

PRELIMINARY ISSUES DETERMINED IN BANK MELLAT DAMAGES CLAIM

Bank Mellat v Her Majesty's Treasury [2015] EWHC 1258 (Comm)

Introduction

By a judgment handed down on 6 May 2015 in *Bank Mellat v Her Majesty's Treasury* [2015] EWHC 1258 (Comm), preliminary issues were determined in favour of Bank Mellat (“the Claimant”) in its damages claim against Her Majesty’s Treasury (“the Defendant” or “the Treasury”) currently before the English Commercial Court.

Background

The Claimant is a privately owned Iranian bank that operated in the UK financial sector. The Defendant subjected the Claimant to asset freezes by virtue of the Financial Restrictions (Iran) Order 2009 (“the 2009 Order”), which was made under the Counter-Terrorism Act 2008 (“the 2008 Act”).

The object and effect of the 2009 Order was to exclude the Claimant from the UK financial sector. The Claimant claimed damages under the Human Rights Act 1998 contending that the Defendant’s actions amounted to an unlawful interference with ‘possessions’ contrary to Article 1 of Protocol 1 (“A1P1”) to the European Convention on Human Rights (“ECHR”) because the Claimant had been prevented from making a profitable use of goodwill that it had established in the UK and accordingly had suffered significant losses.

In a judgment handed down on 19 June 2013 (*Bank Mellat v HM Treasury* [2014] AC 700), the Supreme Court held by a majority that the 2009 Order was unlawful. The damages claim was ultimately transferred to the Commercial Court. The Claimant sought damages for: (1) loss of profits; (2) loss of return on funds deposited with its subsidiary; and (3) losses caused by the reduction in the subsidiary’s earnings before taxation (“EBT”).

The Commercial Court was asked to decide three preliminary issues:

- (1) whether it was open to the Defendant to contend that it had not acted unlawfully and/or in a manner incompatible with an ECHR right;
- (2) whether it was open to the Defendant to contend that the Claimant could not recover losses caused by the EBT reduction because of the ‘reflective loss principle’. This principle provides that, except in exceptional circumstances, where loss of individual shareholders is inseparable from the general loss of a company, only the company itself may bring legal action, not the shareholders, in order to prevent a double recovery; and
- (3) whether the recoverable damages were limited to the loss of ‘possessions’ themselves or whether recoverable damages included all losses flowing from the unlawful interference with those ‘possessions’.

Decision

The Commercial Court (Flaux J) determined all three preliminary issues in favour of the Claimant.

(1) The Defendant could not contend that it had not acted unlawfully and/or incompatibly with an ECHR right because the Supreme Court had clearly considered that issue and the majority of that court had reached the opposite conclusion. That the Supreme Court had expressly considered and decided this issue (which in fact was the basis of the claim) was evidenced by explicit references in the judgments to principles of human rights law such as proportionality and rationality as well as to ECHR rights in the context of the 2008 Act.

(2) The reflective loss principle did not apply to the claim insofar as the claim related to the subsidiary. Although the loss complained of (diminution in the value of the subsidiary's shares) was reflective loss and therefore irrecoverable in principle, this was a case where exceptional circumstances displaced the reflective loss principle. The subsidiary itself could not bring an action against the Defendant (either under the Human Rights Act 1998 or at common law) because it was not the direct victim of the 2009 Order and, furthermore, the 2008 Act did not confer upon the subsidiary a right to damages. The effect of these exceptional circumstances was that the Claimant could pursue a claim to recover those losses.

(3) There was no restriction on the recoverable damages by reference to technical definitions of what constitutes 'possessions' for the purposes of A1P1. Once the Claimant had established an unlawful interference with 'possessions', damages could be recovered in respect of whatever loss, including consequential loss, was caused by that interference. It was not a requirement that what was claimed by way of loss was itself a 'possession'.

Concluding Remarks

The litigation between Bank Mellat and the Treasury has produced a number of significant judgments, including the Supreme Court's landmark decision that it could and would hear evidence from the Treasury in a Closed Material Procedure – i.e. in the absence of Bank Mellat and its lawyers.

There is an appeal outstanding against a separate decision (*Bank Mellat v HM Treasury* [2014] EWHC 3631 (Admin)) that the Treasury must, although national security considerations prevented full disclosure, provide Bank Mellat with sufficient information to enable it to give instructions to special advocates in its applications to set aside two other financial restrictions decisions.

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