect of private information, it is now reasonably clear that the first and second requirements of the equitable duty of confidence have been replaced (as a result of the impact of Art.8) by a more general enquiry as to whether or not the information is private.<sup>45</sup> If it is, then the obligation of confidence will arise. The dominant view is that the obligation will be imposed if the recipient of the information knows or ought to know that there is a reasonable expectation that the information should be kept confidential.<sup>46</sup> Arguably, corporate entities possess some “private” information such as financial documents, minutes of board meetings and internal correspondence which will come

43. [1968] FSR 415.

44. *Ibid.*, 425.

45. *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125, [83]. See generally T Aplin, “The Future of Breach of Confidence and the Protection of Privacy” (2007) 7(2) OULJ 137; G Phillipson, “Privacy: the Development of Breach of Confidence—the Clearest Case of Horizontal Effect”, ch.7 of Hoffman (*supra*, fn.10).

46. *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457, [85] and [134]; *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125, [82].

within the scope of the reformulation, but this “extended” action for breach of confidence (as it is sometimes called) has not as yet brought commercial information within its scope.<sup>47</sup> Some argue strongly against such an extension, not least because the removal of the requirement that the information must be confidential would be anti-competitive (possibly having an adverse impact on the patent system, to take one example) since commercial enterprises would then be able to restrain the use of information which might otherwise be in the public domain.<sup>48</sup> Yet, for individual business claimants, there would be benefits arising from the new formulation. There would be no necessity to prove that the information was confidential, or that it was imparted in circumstances of confidence. In particular, the absence of the latter requirement as an ingredient of the cause of action would have the advantage that information obtained by stealth would be protected, when presently it is not. More generally, meritorious claims which sometimes presently fail because a business has not adopted the correct internal procedures (for example, in respect of the execution of non-disclosure agreements) would now be more likely to succeed.

In the short term at least, on the current state of authorities, it is perhaps unlikely that confidential information will be encompassed by this extended action for breach of confidence. There is, however, another possibility, arising either where a statute can be found to take the issue out of the realm of pure common law and into the realm of s.3(1), or where the opposing party can be characterised as a public body to whom s.6(1) straightforwardly applies. In either of such circumstances business may be assisted in restraining the disclosure of information through the application of AIP1. Thus, in *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council*,<sup>49</sup> it was held that confidential information was a “possession” within the meaning of the First Protocol as being “a well-recognised species of property”. Accordingly, the Audit Commission Act 1988, s.15(1) was required to be read down to exclude from its ambit certain confidential information of a financial nature. At one level the decision has a narrow compass, since one of the litigants was a public authority and it related to the interpretation of specific legislation. Yet, more widely, it is now possible that AIP1 will be raised by private litigants in the context of an action for breach of confidence with a consequent potential to influence the present elements of the action (independently of the effect of Art.8) In this context the HRA may turn out to be a rather helpful friend to business.

## 2. Facilitating the making of profit from assets

As we have seen, businesses need to be able to maximise profit from their assets if their needs are to be fully met. Part of the role of the state is to inhibit such behaviour in the name of the greater good: not every business can do whatever it wants with its property, turn to wherever a profit beckons, deploy its assets in any kind of new way that it is judged will play well with shareholders whatever its impact might be on society or the immediate environment. In order to control business behaviour, the state obliges business to obtain permissions for a whole range of activities (in the form of licences, planning permissions and so on). It is important for business that such permissions are granted by the authorities

47. See T Aplin, “A Right to Privacy for Corporations?”, in P Torremans (ed), *Intellectual Property and Human Rights* (London, 2008), 475–505, where the relevant authorities are discussed.

48. Aplin, *supra*, fn.45.

49. [2010] EWCA Civ 1214; [2010] UKHRR 1317.

fairly in accordance with the law and that, if they are not, there is an appropriate remedy available to those affected. Has the HRA assisted (or indeed impeded) the ability of business to challenge this kind of state decision-making? The key provisions are once again A1P1 and also, in this context, Art.6(1). We return to the first of these at the end of this section: recent case-law suggests that the HRA may be about to unleash an important new protection for business in the form of a novel action for damages for unlawful state actions which are in violation of corporate Convention rights. But first there is Art.6 to consider.

The text of the right is distinctly unpromising from a business point of view. The bulk of it is concerned in a quite detailed way with fairness in the criminal process, and even that small part of it which is not (part of the first sentence of Art.6(1)) does not appear relevant at first glance: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". As the wording suggests, the original idea behind this was to extend guarantees of fairness into the civil as well as the criminal sphere, with the "determination" of "civil rights" referred to being intended to cover court actions between private parties. However, over time, in a series of cases which were sometimes very controversial and decided by wafer-thin majorities, the ECtHR inexorably expanded the remit of the right.<sup>50</sup> We need not dwell on the details here: first, tribunals were brought within its reach; then regulatory bodies; then local planning authorities; and so on until the point was reached where all pecuniary claims asserting economic rights came to be considered presumptively within the Article so long as some kind of relevant "determination" involving a dispute (in the French version "contestatio") could be established.<sup>51</sup> This emerging jurisprudence meant that when it came into force in 2000, the HRA could potentially operate as a mechanism for challenging state decision-making, over and above the system of judicial review already in place. This ECtHR oversight, it should be said, revealed inconsistencies of approach, with some cases stressing the need for a review of facts as well as the law and others saying that this was not required.<sup>52</sup> So how has Art.6(1) played out?

Even before implementation across the whole United Kingdom in October 2000, the quirks of devolution had allowed Scottish courts first bite at the issue and in one such early case a corporate developer struck terror into planning departments everywhere, successfully arguing that a Reporter (in English terms an Inspector) into a planning proposal was not sufficiently separate from the relevant government department to make his or her findings independent for Art.6 purposes and, furthermore, that the court's capacity to review any such decisions was too restricted to cure the resulting procedural defect.<sup>53</sup> State-oriented sceptics of human rights licked their lips in anticipation of the collapse of the planning system into a kind of litigious free-for-all, but in its first major decision under the HRA, on 9 May 2001, the House of Lords unanimously imposed a UK-wide view that was different and altogether more deferential, in the important case of *R (Alconbury*

50. For a good survey of the cases, see D J Harris, M O'Boyle and E P Bates, C M Buckley, *Harris, O'Boyle and Warbrick's Law of the European Convention on Human Rights*, 2nd edn (Oxford, 2009), 210–235.

51. *Editions Périscope v France* (1992) 14 EHRR 597.

52. Contrast *W v United Kingdom* (1987) 10 EHRR 29 and *Kingsley v United Kingdom* (2002) 35 EHRR 177 with *Bryan v United Kingdom* (1995) 21 EHRR 342.

53. *County Properties v Scottish Ministers* 2000 SLT 965 (OH).

*Developments Ltd*) v *Secretary of State for the Environment*.<sup>54</sup> The matter at issue in planning cases such as this was largely one of policy and as such was primarily for ministers and the parliamentarians and electorate to which they were responsible. The courts needed to back out and the means of reversal deployed by their Lordships in *Alconbury* was via acceptance that in the overall context of planning law the appeal process was sufficient for Art.6 purposes. Duly chastened, the Scottish judges fell into line.<sup>55</sup> The HRA has not had a large impact on the planning process since then.<sup>56</sup>

The same has also been broadly true of public decision-making more generally, at least so far as Art.6(1) is concerned. Of course, public bodies need to act in a way that is compatible with Convention rights generally and this is as much the case with businesses as with anyone else.<sup>57</sup> But, where the issue is solely one of the “determination of a civil right” (ie, Art.6 alone), then the traditional grounds of judicial review have been invariably held to be sufficient by the UK courts, so far at least as business litigants involved in challenging licensing-type decisions are concerned.<sup>58</sup> The pre-existing framework of judicial review has not found itself in need of radical overhaul. True, this might be because of an increasing (albeit as yet incomplete) embracing of the test of proportionality within that old system of oversight, since the deployment of this new head of legality to public decision-making takes the overseeing judicial body much closer to the facts than did traditional *Wednesbury* review, thereby making Art.6(1) compatibility much easier to establish.<sup>59</sup> So perhaps it is fairer to say that Europe and traditional judicial review have met half-way. However we choose to characterise it, however, it is reasonably clear that Art.6(1) has not created significant new space for the challenging of governmental regulation.

Turning now to A1P1, this has not generally been of significant benefit for businesses seeking to overturn state decisions which limit or deny the ability to utilise profit-making assets. In *R. (Malik) v Waltham Forest NHS Primary Care Trust and Secretary of State for Health*,<sup>60</sup> the High Court found the suspension of the claimant from the medical performers’ list to be unlawful as a breach of the Protocol. However, this decision was overturned in the Court of Appeal. For Auld LJ, the judge in the court below had “wrongly concluded that the personal right of Dr Malik to practise in the National Health Service flowing from his inclusion in the performers list was a ‘possession’ within Art.1”.<sup>61</sup> Even where the Protocol applies, the heavily diluted nature of the right reduces its impact. In *R. (Bizzy B Management Ltd) v Stockton on Tees Borough Council*,<sup>62</sup> for example, not even the demolition of the claimant company’s property (pursuant to an

54. [2001] UKHL 23; [2003] 2 AC 295.

55. See *County Properties Ltd v The Scottish Ministers* [2002] SC 79.

56. See Clayton and Tomlinson, *The Law of Human Rights* (Oxford, 2009), [11.57].

57. *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532.

58. See *Tomlinson, Ali and Ibrahim v Birmingham CC* [2010] UKSC 8; [2010] 2 AC 39 for a comprehensive analysis of the Art.6 case law. Mostly the issues arise in the pure public law context.

59. *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532. Cf *R. (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] QB 1397.

60. [2007] EWCA Civ 265; [2007] 1 WLR 2092.

61. *Ibid.*, [48]. Rix and Moses LJ delivered concurring judgments.

62. [2011] All ER (D) 114 (Aug). See also *Global Knafaim Leasing Ltd v Civil Aviation Authority* [2010] EWHC (Admin) 1348; [2010] UKCLR 1459 (apparently excessive charges payable for the release of a detained aircraft held to be proportionate).

order which the local authority had refused to defer) was thought to be an interference with their Convention right to the enjoyment of their property.

There is one caveat on this narrative of deference, however, and it may turn out to be a very important one. Certainly the decision of Lindblom J in *R (Infinis Plc and Infinis Re-Gen Ltd) v The Gas and Electricity Markets Authority*<sup>63</sup> is a fairly recent one and may yet go to appeal. If it survives intact, it has the potential to provide a strong extra card for business to play against Government—one that includes not only the ethical cachet of human rights but the trump card of money as well. The issue in the case was a simple one: had the defendant authority acted lawfully when it refused the claimants' accreditation under the relevant statutory orders for the purpose of running two generating stations owned by them? The question was not whether there had been a discretion wrongly exercised, but rather whether the claimants had had a legal entitlement to which they had been denied on account of the defendant's error of law. After a long and careful review of the facts, the judge held that, on a close reading of the statutory provisions governing the matter, the authority had indeed acted unlawfully. The claimants had presented their case as one rooted not only in legal entitlement in this way but as also involving a breach of their First Protocol right to a "pecuniary benefit to which they were statutorily entitled".<sup>64</sup> Interestingly, the defendant seems to have accepted that the breach of the right followed as a matter of course from the initial finding of illegality.<sup>65</sup> The effect of this was, however, to open the door to a damages jurisdiction that might otherwise have been rather less easy to unlock.<sup>66</sup> This was on account of the way that HRA, s.8 allows the award of damages where on the basis of various criteria "the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made". Giving the judgment of the Court of Appeal in *Anufrijeva v Southwark London Borough Council*,<sup>67</sup> Lord Woolf CJ had suggested that the successful claimant "should in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed" and, where "the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded".<sup>68</sup> This approach was subsequently approved in the House of Lords.<sup>69</sup>

Having reviewed the guidance from the domestic courts and also the Strasbourg decisions to which the HRA section on damages specifically directed him,<sup>70</sup> Lindblom J in *Infinis*<sup>71</sup> felt emboldened to rule as follows on the issue of just satisfaction:

"I do not believe the claimants would receive just satisfaction from quashing and mandatory orders alone. No claim in private law is available to them. If damages are not awarded they will not recover what is due to them under the relevant statutory provisions. . . . I have held the claimants' argument on accreditation to be well-founded. Though acting in good faith, the Authority misapplied the statutory scheme, and the claimants were unlawfully denied that to which they were statutorily entitled. Their rights under [A1P1] were thus breached. Just satisfaction requires that damages be

63. [2011] EWHC (Admin) 1873.

64. *Ibid.*, [103].

65. *Ibid.*

66. See generally J N E Varuhas, "Damages", ch.11 of Hoffman (*supra*, fn.10).

67. [2003] EWCA Civ 1406; [2004] QB 1124.

68. *Ibid.*, [59].

69. *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673.

70. Human Rights Act 1998, s.8(4).

71. [2011] EWHC (Admin) 1873, [106].

awarded to them. If this outcome is repeated in other cases still to come, the precedent is set only by an understanding of the relevant statutory and contractual provisions which, as a matter of law, I have concluded is right. That, in my judgment, would not be a good reason for departing from the principle of ‘*restitutio in integrum*’.”

And so far as the case before him was concerned there was no particular difficulty in coming to a specific sum:<sup>72</sup>

“In this instance, there will be no lasting imponderables. A clearly calculable loss has flowed directly from the Authority’s unlawful decision. And there is, at least at this stage, no active dispute about the figures which the claimants have presented to the court . . . .”

The sums of money involved were considerable: the total loss contended for by the claimants, subject to mitigation, amounted to £2,656,743.84.<sup>73</sup> The matter of the precise award was stayed with the court to decide in the absence of agreement, but it is not likely to be other than very large.

When the HRA was first mooted and in the period after enactment and before implementation, no issue concerned ministers more than the question of damages. Section 8 was designed to keep their level down, and the Law Commissions were asked to report on the jurisprudence of the Strasbourg court so as to ensure a consistent practice.<sup>74</sup> The early cases seemed to support the executive’s hope that damages under the HRA could be kept under control.<sup>75</sup> Now, after *Infinis*, that can no longer be taken for granted. Regulators will have the “judge over their shoulder”<sup>76</sup> and a cheque book or credit card to one side when they are making these difficult judgments about the application of the law to corporate supplicants desirous of maximising revenue from their assets and with enough funds for the kind of legal advisers who will have the quality to be able to leap upon any mistake.

Is there a new trend here towards damages award? While it is too early to answer that question either way (and as we have already said, the issue is likely to go further up the appellate system in one form or other), there is another piece of evidence for this, in a case decided the year before *Infinis*, namely *R (The London Reading College Ltd) v Secretary of State for the Home Department*.<sup>77</sup> Here a regulatory decision by the UK Border Agency which was adverse to the financial interests of the claimant college was found to have been unlawful because procedurally unfair. So far so good—a rather typical public law case. But then, responding to the submissions of counsel, the judge, Neil Garnham QC, said this:<sup>78</sup>

“I have found that the withdrawal of the licence was carried out in a manner that was procedurally unlawful. In my judgment it must follow that that revocation was not ‘*subject to the conditions*’

72. *Ibid.*, [107].

73. *Ibid.*

74. Law Commission, Scottish Law Commission, *Damages under the Human Rights Act* (Law Com 266; Scot Law Com 180, Cm 4853, HMSO, 2000).

75. *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406; [2004] QB 1124; *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673.

76. Treasury Solicitors, *The Judge Over Your Shoulder*, 4th edn, with an introduction by Sir Gus O’Donnell (January 2006).

77. [2010] EWHC (Admin) 2561; [2010] ELR 809.

78. *Ibid.*, [67] and [68] (emphasis in original).

*provided for by law*' since those conditions include, as a matter of domestic law, procedural fairness.

It follows that there has been a breach of A1P1. I will hear argument from counsel as to the appropriate order in respect of the assessment of damages for that breach."

It is worth noting that here the issue was not one of statutory entitlement but rather of the wrongful (because procedurally inept) exercise of a discretion. The "must follow" of *Garnham QC* may have wide implications if other judges feel under a similar obligation. If all such cases are to attract damages under the HRA so long as they can be brought within the rather broad framework of possession under A1P1, then the HRA will have added greatly to the armoury of litigants seeking to challenge administrative decisions in a wholly unexpected way. In this sphere at least, the HRA will have become a great friend to business, albeit at what might arguably be thought to be the expense of the public interest.

### 3. Minimising restrictions on the use of assets

If deploying assets to profitable effect is a core concern of business, protecting those same assets from too many externally-imposed restrictions is another. Business is accustomed to (and indeed accepts) a clear and certain regulatory framework, but it is important that any business plan is not undermined by new restrictions which are not reasonably foreseeable. Here the story is once again of a fairly benign HRA from the business point of view. Where the Act has been intrusive in a way that has not always been welcomed by the enterprises which have been on the receiving end of its attention, the commercial sectors affected have been few, and arguably in each case the public interest has required, or at least explained, the engagement. In this section we consider three such business areas, related to the environment, enterprises attracting public protest, and the media respectively.

The first of these engages the HRA only indirectly and then very slightly. There is of course no right to environmental protection in the Act. The ECtHR has, however, worked creatively with the right to respect for privacy in Art.8 so as to grow out of its words a positive obligation on the part of a state to ensure that its laws restrict the polluting effect of business enterprises within its jurisdiction. The leading cases are *Lopez Ostra v Spain*<sup>79</sup> and *Guerra v Italy*,<sup>80</sup> albeit there was in each case an important element of culpability on the part of the authorities in that they had failed to enforce their own planning laws. *Hatton v United Kingdom* was an altogether more ambitious attempt to force the hand of the British Airport Authority (a private body) with regard to its management of the noise problem generated by aircraft at Heathrow airport. Having enjoyed an initial success in a Chamber's ruling,<sup>81</sup> the applicants eventually lost before the Grand Chamber,<sup>82</sup> a substantial majority of judges being clear that the Convention could not be turned into an environmental charter by dint of a set of positive obligations unselfconsciously forcing themselves into fields which had hitherto been conceived of as of high policy. As a dissenting judgment of four of the judges in the Grand Chamber put it, the ruling "gives

79. (1994) 20 EHRR 277.

80. (1998) 26 EHRR 357.

81. (2001) 34 EHRR 1.

82. (2003) 37 EHRR 611.



precedence to economic considerations over basic health conditions in qualifying the applicants' sensitivity to noise as that of a small minority of people".<sup>83</sup> It may be that British judges have been happy to explain their inactivity on the environmental front by reference to the stern "hands-off" that the Strasbourg court appears in *Hutton* to have issued. Whatever the reason, the activity has been slight and has not created additional environmental impediments to business activity. Not even the obvious problem of the limitation of the tort of nuisance to those with interests in land has been explicitly revised in light of the Convention's much wider commitment to the privacy of the home, proprietary interest or no proprietary interest.<sup>84</sup>

So far as the second of the areas of interest in this part is concerned, it is well known that some commercial operations engage in controversial activities which attract protest from concerned members of the public. Among the more important of the rights protected in the HRA are those related to civil liberties, the right to freedom of expression in Art.10 and, even more relevantly for present purposes, the right to freedom of assembly in Art.11. The impact of these political rights on private business has, however, been slight. As we have already noted, the Convention and its Strasbourg and UK case law clearly focus on state rather than on private action and, following on from the logic of this, while the judges have been heavily engaged where they have been analysing police power, they have been altogether more passive when it has come to asking questions of non-state agencies defending the private sphere. A case decided in Strasbourg shortly before enactment of the HRA is instructive on the general point. In *Appleby v United Kingdom*<sup>85</sup> the applicants were refused permission to collect signatures for a petition in a private shopping centre. Even to have a chance of success in Strasbourg the protestors had to force the case into a form recognisable to the European judges, so they argued that the state had had a positive duty to facilitate their protest. They lost: the court was clear that there was no obligation to organise matters on this part of private commercial property so as to permit the exercise of the applicants' civil liberties. Protestors could go back to the traditional high street and set up their stall (however deserted it might be now that there was a new mall to which everyone went). The question of whether there was a direct obligation on the shopping centre owners to allow protestors on to their property did not even arise; and, while it would be theoretically possible for the British courts to work the HRA's potential horizontality to this effect, it has to be said that it is most unlikely. And, even if the judges were so minded, it might well be that they would choose to grow the common law by narrowing the capacity for trespass in such cases rather than by going for the quick fix of the HRA.<sup>86</sup>

Where the Act has the potential to have an impact has been in controlling what the police can do to restrict protest which is taking place in a public area for sure but which is targeted at a particular private enterprise close to where the protest has gathered. In *Gillan v United Kingdom*<sup>87</sup> the Strasbourg court found a breach of Art.10 where the police

83. *Ibid.*, [118].

84. See *Hunter v Canary Wharf Ltd* [1997] AC 655. See *Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28; [2009] 3 All ER 319, where *Hunter* was followed (at [31]), albeit in a case where the defendant was a public authority for HRA purposes (at [37]) and so there was a different, more straightforward, route to damages.

85. (2003) 37 EHRR 783.

86. See *Director of Public Prosecutions v Jones* [1999] 2 AC 240 for how it could be done.

87. (2010) 50 EHRR 1105.

had been found to have been protecting an arms fair from exposure to protest in an over-zealous way—in doing so the Strasbourg judges took a different view from that of what had been a unanimous ruling from the House of Lords.<sup>88</sup> The instantly recognisable example of such targeting would, however, be that of a picket of an industrial concern, with the police having historically exercised their broadly based common law power to prevent breaches of the peace to stop things getting out of control in such situations.<sup>89</sup> Interestingly, however, there has been little judicial activity in this area since enactment of the HRA,<sup>90</sup> probably on account of the extent to which the conflict point is already heavily regulated by specific laws. One situation has been litigated a very great deal—this is the stand-off between the police and demonstrators outside a controversial private business enterprise dedicated to animal research, Huntingdon Life Sciences Laboratories.<sup>91</sup> However, the Act has not had a radical inhibiting effect on the legislation against harassment which has been deployed by the private companies in civil proceedings to seek to prevent the protests to which they are being subjected. It has been altogether more on the margins than that, a guide to the structuring of judicial discretion rather than a call to civil libertarian arms. So, while Arts 10 and 11 might have gone down another route, we can clearly see that, as interpreted by both the Strasbourg and UK courts, the provisions have certainly not been antagonistic to business even if in this context it would be going too far to call them friends.

Turning now to our final field under this head, the media, the story is a somewhat ironical one. Newspapers were among the very first advocates of the HRA, with arguments for incorporation of the Convention transcending the political divisions with which the British print media are so often associated. Made aware of the potential of the Convention by a series of eye-catching Strasbourg decisions (not least the early ruling in favour of the *Sunday Times* on the Thalidomide litigation,<sup>92</sup> as well as the notorious series of *Spycatcher* cases in the 1980s<sup>93</sup>), editors saw in the guarantee of freedom of expression in Art.10 a chance to liberalise Britain's relatively stringent libel laws. They were right about this: since its enactment, the courts have indeed lightened their touch in this area with a series of liberal rulings which arguably would not have taken the shape they did without the influence of the HRA. But rather late in the day the newspapers and their advisers came upon two aspects to the proposed HRA which were less to their taste: first, that the European Convention contained a right to privacy as well as a right to freedom of expression; and, second, that the new law would as drafted potentially allow individuals to assert this right in court against newspapers (on account of the Act's indirectly

88. *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12; [2006] 2 AC 307.

89. *Piddington v Bates* [1961] 1 WLR 162.

90. See H Collins, "The Protection of Civil Liberties in the Workplace" (2006) 69 MLR 619. An early and prescient analysis is K D Ewing, "The Human Rights Act and Labour Law" (1998) 27 ILJ 275. For a recent somewhat broader discussion, see H Arthurs, "The Constitutionalisation of Employment Relations: Multiple Models, Pernicious Problems" (2010) 19 *Social Legal Studies* 403.

91. There is a good review of the case law at *Novartis Pharmaceuticals UK Ltd (for and behalf of all members of the Novartis Group) and A R Grantham (for and on behalf of the employees of the Novartis Group of Companies) v STOP HUNTINGDON ANIMAL CRUELTY ("SHAC"), Avery, Avery and James* [2009] EWHC 2716 (QB); [2010] HRLR 8.

92. *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

93. See eg *The Observer and the Guardian v United Kingdom* (1991) 14 EHRR 153; *Sunday Times v United Kingdom (No 2)* (1991) 14 EHRR 229.

horizontal impact).<sup>94</sup> A rather comic effort by the then chair of the Press Complaints Commission to use his membership of the House of Lords to secure an exemption for the press from the effect of the Act proved unavailing, albeit with the Government conceding a new clause (now s.12) which stressed how important the press was and how careful the judges ought to be before imposing *ex parte* injunctions on it. So, when the Act came fully on stream in October 2000, those elements of the media with a commercial interest in the invasion of the privacy of persons judged newsworthy sat back and waited with a degree of trepidation to see what would happen.

Their fears were well-justified. It is so well known as not to need accounting in any detail here: how the HRA has essentially facilitated the emergence of a kind of tort of privacy in this country, or at least a new jurisdiction based on the protection of confidential information.<sup>95</sup> The story is often presented (not least by the press itself) as one in which the judges are attacking liberty by clamping down on its freedom of speech but actually it is easier to understand if viewed in commercial terms. The first case was particularly instructive in this regard, a dispute about whether a magazine with no agreement to cover a celebrity wedding could nevertheless publish spoiler pictures of the event in order to steal a march on a rival.<sup>96</sup> The next big decision stopped the media from announcing to the world the new identities of the boys responsible for the notorious Jamey Bolger killing, then just about to be released from prison.<sup>97</sup> Since then a succession of footballers, actors, and the occasional business-person, journalist and politician has succeeded in protecting themselves and their families from media intrusion by calling in aid Art.8.<sup>98</sup> The jurisdiction is not unqualified, with the courts being clear that privacy must always be balanced against the legitimate demands of free speech.<sup>99</sup> Strasbourg, too, has no inclination to push this too far, as the crusading privacy campaigner Max Mosley has found to its cost.<sup>100</sup> But the new laws here are likely to have had a damaging effect on the profits of those media outputs whose success was to a great extent dependant on successful intrusion. Without the impetus of the HRA it is very unlikely any similar jurisdiction would have been developed by the courts off their own bat. And certainly until the telephone hacking scandal (and possibly still) there has never been any appetite for legislation in this area, politicians being easier to intimidate than high court judges.<sup>101</sup>

Whilst it is clear that certain sections of the media have been adversely affected by the impact of Art.8, and consequential developments in the law of privacy, it requires emphasis that this jurisprudence has also resulted in some positive benefits for business. It is, of course, open to non-media business to avail itself of the new jurisdiction. One business, Trafalgar, achieved a high degree of notoriety on account of its having obtained

94. The relevant parliamentary debates are in J Cooper and A Marshall-Williams, *Legislating for Human Rights. The Parliamentary Debates on the Human Rights Bill* (Oxford, 2000), 168–177, 217–230.

95. We have already considered this from a broader business point of view when we were assessing the impact of the HRA on the protection of business assets: see *ante*, text to fnn 45–??. On the media aspect see G Phillipson, “Privacy: The Development of Breach of Confidence—The Clearest Case of Horizontal Effect?”, ch.7 of Hoffman (*supra*, fn.10).

96. *Douglas v Hello! Ltd* [2001] QB 967.

97. *Venables v News Group Newspapers Ltd* [2001] Fam 430.

98. Phillipson, *supra*, fn.95, has the details.

99. See most recently *In re British Broadcasting Corporation* [2009] UKHL 34; [2010] 1 AC 145.

100. *Mosley v United Kingdom* (2011) 53 EHRR 30.

101. See the extraordinary attack on Mr Justice Eady by Paul Dacre, the editor of the *Daily Mail*: “Mail editor accuses Mosley judge”, BBC website, 10 November 2008: [news.bbc.co.uk/1/hi/uk/7718961.stm](http://news.bbc.co.uk/1/hi/uk/7718961.stm).

a so-called “super-injunction”<sup>102</sup> (although on the whole the courts have sensibly not permitted arguments in favour of corporate privacy to inhibit proper news reporting as opposed to celebrity gossip). Furthermore, as discussed elsewhere, Art.8 has enabled business to challenge state powers to inspect and seize business assets, and may lead to improved protection for confidential business assets.<sup>103</sup> Additionally, business (including the media) has been fortunate that the right to freedom of expression in Art.10 has not negated its ability to protect and enforce intellectual property rights, in particular, copyright and trade marks.<sup>104</sup> The impact of Art.10 has so far not been very significant apart from the establishment of a somewhat higher threshold for obtaining interim injunctive relief.<sup>105</sup> All in all, aside from a sensible restraint upon excesses of some sections of the media, the HRA cannot be viewed as imposing increased restrictions on the use of business assets.

#### 4. Delivering certainty

The function of contract law is perceived in different ways. Some argue that its purpose is to promote economic efficiency.<sup>106</sup> Others say that altruism should be the underlying rationale and, indeed, that contract law should be a vehicle for the distribution of wealth (from rich to poor).<sup>107</sup> These views are unlikely to be applauded by business and indeed there is some empirical evidence<sup>108</sup> that many business people pay little attention to doctrinal legal rules when either negotiating contracts or enforcing them. Yet those who do address their minds to the question of what laws are most suitable to business dealings consider that legal contractual rules should be clear and certain, with easily enforceable remedial options, coupled with a freedom to negotiate terms with little interference by the courts or the legislature. This approximates to the classical model of contract theory, where, as Professor Atiyah has put it, “contract law is seen as an instrument of market planning”.<sup>109</sup>

102. On which see the recent authoritative report: Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (2011).

103. See *post*, text to fn.142. In *BKM Ltd v BBC* [2009] EWHC (Ch) 3151: one company whose poor standards in its care homes were about to be exposed by the BBC relied (it might be thought somewhat opportunistically) on the right to privacy of the residents in their effort to prevent transmission. It may not come as a surprise to learn that the application before Mann J was unsuccessful.

104. See, eg, *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142; [2002] Ch 149, [31] (literary copyright viewed as “not normally constituting a significant encroachment on freedom of expression”); *Levi's v Tesco* [2002] ETMR (95) 1153 (Art.10 not impacting on rules relating to international exhaustion); *Twentieth Century Fox v British Telecommunications Plc* [2011] EWHC 1981 (Ch); [2012] 1 All ER 806 (Art.10 not operating to prevent granting of injunction against internet service provider).

105. See Human Rights Act 1998, s.12(3) and its interpretation in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 AC 253; *Miss World Ltd v Channel Four Television* [2007] EWHC 982 (Pat). The applicant must show that he or she will “probably” (ie, “more likely than not”) succeed at the trial, but even then there may be departures from this general approach.

106. For an overview see R Craswell, “In That Case, What is the Question? Economics and the Demands of Contract Theory” (2003) 112 Yale LJ 903.

107. See D Kennedy, “Form and Substance in Private Law Adjudication” (1976) 89 Harv L Rev 1685; AT Kronman, “Contract Law and Distributive Justice” (1980) 89 Yale LJ 472.

108. See S Macaulay, “Non-Contractual Relations in Business” (1963) 28 *American Sociological Review* 55.

109. P Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), 681.

Whilst English law has to an extent moved away from this classical model, it is fair to say that as it stands it largely meets the business requirement of certainty. There has been no widespread adoption of a general duty of good faith and there has been a firm rejection of the notion that the validity of contracts can be challenged on the general basis of “inequality of bargaining power”. True, there has been some legislative control exercised over the terms that can be validly incorporated within a contract, even between businesses when using standard forms, but the results are relatively predictable and do not cause undue uncertainty. Indeed, as indicated in our introduction, some sections of smaller business will regard this control as beneficial in that it limits the ability of economically stronger businesses to impose an unfair allocation of contractual risk.<sup>110</sup> All in all, the current model of contract law suits business and it would not have welcomed any application of the HRA which would have had the effect of introducing new and possibly uncertain legal principles. There were some well-informed specialists who predicted far-reaching effects for the HRA in this field. Professor McKendrick wrote that “Convention rights may yet turn out to be a time bomb ticking away under the law of contract”.<sup>111</sup> And so, what has happened since October 2000? Has the time-bomb gone off? Is it there at all?

Clearly, many provisions of the HRA are unlikely ever to have any impact on substantive contract law, either because they are directed to individual rights which are not likely to be affected by contractual arrangements or because they are procedural in effect. Thus, in *Wilson v First County Trust Ltd (No 2)*,<sup>112</sup> the House of Lords held that Art.6 was “a procedural guarantee of the right to have issues judicially determined” and could not impose any kind of new reading on the Consumer Credit Act 1974, s.127(3), a well-established provision of substantive law denying to a loan agreement the quality of enforceability. On other occasions the HRA may not have any impact simply because it is not needed, the common law having delivered the kinds of protection upon which it would have insisted—but without needing the HRA to make the change. Thus, in the old case of *Horwood v Miller’s Timber and Trading Co Ltd*<sup>113</sup> (decided long before the HRA) a credit agreement was concluded on terms that were highly prejudicial to the borrower, with this party having undertaken not to change his employment, or residence, or part with any of his possessions without the lender’s consent. He also went so far as to assign his salary to the lender. It has been correctly stated<sup>114</sup> that this factual matrix would now infringe Art.4 (prohibiting slavery and servitude), but the court in any event held that the loan agreement was contrary to public policy. Alternatively, it might have been regarded as invalid on the basis that it was an unconscionable bargain. So any unfairness and derogation from individual rights was easily resolved within the frame of accepted contractual doctrine.

110. This analysis leaves aside the extensive legislative control of consumer credit contracts, but this can be viewed as an aspect of state regulation rather than private contract law.

111. E McKendrick, *Contract Law*, 5th edn (Basingstoke, 2003), 17. The prediction is also made in the current (9th) edn (2011), 14.

112. [2003] UKHL 40; [2004] 1 AC 816. For an excellent analysis of this case, see F D Rose, “Commercial Law”, ch.13 of Hoffman (*supra*, fn.10), 309–316.

113. [1917] 1 KB 305.

114. See Brownsword (*supra*, fn.35 ), [1.229].

Case law developments have also occurred without the HRA even after its having come into force. One (not unrealistic) suggestion<sup>115</sup> was that Art.8 might be engaged where a bank with no constructive notice of a husband's improper conduct in inducing his wife to give a guarantee (supported by a legal charge over the matrimonial home) seeks to repossess the family house. But in *Royal Bank of Scotland v Etridge*<sup>116</sup> it was held (without any reliance on the HRA) that the bank is fixed with the relevant constructive notice simply by knowledge that the relationship is that of husband and wife, and in practice the bank almost always has that knowledge. Additionally, the current banking procedure is for the bank to ensure that any wife giving a guarantee in respect of her husband's debts receives independent advice.

On the face of it, A1P1 appeared to have the greater capacity to remould the existing contractual framework, especially since, on one view, the denial of contractual rights in certain contexts can be a deprivation of a "possession", a term which, as we have seen, has been given a fairly wide meaning by the Strasbourg court. However, as is well known (and as was illustrated earlier in this article), that same court has long taken a fairly relaxed approach to this property right, readily permitting state interferences in ways that the starker language of other rights would not have allowed. It is not surprising, therefore, that the English courts have so far shown little inclination to apply A1P1 in a way that would effect changes to the existing contractual framework, even though the horizontal capacity of the HRA (which we have earlier discussed) would permit a development along these lines. *Mahmud Al-Kishtani v Shanshal*<sup>117</sup> is a good illustration of what is involved here. The claimant argued that there was an infringement of A1P1 because of the common law rule which denies (in some circumstances) the right of the party to an illegal contract to recover benefits conferred by the contract. In the Court of Appeal, at least, Holman J considered that the Protocol may not be engaged at all since the relevant statute deprived the claimant of any remedy whatsoever, so that he was not being deprived of a "possession". And all members of the Court of Appeal held that the statute was in the public interest because of the provisions of the statute itself (which allowed for some flexibility and discretion by the state to grant exemptions) and, significantly, in respect of our debate, the common law doctrine of illegality itself, which the court was clear was "an ancient, firmly established, well-defined and accessible principle of our law".<sup>118</sup> Similarly, in *Horsham Group Properties v Clark*,<sup>119</sup> it was held that the exercise of the statutory right of a mortgagee to appoint a receiver and to sell residential property pursuant to a provision in a mortgage deed does not violate A1P1, but merely "reflects the bargain habitually drawn between mortgagors and mortgagees for nearly 200 years".<sup>120</sup> Like business, it appears that our courts very much favour common law contract principles undiluted by the application of the HRA.

115. H Beale and N Pittman, "The Human Rights Act 1998 in English Tort and Contract Law", ch.7 of Friedman and Barak-Erez (*supra*, fn.10).

116. [2001] UKHL 44; [2002] 2 AC 773. For more detailed discussion and the commercial background, see J C Phillips, *The Modern Contract of Guarantee*, 2nd edn (England) (London, 2010), 254-274.

117. [2001] EWCA Civ 264; [2001] Lloyd's Rep Bank 174.

118. *Ibid.*, [69].

119. [2008] EWHC 2327(Ch).

120. *Ibid.*, [44]. Note, however, that the basis for the court's decision on the human rights point in *Horsham* was a couple of House of Lords' decisions which have since been superseded (*Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441), so on its precise reasoning the ruling may be open to doubt. Additionally, and surprisingly, there was also no discussion of Art.8.

One area of contract law, however, has seen a great deal of activity. There was from the outset an immediate potential impact of the HRA because of the widespread and increasing practice of the public sector contracting out its functions to the private sector. Were such private contracting parties within the remit of the HRA as public bodies without the need to resort to any kind of horizontal application, direct or indirect? Section 6(3)(b) defines public authority as including “any person certain of whose functions are functions of a public nature”. Section 6(5) then further explains that, “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”. Business therefore needed to be prepared for the HRA to apply and to regulate its activities if it was acting as someone “certain of whose functions are functions of a public nature”, as opposed to performing a purely private act (in which case it was horizontality—discussed above—or nothing).

No further guidance appeared in the statute as to what might be entailed in these terms. In particular there was no schedule of public authorities for the purpose of the Act or any kind of deeper indicator as to what a “public function” might be. Early case law oscillated between expansive and narrow readings of the provisions. Business must have been initially relieved (and no doubt also somewhat surprised) as the court rulings tended in an ever-narrower direction, and especially when it was held in the House of Lords decision of *YL v Birmingham City Council*,<sup>121</sup> that a private company (Southern Cross) was not acting as “someone certain of whose functions are functions of a public nature” when providing residential care and accommodation to the residents through individual contractual arrangements which it had entered into with them. This was so even though Southern Cross was also acting pursuant to a contract with a local authority concluded in order to fulfil its statutory duty to provide residential accommodation to those in need and when the cost of care was being paid (in the main) by the Council. Whilst (as all members of the House of Lords agreed) the factors to be taken into account in determining whether or not an act is “public or private” are varied (and will include the extent to which the body carrying out the relevant function is exercising statutory powers and is publicly funded), for the majority a significant element was the fact that the services were being provided by a private company for profit. Lord Scott of Foscote said this:<sup>122</sup>

“Southern Cross is a company carrying on a socially useful service for profit. It is neither a charity nor a philanthropist. It enters into private law contracts with the residents in its care homes and with the local authorities with whom it does business. It receives no public funding, enjoys no special statutory powers and is at liberty to accept or reject residents as it chooses . . . and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors.”

Similarly Lord Mance (albeit more shortly) emphasised that, “in providing care and accommodation, Southern Cross acts as a private profit earning company”.<sup>123</sup>

Followers of human rights issues will be very much aware that the majority view in *YL v Birmingham City Council* has been stridently criticised, with widespread support for the minority view that the company undertook functions of a public nature (even though they were undertaken by a private company) because it was a “task for which the public, in the

121. [2007] UKHL 27; [2008] 1 AC 95.

122. *Ibid.*, [26].

123. *Ibid.*, [116].

shape of the State, have assumed responsibility at public expense . . . and in the public interest". The issue took on added poignancy with the revelation by BBC's Panorama programme in 2010 of widespread abuse of residents in at least one of the company's care homes, inhuman and degrading treatment that according to the majority in *YL* would not (in this technical HRA sense at any rate) have been in breach of their human rights. Fortunately for the integrity of human rights law, by then there had been specific legislation<sup>124</sup> expanding the term "public authority" to reach the kind of situation that had given risen to the facts in *YL*. There has been further pressure from the Joint Committee of Human Rights to undo what it has described as the unnecessarily limiting effect of the decision.<sup>125</sup>

It will not come as a surprise that business is not as keen as the Joint Committee on undoing the broader effects of *YL*. The commercial intuition is that private business, operating as it does in a competitive environment, should be treated differently from the public sector in terms of the controls placed upon it, and that this should be the case even when it is operating in a market which has been created by a policy of privatisation to which Government has committed itself. Yet, on closer inspection, business did not universally applaud the decision, being concerned that the range of factors and the broad contextual approach in determining whether or not the function was public or private meant that future decisions (involving different forms of public sector involvement) would be difficult to predict, potentially necessitating expensive litigation.<sup>126</sup> This uncertainty provides an on-going difficulty for business. Indeed, it might be argued that a better outcome for business would have been the certainty of an expansive application of the HRA via s.6(3)(b), or even for that matter (recalling our earlier discussion) a horizontal application of the HRA to all commercial activities. The rights in the HRA are not so frightening that they must at all costs be avoided, especially where this must then involve the uncertainty inherent in endless nit-picking about whether this or that function is or is not sufficiently public to attract the Act or so private that it can avoid doing so after all. The rational approach for business is surely to assume application of the HRA in all its activities and leave expensive litigious hair-splitting to commercial colleagues less able or willing to take the longer view.

There is one other area of importance to business where the HRA has had some effect, and which accordingly merits specific mention here: contracts of employment. As the HRA, in the main, governs individual rights, it might have been expected that it would have a direct impact<sup>127</sup> on employees' rights with a consequent negative impact on certainty. However, its influence on contracts of employment has from the outset been

124. Health and Social Care Act 2008, s.145.

125. Joint Committee on Human Rights, *Fifteenth Report* (HL 81, HC 440, Session 2007–2008, HMSO, 2008), 41–48. See further Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 77, HC 410, Session 2006–2007, HMSO, 2007); Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 39, HC 382, Session 2003–2004, HMSO, 2004).

126. See the views expressed in Joint Committee on Human Rights, *Any of our Business? Human Rights and the Private Sector* (*supra*, fn.12), [140–141].

127. There has, of course, been significant indirect impact arising from Convention rights, as well as more specific EU legislation, eg. the Employment Equality (Sexual Equality) Regulations 2003 (SI 2003/1661); Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660). The breadth of this legislation leaves little scope for reliance on the Human Rights Act. See generally H Oliver, "Discrimination Law", ch.10 of Hoffman (*supra*, fn.10).



controlled by its jurisdictional limitations. The Employment Tribunal has no power to entertain claims directly based on a breach of the HRA and employees of private enterprises (not being “public authorities”) were precluded from bringing a claim in the courts under the ordinary routes laid down in the HRA itself.<sup>128</sup> Nevertheless, it is now accepted that violations of the HRA may be relevant to the determination of whether a dismissal is unfair for the purpose of the HRA. Indeed, Mummery LJ was of the view (perhaps alarmingly for private business) that “in the case of such a basic employment right there would normally be no sensible grounds for treating public and private employees differently”.<sup>129</sup> When substantive issues relating to the HRA have arisen in the context of dismissal proceedings, however, the general pattern of decisions appears quite favourable to business. So, where the employee’s allegation is that a change in working hours or the requirements of a company dress code interferes with the right to freedom of religion (Art.9), courts and tribunals appear readily to accept that solutions proposed by employers to accommodate the employee’s needs are reasonable and proportionate.<sup>130</sup> It is true that in the future other issues may arise in relation to the interaction of employment law and the HRA. Employees dismissed for disclosing information in breach of a confidentiality clause may invoke the right of privacy and those refusing to move to another geographical location contrary to a mobility provision may rely on the right to respect for family life (both rights being capable of being deduced from Art.8). But so far it cannot be said that the HRA has been applied so as adversely to affect employers’ rights pursuant to contracts of employment. Indeed, it has been rather responsive to its needs. From the perspective of three leading employment lawyers (writing in 2005), the implications of the HRA for employment law were not “particularly encouraging”.<sup>131</sup> In 2011 business should be quite pleased with the outcomes. It may have found an unexpected friend.

We can conclude from the foregoing that, aside from the circumstances where business is undertaking a public function, there is little evidence that the existing contractual framework will be changed significantly by the HRA. There are, however, a couple of lurking dangers for business, which should not be dismissed. The first is that it is arguable that the courts, as public authorities, should not only construe legislation and the common law in a way that is compatible with Convention rights, but that they should also engage in the same exercise in respect of the terms of the contract itself.<sup>132</sup> So, for example, if the terms of the contract provide that a lender can enforce a charge over commercial property (leading to repossession of the property) upon a breach of condition, the accepted position in English contract law is that the lender can proceed to enforcement if there is any breach of that term, however trivial. But an application of A1P1 might lead to an interpretation of the term which requires proof of the serious breach, leading to less certainty as to when a contract can be terminated. It should be said, however, that the courts have not yet interpreted contractual terms in the light of A1P1 and, if the general approach taken so far

128. See the position summarised in *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932; [2005] ICR 1789.

129. *X v Y* [2004] EWCA Civ 662; [2004] ICR 1634, [57].

130. *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932; [2005] ICR 1789; *Eweida v British Airways Plc* [2010] EWCA Civ 80; [2010] ICR 890; *Cherfi v G45 Security Services* [2011] UKEAT 0379\_10\_2405.

131. H Collins, K D Ewing, A McColgan, *Labour Law Text and Materials*, 2nd edn (Oxford, 2005), 561. See also, generally, H Oliver, “Discrimination Law”, ch.10 of Hoffman (*supra*, fn.10).

132. See Brownsword (*supra*, fn.35 ), [1.235].

is any guide, are unlikely to do so, at least in a way that affects the parties' agreement.<sup>133</sup> Such an approach could also justifiably be regarded as in conflict with the well-developed, contextual rules for the construction of contracts and as having the effect of imposing a bargain upon the parties to which they have not agreed.

Secondly, there are those who argue in favour of a "strengthened horizontal" application of Convention rights to private law, so that there will be an obligation upon the courts to create "tools" for "the absorption of constitutional human rights into private law".<sup>134</sup> Indeed, as we have seen, the impact of Art.8 is that the action for breach of confidence has developed to a point where there is now no requirement to show a relationship of trust and confidence. In contract one possible "tool" for the development of Convention principles might be reliance on implied terms in accordance with the usual criteria for implication; that is, they must be necessary and reasonable. One suggestion is that "a robust reading of indirect horizontality" would permit the incorporation of an implied duty of good faith.<sup>135</sup> This would then open up the way for the engagement of Articles of the HRA which might limit the freedom to contract, for example, a party's refusal to contract with another person because of his/her political beliefs would presumably engage Art.9 (freedom of thought). It is not probable that this development will flow from the HRA. The English judiciary is in general opposed to the incorporation of the duty of good faith into English law<sup>136</sup> and (unlike the law in respect of privacy and confidential information) there is no specific Convention right in the HRA which has an immediate and direct connection with such duty.

## 5. Managing disputes effectively

At first glance it might have been thought that the HRA posed a serious challenge to the desire that most businesses have to settle their legal arguments speedily and effectively. After all, Art.6(1)'s guarantee of procedural fairness in the "determination of civil rights" is extensive, suffocatingly so from the perspective of many commercial enterprises who find themselves caught up in such disputes. However, the reality is that the HRA has little or no effect here. This is on account of the operation in English domestic law of the Strasbourg court's well-developed principle of waiver, under which certain rights can be given up (and Art.6(1) is the paradigmatic example in the case law) so long as the decision to do this is unequivocal and that the waiver in issue does not "run counter to any important public interest".<sup>137</sup> Thus, in *De Placito v Slater*,<sup>138</sup> the appellant failed in his argument that an undertaking he had given as part of a compromise was a breach of his

133. See *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA 1834; [2004] QB 601, [88–89], *per Rix LJ*, stressing the need for certainty. Some earlier flirtation with the application of Convention notions of proportionality to remedies for non-disclosure in the context of insurance contracts has not been subsequently followed. See the excellent discussion by FD Rose, "Commercial Law", ch.13 of Hoffman (*supra*, fn.10), 316–320.

134. A Barak, "Constitutional Human Rights and Private Law", in Friedmann and Barak-Erez (*supra*, fn.10), 30.

135. Brownsword (*supra*, fn.35 ), [1.231].

136. See, eg, extrajudicially, Mr Justice Vos, "Men Behaving Badly or Why is Good Faith in the Contract Process shunned by English Contract Law?" (Paper presented to Chancery Bar Association Conference, 21 January 2011).

137. *Håkansson and Sturesson v Sweden* (1990) 13 EHRR 1.

138. [2003] EWCA Civ 1863; [2004] 1 WLR 1605, esp. [51].

implied right to a court under Art.6. In *Stretford v Football Association*<sup>139</sup> the Court of Appeal sought to close down this area to further litigation, stressing both the availability of the doctrine of waiver but also drawing attention to the range of remedies available to disputants either within the Arbitration Act 1996 (where the dispute was governed by its terms) or at common law.<sup>140</sup> What promised to be a rich source of litigation when the HRA was enacted has never really got going: rights may be inalienable in the world of rhetoric, but this has proved not to be the case in the realm of law.<sup>141</sup>

If the Act has been neutral so far as dispute resolution is concerned, then it has been actually helpful when it has come to resisting the enforcement of the law by the state. As we have already noted, the HRA resolutely refuses to distinguish between natural and legal persons for the operation of most of the Convention rights. In taking this line it is following the jurisprudence of the Strasbourg court. Decisions at European level mean that Art.8 now embraces the right to respect for the privacy of a company's registered office and business premises, thus enabling business to challenge powers given under national legislation to inspect and seize business documents.<sup>142</sup> This position has been taken despite judicial and academic views that in some contexts the protections of privacy should not extend to companies "because they have no sensitivities to wound and no selfhood to protect".<sup>143</sup> Whilst this is obviously true, it would be prejudicial to business in the context of the application of the HRA to draw a sharp distinction between companies and individuals. In any case, in many situations this dichotomy is fallacious because the corporate entities involved in litigation are no more than legal vehicles (established for legitimate purposes of limiting liability or for tax reasons), designed to disguise the fact that the business is operated by an individual, or a small number of individuals. Yet of course the advantages of the HRA in restricting state enforcement must not be exaggerated: the courts are more than ready to allow a fair degree of discretion to state authorities in cases such as these, with (to choose one example) the unsuccessful frontal assault on seizure orders (then known as *Anton Piller* orders) surviving challenge in Strasbourg despite the court's recognition that the invasion of privacy in issue had been "disturbing, unfortunate and regrettable".<sup>144</sup>

139. [2007] EWCA Civ 238; [2007] Bus LR 1052; [2007] 2 Lloyd's Rep 31.

140. And, at the same time, *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243; [2007] Bus LR 1075; [2007] 2 Lloyd's Rep 87. An influential High Court decision decided before these had been *El Nasharty v J Sainsbury Plc* [2007] EWHC (Comm) 2618; [2008] 1 Lloyd's Rep 360.

141. See *Re Blackspur Group Plc*; *Eastway v Secretary of State for Trade and Industry* [2006] EWHC (Ch) 299, where counsel's reliance on Art.6 in relation to disqualification proceedings was judicially described as "extravagant": at [36], *per* Lightman J. See FD Rose, *supra*, fn.133, for a more detailed treatment of this issue, including the extent to which, even apart from waiver, current arbitration law is broadly consistent with the underlying principles and policies of the Convention.

142. *Niemietz v Germany* (1993) 16 EHRR 97; *Societe Colas Est v France* (2004) 39 EHRR 17 (extending Art.8 to corporations); *Varec SA v Belgium* [2008] 2 CMLR 24 (concluding business secrets fell within Art.8 for this purpose).

143. *R v Broadcasting Standards Tribunal, ex p BBC* [2001] QB 885, 900, *per* Mustill LJ. Similarly Hale LJ (as she then was) at 899; *Douglas v Hello (No 3)* [2007] UKHL 21; [2008] 1 AC 1, [118], *per* Lord Hoffmann, [256] *per* Lord Nicholls of Birkenhead. See also Aplin, *supra*, fn.47.

144. *Chappell v United Kingdom* (1989) 12 EHRR 1, [63], agreeing with the Court of Appeal's description of an aspect of the case in these terms.

Most public law decisions involving the imposition of a penalty can be taken to be presumptively within “the civil right” in Art.6(1).<sup>145</sup> For the most part, so long as judicial review is thought to be doing its job, which has generally been the case with regard to these cases in so far as they have involved the business sector, then the impact of the right has not been as great as perhaps some businesses—seeking to challenge regulatory decisions inhibiting their use of assets—would have liked. But there may be exceptional cases where Art.6 creates additional rights for business. In relation to proceedings to enforce antitrust provisions, the fact that punitive penalties may be imposed means, on one view,<sup>146</sup> that they amount to “core” criminal proceedings, thus necessitating the beefed-up protection accorded criminal matters in Art.6(1), including an initial determination by an independent tribunal (and not merely a guarantee of later judicial review). In a recent government consultation paper examining possible changes to existing procedures, two out of the three options put forward in fact proposed the establishment of such a tribunal (which represents a change from the present scheme).<sup>147</sup> If adopted, the HRA will have had a direct influence on the form of antitrust enforcement structures, with the advantage that business will be able to contest the complaint in an initial hearing, rather than simply challenge an administrative determination that has already been made.

#### D. CONCLUSION

We end this necessarily broadly drawn survey by returning to the questions we posed at the introduction, seeking now to offer some tentative answers—tentative not only on account of the vast field we have sought to cover but also because the judicial record can of course change and new impacts forcing fresh readings may be just around the litigious corner. First, we asked how has the HRA impacted on business? The answer would appear to be not a very great deal. Whilst the legislation (perhaps surprisingly) has led to some identifiable advantages to business, on the whole it has been neutral so far as commercial enterprises have been concerned, with the judges not permitting its wide language to tempt them into positions either unduly aggressive or over-conciliatory towards enterprise. Indeed, a neutral impact is a very positive outcome for business. It cannot legitimately complain that the HRA has resulted in another layer of regulation or unacceptable uncertainty. Neither the creation of “human property rights” nor the reworking of contract law anticipated by some has occurred. The licence for inconvenient employee individuality has not materialised. Even the decision to step outside judicial due process altogether (via arbitration agreements) has not produced any HRA noise—rather we have seen something of the opposite, with the judges performing intelligent analytical tricks to show why, here, the Act should never apply. In this as in other areas there appears to be

145. See, eg, taxation penalties (*Bassysillan Community Forum v Commissioners For Her Majesty's Revenue Revenue and Customs* [2011] UKFTT 257 (TC), following *Jussilla v Finland* (2007) 45 EHRR 39) and disciplinary proceedings brought by the Securities and Futures Authority (*R (Fleurose) v Securities and Futures Authority* [2001] IRLR 764).

146. See generally, J Aitken and A Jones, “Reforming a World Class Competition Regime: The Government's Proposal for the Creation of a Single Competition and Markets Authority” [2011] Comp Law 95, esp. 104–107.

147. *Ibid.*, 108–116. See in detail Department for Business Information and Skills, *A Competition Regime for Growth: a Consultation on Options for Reform* (March 2011).

something of a basic judicial intuition at work: if a case is perceived to be one involving the interests of business or commerce (as opposed to a mainstream civil liberties matter such as free speech or anti-terrorism law), then the judges seem to be starting their reflections with an assumption against the interests of claimants of this sort. Something like this appears to have occurred in *AXA Insurance*, just as it did in earlier Strasbourg decisions involving rich “victims” such as the Duke of Westminster<sup>148</sup> or the owners of shipbuilding yards.<sup>149</sup>

But this is not to say, to answer our second question from the introduction, that the HRA has been damaging to the goals of commerce. Losing cases you have launched yourself to undermine a hostile governmental act is not the same as being put in a worse position by the actions of others when such actions would not have been possible but for the existence of the HRA. The latter has happened only very rarely. Perhaps it is only those sectors of the media whose profits used to be substantially improved by reportage of the private lives of public figures who can unequivocally say, because of the effect of Art.8, that the Act has (to paraphrase our third introductory question) inhibited their capitalist enterprise. But even here, as we have seen, other sectors of the media have benefited from the HRA’s loosening up of libel laws in the name of free speech and, additionally, the application of Art.8 has also led to legal developments which benefit business generally.<sup>150</sup> In any event, as we observed earlier, there can often be a broad public interest in controlling profit and many would believe (as we do) that cracking down on press invasiveness of this sort falls into just such a category.

Our final question was as to whether the HRA might even have “worked to the private sector’s advantage, tying interfering officials up in knots”. There is no doubt that all public authorities now have a wider set of obstacles to negotiate when they wish to act than was the case in the past. If a Convention right is involved in a decision an official has to make, then care needs to be taken to be rights-compliant and of course this slows the administrator down, and leaves him or her more vulnerable to review. That said, the HRA has not in practice produced reams of new knots for officials to unravel before they can move against business. The controls that were already in place before the HRA—a presumption against abuse of rights; a strong tradition of judicial review; a keen commitment to the principle of legality—render the new constraints in the measure more duplicatory of what was already there than draconian in their devising of new obstacles to official action. And the judicial intuition against using the HRA in the business context just referred to has always been on stand-by, ready to help out authority where the HRA has threatened to do serious mischief. The one exception to this broadly pro-government story—admittedly a potentially huge exception—is the ruling on damages in the *Infinis* case. If readings of statutory powers by public authorities are at risk of being retrospectively overruled by courts, and if these official mistakes are then to be characterised as breaches of human rights (in particular the right to property) warranting the payment of compensation, perhaps on a large scale, then the HRA will certainly have a major impact which will be likely to be very positive for the businesses concerned, less so for the wider public (and tax-payer) interest. It remains to be seen whether this line of cases will bed down.

148. *James v United Kingdom* (1986) 8 EHRR 123.

149. *Lithgow v United Kingdom* (1986) 8 EHRR 329.

150. As discussed above: see text to fnn 43–49, 142.

There has in recent years been quite a head of steam built up against the HRA by certain media and some political parties. The critique has sometimes associated the HRA with other concerns about the inhibiting effect of health and safety legislation (the “nanny state”) and the impact of equality legislation (“political correctness gone mad”). We do not doubt that there are reasons why one could credibly argue to repeal the HRA, just as one could choose passionately to defend it. One could even argue that the HRA is neither here nor there, given the fast expanding human rights jurisdiction being developed by the European Court of Justice.<sup>151</sup> But it seems to us that the one thing that cannot really be done is to argue that the HRA ought to go because it is damaging to the business interest. It is sometimes the friend of business and sometimes its foe—but more often it is just a remote relative.

151. On which see A O'Neill, *EU Law for UK Lawyers* (Oxford, 2011), ch.6.