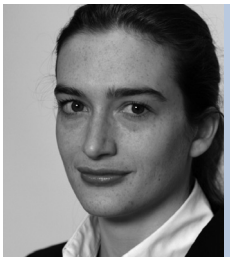
Hot topics in commercial judicial review



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COMPANIES ARE INCREASINGLY USING judicial review to protect valuable business interests. It is now routine for companies to challenge official decisions not only on the traditional grounds of illegality, irrationality and procedural unfairness, but also by invoking human rights principles and European law. When used effectively, commercial judicial review is a powerful tool. This article offers an overview of important recent trends.

WHAT IS COMMERCIAL JUDICIAL REVIEW?

There is no strict definition of commercial judicial review. Broadly speaking, any challenge by a commercial entity to a regulatory or government decision, made to protect its business interests, falls into this subset of judicial review. The following examples illustrate the types of interest at stake in commercial contexts:

- Tate & Lyle's challenge to the level of subsidy allocated to its renewable energy technology (*R (Tate & Lyle Sugars Ltd) v Secretary of State for Energy and Climate Change & anor* [2011]);
- ICO's action against Ofcom's attempts to remove it from an international register, laying waste to its £2bn investment in mobile satellite services (*R (ICO Satellite Ltd) v OFCOM* [2011]); and
- Burnley Training College's challenge to the Secretary of State's refusal of its application for a sponsor licence, with 'economically catastrophic' consequences (*R (Burnley Training College Ltd) v Secretary of State for the Home Department* [2011]).

RECENT CASES

A review of cases in 2011-12 shows that the following topics have been of particular significance:

1) The amenability to judicial review of 'private law' disputes;
2) The intensity of review where a decision affects economic interests;
3) The reliance by companies on the protection of property rights in Article 1 Protocol 1 of the European Convention on Human Rights (A1P1); and
4) The importance of European Union law.

AMENABILITY TO JUDICIAL REVIEW OF 'PRIVATE LAW' DISPUTES

Private legal relationships between public bodies and companies, such as contractual relationships, are not generally open to challenge by judicial review except in certain restricted circumstances. Two cases decided earlier this year involving public procurement contracts reached contrasting views on the limits of review of the private law functions of public bodies.

In *R (Broadway Care Centre Ltd) v Caerphilly County Borough Council* [2012], the claimant sought judicial review of the council's decision to terminate its contract to provide care for elderly dementia sufferers at its care home. The preliminary issue was whether the council's decision to terminate the contract was amenable to judicial review. The court emphatically rejected the claimant's submission that it was, deciding that termination of the contract involved the exercise of a private law power and was not amenable to judicial review; the critical factor for the court was that the claimant was entitled to avail itself of private law remedies under the contract (para 44).

In comparison, in *R (Bevan & Clarke LLP & ors) v Neath Port Talbot County Borough Council* [2012] the court reached the opposite conclusion in a challenge by nine residential care home owners to the council's decision to set the rate that it paid them for accommodation. The council argued that the nature of its decision was contractual and that it was carrying out a private function that was not amenable to judicial review. The court disagreed, finding that in providing residential accommodation to those in need of it, the council was carrying out a public function. An important consideration was that the authority had to follow statutory guidance and could not act like a private individual and use its bargaining power to drive down prices. In its view:

> 'The mere fact that the decision concerns the setting of a fee under a contract does not mean that it is to be characterised as a private act.' (para 48)

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In contrast to the approach in *Broadway Care Centre*, the court thought it necessary to look beyond the contract itself, and to consider the wider statutory framework to determine whether a decision made in relation to a contract is amenable to review.

Another recent decision on the scope of review of contractual relationships is *R (Unison) v NHS Wiltshire Primary Care Trust & ors* [2012]. Unison challenged the decision of ten primary care trusts to enter into contracts with a company called NHS Shared Business Services for the provision of health care services. The court held that, under the relevant statutory framework, the contractual relationship was capable of giving rise to public law remedies for third parties in certain circumstances. However, ultimately the court held that Unison did not have sufficient interest in the decision and therefore did not have the requisite standing to challenge the contract.

In view of the continuing economic crisis and associated budgetary cuts, contractual relationships with public bodies will continue to be hotly contested and the boundaries between public and private law will be put further to the test.

THE INTENSITY OF REVIEW WHERE THE CONCERN IS ECONOMIC: CONTEXT IS EVERYTHING

In public law, the intensity of review of a decision is recognised as being flexible. In practice, this means that the application of the traditional grounds of judicial review (illegality, irrationality, procedural unfairness) varies substantially depending on the subject matter and administrative function under review. In general, in economic contexts, a low level of scrutiny applies.

This is particularly so where a commercial entity is seeking to challenge the decision of a specialist regulatory or licensing body. The reason is that courts will give a wide discretion to regulators with specialist knowledge and expertise acting within the powers conferred by statute (for a recent statement of this principle see *R (Welsh Water) Ltd v Ofwat* [2009]).

A good example is the Court of Appeal's 2011 judgment in *ICO Satellite*. ICO challenged Ofcom's decision to write to the International Telecommunications Union – the body responsible for co-ordinating shared global use of the radio spectrum – to cancel ICO's entry on its register. Ofcom had taken action against ICO because it had failed to bring its satellite system into full commercial use within the timeframe specified in the statutory and regulatory framework.

The impact on ICO was severe, as removal from the register would block ICO from using the spectrum in the future and would prevent it from developing a commercial satellite communications system. Furthermore, there was no evidence that any other satellite system was being prevented from using the spectrum by ICO's continued presence on the register – an important factor given that the purpose of the international regulation of the radio spectrum is to conserve a scarce resource.

One of the main grounds pursued by ICO was that Ofcom had failed to take into account relevant considerations in making its decision. It argued that Ofcom should have considered both the absence of detriment to third parties and the severe impact on ICO, namely the laying to waste of £2bn of investment. The Court of Appeal disagreed. On the question of Ofcom's failure to take into account relevant considerations, the court held that Ofcom could not be criticised for basing its decision on ICO's major default and it was not required to take into account ICO's financial losses or the absence of evidence of another satellite operator wishing to utilise the spectrum.

The Court of Appeal's decision is perhaps unsurprising given that ICO had failed to comply with the statutory framework governing its use of the radio spectrum. What makes the decision interesting from the perspective of commercial judicial review is that the court gave so little weight to significant commercial and economic factors.

In contrast, the Administrative Court was willing to intervene to protect commercial interests in *Burnley Training College*. The applicant, a training college, applied for judicial review of the Secretary of State's decision to refuse its application for a Tier 4 sponsor licence, which it needed in order to be able to teach international students. The college argued that the procedure by which the secretary of state reached his decision was unfair. The licence had been refused because the officer responsible for determining the application did not consider the proprietor of the college met the scheme's 'suitability requirements'. In his view, the proprietor had been dishonest when she sent an e-mail to say the college had been exonerated by an appeal panel in relation to all charges brought against it by training course accreditor Edexcel.

In fact the panel had exonerated the proprietor in connection with allegations of dishonesty but upheld others concerning management and administration. The decision to refuse the licence was made solely on the basis of the contents of the e-mail and the proprietor had not been given an opportunity to explain the situation. The court agreed that the decision had been made unfairly:

> 'An allegation of dishonesty against any person is a grave and serious charge; it may have very serious implications for the accused; it may affect their insurance or accreditation with other agencies or departments. Instinct and natural justice immediately leads one to think that the charge should not be levelled, still less assumed, without proper and due and responsible care

and consideration; certainly not without giving, at the very least, the accused an opportunity to explain the inaccuracy or charge, or the circumstances that have led the accuser to believe that the accused is being dishonest. More so where the finding may have, as potentially it does here, potential disastrous consequences for the claimant.' (para 34)

The disastrous consequences envisaged by the court were the serious professional and financial consequences that flowed from a training college's failure to obtain a Tier 4 sponsor licence. This had been described by the judge at permission stage as an 'economic catastrophe'. In comparison to the Court of Appeal's decision in *ICO*, the court in *Burnley Training College* attached significant weight to economic and commercial factors.

Another case decided last year concerning the scope of procedural fairness in the commercial context was *Tate & Lyle Sugars*. The Court of Appeal was asked to consider whether the secretary of state had unlawfully allocated Tate & Lyle's renewable energy technology a lower subsidy than he ought to have done. The company's initial challenge was to the precision of the minister's assessment criteria. However, in preparing for the proceedings the minister discovered that he had used the wrong figures to assess costs and he therefore decided to carry out an early review under the relevant statutory scheme.

The minister's assessment of the level of subsidy owed remained unchanged. Tate & Lyle amended its grounds, arguing that it was unfair for the minister to review its subsidy using more up-to-date information, in circumstances where its competitors continued to receive subsidies calculated on the basis of old information. Because of changes in electricity prices, the effect was that Tate & Lyle received a lower subsidy than its competitors.

The Court of Appeal rejected the challenge. In the leading judgment, Lord Justice Elias said that in determining what is fair in any particular context it is necessary to look at the wider public interests. In doing so, he considered that Tate & Lyle was receiving the appropriate subsidy for its technology.

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In essence, it was simply not obtaining the windfall received by its competitors resulting from the increase in electricity prices. It was not unfair to deprive Tate & Lyle of the same windfall even though its competitors would continue to receive it; rather, it was a question of bad luck.

Taken as a whole, the lesson to be gleaned from the above cases is that context is everything. What is important from the perspective of commercial litigants is that, despite the lower degree of scrutiny in cases with a commercial element, significant weight will be attached to economic and financial considerations in the right case.

ARTICLE 1 PROTOCOL 1

Commercial organisations increasingly rely on A1P1 to challenge decisions that interfere with their assets. This is unsurprising, since A1P1 protects the property rights of both natural and legal persons unless the interference can be justified in the public interest. A1P1 was the subject of two important cases considered by domestic courts in the last year.

In *AXA General Insurance Ltd & ors v Lord Advocate & ors (Scotland)* [2011] the Supreme Court considered a challenge brought by insurance companies against an enactment of the Scottish parliament. The Act changed the law to allow people to bring personal injury claims on the basis of asbestos-related pleural plaques. The new law would expose the insurance companies to a substantial number of claims by employers claiming against their liability insurance policies. They complained that it was therefore an interference with their A1P1 rights.

The first question for the Supreme Court was whether, by imposing an indirect liability on the insurers, the relevant statutory provision amounted to an 'interference with possessions'. Lord Hope, with whom the other judges agreed, found that it did. He reasoned that the amount of money the insurers would have to pay to satisfy their obligations under insurance policies was a possession for the purposes of A1P1. Moreover, the liability was an interference because, although indirect, it could not be dismissed as remote or hypothetical. However, the death blow to the companies' claim was the court's view that the interference was justified, and that insurers were not being asked to bear a disproportionate or excessive burden.

The Supreme Court's decision is likely to be of significance because it recognises the wide ambit of what is considered a 'possession' for the purposes of A1P1, while also indicating the scope of the state's ability to interfere with possessions in the general interest.

The second A1P1 case is *R (Infinis Plc & anor) v Gas and Electricity Markets Authority & anor* [2011]. Although a decision of the Administrative Court, it is significant because it concerns the proper approach to an award of damages for breach of A1P1. The court in *Infinis* set a rare precedent in not only finding an unjustified breach of A1P1, but also by awarding damages following the breach. The court agreed with Infinis that the Gas and Electricity Markets Authority's (GEMA) decision not to accredit Infinis' generating stations was unlawful. It followed that Infinis was denied a pecuniary benefit that it was entitled to by statute.

In its decision on the question of damages, the Court's starting point was that the principle to be followed in human rights cases is that 'following an interference a

person is to be placed in the same position as if his Convention rights had not been infringed'. Applying that principle, the Court found that it was appropriate to award Infinis damages. Its decision was based on the following factors:

1) Infinis would not receive just satisfaction from quashing and mandatory orders alone;

2) A private law action was not available;

3) If no damages award were made, Infinis would not recover what was owed to it by statute; and

4) A clear and calculable loss flowed directly from GEMA's unlawful decision.

Infinis therefore serves as a reminder to commercial litigants of the courts' willingness to award damages for unjustified interferences with property rights in appropriate cases. It provides a helpful statement of the factors likely to be taken into account in deciding whether an award of damages is appropriate.

In view of the renewed emphasis on the availability of damages and the ever-widening understanding of what amounts to a 'possession' for the purposes of A1P1, it seems likely that A1P1 is set to continue to be a fertile ground of challenge.

RELIANCE ON EUROPEAN UNION LAW

The reach of EU law is ever expanding. It is particularly important in judicial review, where the decisions of public bodies, statutory instruments and even primary legislation are now frequently challenged on the grounds that they are incompatible with an instrument of EU law, for example a directive or article of the Treaty on the Functioning of the European Union (TFEU).

In the past year commercial organisations have not been slow to take advantage of EU law in challenging decisions, as demonstrated by the following cases:

1) JBOL Ltd's challenge to guidance issued by the Health Protection Agency on the basis that it did not comply with a relevant EU directive (*R (JBOL Ltd) v The Health Protection Agency* [2011]); and

2) BT's objection to the Digital Economy Act 2010 on the grounds that it was incompatible with relevant EU directives (*R (BT Plc & anor) v Secretary of State for Business, Innovation and Skills & ors* [2012]).

Of significant value to commercial entities are the economic TFEU rights, such as the right to free movement of goods enshrined in Article 34, which may form a ground for judicial review in its own right.

A recent example is Sinclair Collis, a subsidiary of Imperial Tobacco, which challenged primary and secondary legislation banning the sale of tobacco from automatic vending machines (*R (Sinclair Collis Ltd) v Secretary of State for Health* [2011]). The Administrative Court refused to quash the legislation and in late 2011 the case reached the Court of Appeal. The basis of Sinclair Collis' claim was that the legislation contravened TFEU Article 34, governing the free movement of goods, and violated its right to property under A1P1. The secretary of state appeared to accept (and the Court of Appeal agreed) that the ban would breach Article 34 and A1P1 unless it could be justified for the protection of public health.

The central issue was whether the public health justification was proportionate. A majority of the court found that the ban was justifiable by reference to the principle of proportionality, having particular regard to the wide margin of appreciation that was to be afforded to the government. Lady Justice Arden stated:

> '... in the context of public health protection, European Union law without doubt permits a low level of intensity of review with respect to the acts of the national legislature.' (para 173)

Although Sinclair Collis was ultimately unsuccessful, the scope of the principle of proportionality caused the Court of Appeal some difficulty. Lord Justice Laws dissented, considering the ban to be disproportionate, particularly in light of the availability of a less restrictive alternative.

WHAT NEXT FOR COMMERCIAL LITIGANTS?

Judicial review will continue to be an important remedy for companies seeking to protect their interests against unfair or unlawful government or regulatory actions. In the face of growing pressures on public sector finances, judicial review cases are, if anything, expected to increase. While the traditional grounds of challenge are still the most frequently invoked, the use of human rights or European law brings a vital added dimension, allowing companies to challenge the proportionality of the decision. While the courts have in some contexts been reluctant to interfere to protect mere economic interests, as the cases set out above illustrate, in other cases judicial review has provided a powerful tool.

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AXA General Insurance Ltd & ors v Lord Advocate & ors (Scotland) [2011] UKSC 46

R (Bevan & Clarke LLP & ors) v Neath Port Talbot County Borough Council [2012] EWHC 236 (Admin)

R (Broadway Care Centre Ltd) v Caerphilly County Borough Council [2012] EWHC 37 (Admin)

R (BT Plc & anor) v Secretary of State for Business, Innovation and Skills & ors [2012] EWCA Civ 232

R (Burnley Training College Ltd) v Secretary of State for the Home Department [2011] EWHC 2928 (Admin)

R (ICO Satellite Ltd) v OFCOM [2011] EWCA Civ 1121

R (Infinis Plc & anor) v Gas and Electricity Markets Authority & anor [2011] EWHC 1873 (Admin)

R (JBOL Ltd) v The Health Protection Agency [2011] EWHC 236

R (Sinclair Collis Ltd) v Secretary of State for Health [2011] EWCA Civ 437

R (Tate & Lyle Sugars Ltd) v Secretary of State for Energy and Climate Change & anor [2011] EWCA Civ 664

R (Unison) v NHS Wiltshire Primary Care Trust & ors [2012] EWHC 624 (Admin)

R (Welsh Water) Ltd v Ofwat [2009] EWHC 3493 (Admin)