

COVID-19: PRESSURE POINTS: THE RIGHT TO PROPERTY (UK)

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Legal Briefings

The current pandemic has led to an extraordinary level of state action. In many cases this has involved interference with the private rights of businesses and individuals. While states are undoubtedly seeking to balance health and economic concerns of the utmost importance, their actions nevertheless must comply with rules of domestic and international law.

In this short article we consider one particular form of state action, namely interference with private property, and the domestic protections available to those who find that their right to property has been infringed. This builds on our Arbitration Notes [piece](#) which considered the international law obligations relevant in this context.

THE RIGHT TO PROPERTY

The right to peaceful enjoyment of property is protected by both the common law and Article 1 of the First Protocol (“**A1P1**”) of the European Convention on Human Rights (the “**ECHR**”), as incorporated into UK law by the Human Rights Act 1998 (the “**HRA**”).

Under the HRA, legislation must be read compatibly with the ECHR and the courts can issue a declaration of incompatibility in the event that primary legislation contravenes the ECHR. The courts can also strike down secondary legislation (such as regulations) which is incompatible with the ECHR. The HRA allows “*victims*” whose ECHR rights have been infringed to bring claims against public authorities, including claims for damages where appropriate. Claims can be brought against governmental organisations and other public bodies such as regulators.

Under A1P1, any interference with property must be justified. In particular the interference must serve a legitimate interest and be proportionate. This means that compensation can be payable if a lack of compensation would make the measure disproportionate in the circumstances. Compensation is ordinarily payable in cases of deprivation (or expropriation) of property but is rather less likely to be available where actions instead amount to a “*control on use*” of property.

CORONAVIRUS LEGISLATION

There are a number of provisions in the Coronavirus Act 2020 (the “**Act**”) and the other coronavirus-related regulations which could result in interference with the right to the peaceful enjoyment of property. Indeed the Department of Health and Social Care’s assessment of the Coronavirus Bill 2020 in its [memorandum to the Joint Committee on Human Rights](#) (the “**Memorandum**”) identifies a number of clauses which may engage A1P1.

Legislative provisions which appear likely to lead to interference with property rights include:

- **Closure of various businesses:** Actions taken under the various legislative provisions which operate to close (or restrict the opening of) premises and businesses are likely to interfere with the right to peaceful enjoyment of property. One such provision is section 52 of the Act (together with Schedule 22), which the Memorandum accepts may engage A1P1. While these directions may amount to a “*control on use*” rather than a deprivation, they can still be challenged through the courts if the use of the powers is disproportionate or does not appear to pursue a legitimate aim.
- **Directions in relation to schools and childcare providers:** The Act (sections 37 and 38, together with Schedules 16 and 17) contains various powers in relation to education and childcare. This includes powers to direct the closure of facilities and to direct that they remain open to provide education, training or childcare. Given that such powers apply to private organisations (in addition to state facilities), the directions contemplated by these provisions are likely to engage A1P1. Directions that particular facilities must close (or indeed remain open) may amount to a “*control on use*” of property and may be challenged through the courts.
- **Directions in relation to ports:** Section 50 of the Act (together with Schedule 20) gives the Secretary of State power to direct the closure of ports (including airports) and make consequential directions requiring operators to take specified steps. Notably the Memorandum does not consider the compatibility of these provisions with the ECHR but instead says that this analysis will be undertaken at the point when the Secretary of State decides to make a direction. Again any such direction may engage A1P1 as a “*control on use*” of property and entities which are affected by a direction may be able to challenge it in the courts.

- **Directions given in relation to bodies:** While this issue is not addressed in the Memorandum, the powers in the Act in relation to the transportation, storage, and disposal of dead bodies are likely to engage A1P1. Under these provisions (in particular paragraph 5 of Schedule 28) local or national authorities may “*give a direction requiring a person to do anything calculated to facilitate the transportation, storage or disposal of dead bodies or other human remains*”. Such a direction can involve a requirement to provide services or property (including “*facilities, premises, vehicles, equipment or anything else within the person’s possession or under the person’s control*”). Paragraph 8 of Schedule 28 then requires the establishment of a scheme to provide compensation to those to whom a direction under paragraph 5 is given. While we are not aware that such a direction has yet been given, it seems likely that directions would engage A1P1 and may either amount to a “*deprivation*” or “*control on use*” of property. As contemplated by the legislation, compensation may be payable in order to make any such direction proportionate.

The circumstances of the COVID-19 pandemic also raise concerns about the peaceful enjoyment of property beyond those currently set out in legislation. For example questions may arise in relation to requisitioning private medical supplies or in relation to consumer credit, whereby firms may be forced to forego income or use their property in a particular manner. In all such circumstances public authorities and private organisations alike need to be alive to possible infringements of the right to property.

COMMENT

There is a general acceptance of the need for the curtailment of private rights, including the right to peaceful enjoyment of property, as a result of the COVID-19 pandemic. Interference with property rights can take many forms – it may involve directions (whether by the government or other public authorities such as regulators) that property cannot be used or indeed requirements that property must be used in particular ways. However, even in these extreme circumstances, the law does provide protection for those who find their rights interfered with. Those who find that their property rights have been infringed may be able to challenge actions which are disproportionate or do not serve a legitimate purpose. In such circumstances, the courts could quash unlawful decisions or require compensation to be payable.

[More on COVID-19](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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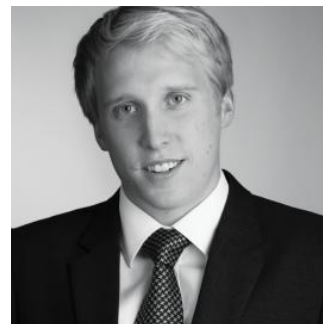
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