Neutral Citation Number: [2024] EWCA Civ 1381

Case No: CA-2024-000196-D

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Mr Justice Edwin Johnson (Chamber President)
[2023] UKUT 271 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/09/2024

Before :

LORD JUSTICE LEWISON

- -

Between :

ADRIATIC LAND 5 LIMITED	**Appellant**
- and -	
THE LONG LEASEHOLDERS AT HIPPERSLEY POINT	**Respondent**
THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Intervener**

- -

Malcolm Birdling and Simon Alison (instructed by **Feildfisher LLP**) for the **Appellant**
Mark Loveday and Hugh Rowan (instructed by **Velitor Law**) for the **Respondent**
Sir James Eadie KC, Michael Walsh and Camilla Chorfi (instructed by **Government Legal Department**) for the **Intervener**

Hearing date: 20 November 2024

- -

Approved Judgment

This judgment was handed down extempore on 20 September 2024 and is released to the National Archives.

.....

Lord Justice Lewison

1. This appeal (the Adriatic appeal) concerns the recoverability by way of service charge of costs incurred before 28 June 2022, when schedule 8, paragraph 9 of the Building Safety Act came into force. The Upper Tribunal held that such costs were not recoverable and gave the landlord permission to appeal.

2. The Respondents are the leaseholders of the building in question and the Secretary of State has permission to intervene.

3. In its skeleton argument, the landlord wishes to argue that paragraph 9 does not have retrospective application to costs incurred and payable before that paragraph came into force. It relies on the wording and purpose of the legislation and on the common law principle leaning against retrospectivity of legislation.

4. But in addition, it wishes to argue that if, applying conventional principles of interpretation, paragraph 9 would otherwise have retrospective effect, the court should apply Section 3 of the Human Rights Act 1998 and interpret the Act so as to avoid an unlawful interference with the landlord's possessions contrary to Article 1 of Protocol 1 to the European Convention of Human Rights ("A1P1")

5. The Secretary of State objects to that point being taken. She argues that the point was not taken below; was not mentioned in the application for Permission to Appeal (and hence is not within the grant of Permission to Appeal, at least without amendment of the Grounds of Appeal), and would require (or at least entitle) the Secretary of State to adduce evidence relating to the legitimacy of the aim of paragraph 9 and its proportionality. Thus, she argues that the Court of Appeal should decide the question applying conventional principles of interpretation and should ignore section 3 of the Human Rights Act.

6. The Upper Tribunal dealt with the question of retrospectivity at paragraphs 119 to 170. In the course of its discussion the Upper Tribunal referred to the decision of this court in *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772, which concerns a different provision of the Act. The court in that case decided that section 135 of the Act did have retrospective effect. The Supreme Court has granted Permission to Appeal in that case and the appeal is to be heard in December 2024. Coulson LJ gave the leading judgment. He referred among other cases to the decision of the House of Lords in *Wilson v First County Trust Ltd (No 2)* [2023] UKHL 40; [2004] 1 AC 816 about the need to construe any statute in a way that was compatible with Convention rights.

7. The Upper Tribunal in the present case took into account the general presumption against retrospectivity but did not specifically address the effect of section 3 of the Human Rights Act.

8. Leaving aside the procedural objection for the time being, it seems to me that if an argument under section 3 is raised the court would ordinarily proceed in the following 8 stages:

    i) Interpret the legislation according to conventional principles of interpretation including the common law presumption against retrospective legislation.

ii) If the appeal succeeds on that basis, section 3 does not arise.

iii) If the appeal would fail, but for the operation of section 3, consider whether that conclusion would be unlawful under A1 P1

iv) In order to evaluate that question the court would need to consider

a) The legitimate aim of the legislation

b) The proportionality of the legislative solution

v) If there is no incompatibility, the appeal fails.

vi) If there is incompatibility, consider whether section 3 permits a different interpretation.

vii) If no, the appeal fails.

viii) If yes, the appeal succeeds.

9. This is a slightly expanded version of the process described by Singh LJ in R (Kaitey) v Secretary of State for the Home Department [2022] QB 695 at [133].

10. The Secretary of State's principal procedural objection is that there is no (or at least inadequate) material on which the court could answer the question raised at stage 4 of this process, and therefore that question should not be answered at all.

11. There are in my judgment three principles in play. The first is that the Court of Appeal will not usually permit a new point to be taken on appeal, if the point requires further evidence or fact finding. The second is that the Court of Appeal will not generally receive evidence that was not before the lower court. The third is the imperative command in section 3, that, so far as it is possible to do so, legislation must be read in a way that is compatible with convention rights. Section 6 of the Human Rights Act also prohibits a court from acting incompatibly with convention rights.

12. The first of these principles was considered by this court in *Notting Hill Finance Ltd v Sheikh* [2019] 4 WLR 146. Snowden J sitting in this court referred to a number of previous cases and said at paragraph 26:

> "These authorities show that there is no general rule that a case needs to be 'exceptional' before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken."

There is, therefore, a spectrum of cases. There is also a spectrum of "newness": *R (Ariyo) v Richmond LBC* [2024] EWCA Civ 960. In further submissions made to the Upper Tribunal on 26 October 2023, with reference to the URS case, the landlord referred expressly to the need to construe a statute compatibly with Convention rights. The point was not developed any further and Mr Birdling accepts that this argument is a new one. But, he says, the point raised by the argument based on section 3 is, in one sense, not a new point. The underlying point is the same: paragraph 9 should not be given retrospective effect. Reliance on section 3 is a different legal argument leading to the same result.

13. Mr Loveday for the leaseholders pointed out that the Appellant had had a number of opportunities to raise the section 3 argument, but had not done so. That is a relevant consideration, but not, in my judgment, a weighty one. He also said that the leaseholder's legal team were working pro bono. That, too, is something to be borne in mind, although he advanced that submission principally in support of a submission that the appeal should be heard sooner rather than later. I will deal with the question of timetabling later on.

14. The legislation in issue was not in force when the application was heard at first instance. The point arose for the first time on appeal to the Upper Tribunal. This removes it from one end of the spectrum to which Snowden J referred. On the other hand, although the interpretation of the legislation is a question of law, it is not a pure question of law in the sense that the court may have regard to a wider range of material (including evidence) which would not be admissible in a traditional exercise in interpretation.

15. As Sir James Edie KC submitted, one reason why an appeal court does not allow new points to be taken is that it does not have the benefit of the trial judge's findings of fact or evaluation. That is because an appeal court will only rarely interfere with the trial judge's conclusions on such matters. But where the issue is whether a rule (including primary legislation) or policy is compatible with Convention rights, it has been said that the appeal court does not accord any deference to the first instance court's proportionality assessment but carries out its own proportionality assessment: *Dalston Projects Ltd v Secretary of State for Transport* [2024] 1 WLR 3327 at [25] to [26].

16. Nor is the determination of whether an interference with a Convention right is proportionate an orthodox exercise in fact-finding: *In Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 at [30].

17. Moreover, this is not merely a case that concerns the particular facts of this case or these particular parties. What it raises is the interpretation of a public act of Parliament which will have potentially wide implications.

18. It is also true that an appeal court will not usually receive evidence that was not before the lower court. Most applications of this kind are decided in accordance with the principles in Ladd v Marshall [1954] EWCA Civ 1. In addition, most such applications are opposed. Here the landlord is willing to permit the Secretary of State to adduce evidence or other material if she wishes to.

19. In *Wilson v First County* Lord Nicholls addressed the question of how a court should go about deciding whether a particular interpretation of legislation would be incompatible with Convention rights. he said:

> "62. The legislation must not only have a legitimate policy objective. It must also satisfy a 'proportionality' test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a 'value judgment' by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force. (I interpose that in the present case no suggestion was made that there has been any relevant change of circumstances since the Consumer Credit Act was enacted.)
> 63. When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation.
> 64. This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be 'questioning' proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.
> 65. To that limited extent there may be occasion for the courts, when conducting the statutory 'compatibility' exercise, to have regard to matters stated in Parliament. It is a consequence flowing from the Human Rights Act. The constitutionally unexceptionable nature of this consequence receives some

> confirmation from the view expressed in the unanimous report of the parliamentary Joint Committee on Parliamentary Privilege (1999) (HL Paper 43-I, HC 214-I), p 28, para 86, that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability."

Lord Hobhouse agreed and said:

> "142. The questions of justification and proportionality involve a sociological assessment – an assessment of what are the needs of society. This in part involves a legal examination of the content and legal effect of the relevant provision. But it also involves consideration of what is the mischief, social evil, danger etc which it is designed to deal with. Often these matters may already be within the knowledge of the court. But equally there will almost always be other evidentially valuable material which can be placed before the court which is relevant, such as reports that have been made, statistics that have been collected, and so on. Oral witnesses may have important evidence to give. To exclude such evidential material from the case merely because it is to be found in some statement made in Parliament is clearly wrong, particularly if ministerial statements made outside Parliament were already being relied on."

20. There are, nevertheless, many cases in which the court has decided whether to apply section 3 on the basis of argument (rather than evidence) from the relevant government department. I would not, therefore, subscribe to the view that evidence is indispensable before the court makes such a decision.

21. In addition, there are cases in which the question of incompatibility is raised for the first time at appellate level. *Wilson v First County* itself is one such example. In that case the Court of Appeal had to consider the enforceability of an agreement under the Consumer Credit Act. At the first hearing of the appeal, only the lender and the borrower were represented. Neither party relied on the Human Rights Act. Nevertheless, the Court of Appeal decided that it was arguable that provisions of the Consumer Credit Act might infringe the lenders Convention rights, and directed a further hearing to which the Secretary of State was to be a party. The Secretary of State duly appeared at the resumed hearing and made submissions. Although the House of Lords reversed the decision of the Court of Appeal on the substantive point of law, there was no criticism of the procedure that the Court of Appeal adopted. As Lord Woolf said in *Poplar Housing Association v Donoghue* [2002] QB 48 at [30] the Court of Appeal must be flexible in its procedures, when a point arises under the Human Rights Act.

22. Indeed, the Supreme Court took a similar course in *Lawrence v Fen Tigers (No2)* [2015] AC 106 where a point was in the Supreme Court about the compatibility of a costs order with art 6 of the ECHR. Likewise in *Poplar Housing*, where the question was whether a mandatory ground for possession infringed article 8 of the ECHR, this court permitted the parties to adduce further evidence after the hearing of the appeal.

That included witness statements on behalf of the relevant government dept, evidence from Shelter, and from academics.

23. I would accept therefore that the Secretary of State is entitled (but not required) to adduce evidence on the question of compatibility with Convention rights. In the absence of evidence, the court will form its own evaluation as it did, for example, in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, and *Wilson v First County*. As Lord Woolf said in *Poplar Housing* at 61:

> "It is not necessary to hold a state trial into successive government's housing policies in order to balance the public and private issues to which article 8 gives rise."

Nevertheless, in that case the Court of Appeal did evaluate the evidence adduced before it on the question of incompatibility, even though none of that evidence had been before the lower court.

24. The third principle is that the court must interpret legislation in a way that is compatible with convention rights. Lord Woolf said in Poplar Housing that section 3 is mandatory in its terms. As Lord Hobhouse said in *Wilson* at [131] the duty under section 3 is the same in both the original trial court and any appeal court. This court made much the same point in *Bulale v SSHD* [2009] QB 536 where a point arose on certain immigration regulations for the first time in the Court of Appeal.

25. There is also the question of precedent to be considered. If, without regard to section 3, this court decides that a statute means x, to what extent is a subsequent court free to decide that, in the light of section 3, it means y? Short of any appeal to the Supreme Court, a decision of this court binds both lower courts and this court itself, unless it can be said to have been decided per incuriam of falls within one of the other exceptions in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. A decision of this court is not decided per incuriam merely because with the benefit of different or better arguments it would (or might) have decided the case differently: see *Ho v Adelekun* [2020] Costs LR 317. Could it be said that this court decided the case in ignorance or forgetfulness of some inconsistent statutory provision, which is another of the exceptions? In circumstances in which the court was fully aware of section 3 but declined to apply it, that seems to me to be very doubtful. But even if another court or tribunal could decline to follow our decision, unless and until it did so, the law would be left in a state of uncertainty; and it is clear from the reasons that the Upper Tribunal gave for the grant of Permission to Appeal, its expectation was that, subject to any appeal to the Supreme Court, this court would provide a definitive answer.

26. Weighing all these factors together, I consider that the landlord should be entitled to advance the argument based on section 3 of the Human Rights Act, but that the Secretary of State should be entitled to adduce evidence on the question of compatibility if she wishes to.

27. That brings me on to the question of timetabling. Mr Allison has proposed a timetable which seeks to bring the parties before the court by the end of the Michaelmas term or early in the Hilary term 2025 (i.e. December or January). Sir James objects, cogently in my judgment, that that does not give the Secretary of State sufficient time. This is not wholly analogous to a Judicial Review claim where a number of discrete

procedural steps would have to be gone through before the defendant is required to put in evidence. I agree with him that the Secretary of State should have 6 weeks to put in evidence.

28. I also agree with him that that means that the December hear by date is too tight a timetable. Rather than fix a date in January, I propose to direct that the appeal be listed by the end of the Hilary term 2025, that is before Easter 2025, which is going to be in mid-April.

29. At the moment the *Adriatic* appeal is linked with another appeal (the *Triathlon* appeal) which also raises questions about the Building Safety Act. The *Triathlon* appeal has a hear by date of May 2025. There is some overlap between the two appeals, although there are also many points of difference.

30. Two of the parties to the *Triathlon* appeal wish to maintain the linking. The management company, in particular, is very concerned to know whether it can safely let contracts for remedying building safety defects. It must not be forgotten that until such time as remediation works are carried out, there are thousands of people living in potentially unsafe flats. The third party to that appeal, SVDP, the developer of the estate, wishes to maintain the hear by date of May 2025 and, if necessary, to decouple the two appeals. The only reason of any substance put forward by Ms Crampin was that her leader, Mr Jonathan Selby KC was at present due to be engaged in two long trials which would not finish until the middle of April 2025. The weight that I can give to what is, in effect, counsel's convenience is necessarily dependent on the type of case involved, the degree of specialist expertise required, and the length of time involved before an altered hearing date. This is not a case, in my view, in which there is a need for further fact-finding in the conventional sense, it is a question of statutory construction. Cases often settle, and there is ample time to instruct alternative counsel if need be. I do not consider that counsel's convenience can outweigh the desirability of a relatively speedy answer to the issues raised by the appeal, all the more so since until such time as answers are given thousands of people are living in what are potentially unsafe flats.

31. I will direct, therefore that the two appeals will be heard sequentially by the same constitution, and that they are to be listed for hearing by the end of the Hilary term 2025. I will expect all parties to co-operate in agreeing a detailed timetable for the adduction of evidence necessary to deal with the section 3 argument and the lodging of skeleton arguments.