Case No: A3/2015/1691

Neutral Citation Number: [2016] EWCA Civ 452
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMMERCIAL COURT
The Hon Mr Justice Flaux

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2016

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE LONGMORE
and
LORD JUSTICE LEWISON

- -

Between:

Bank Mellat	**Respondent**
- and -	
HM Treasury	**Appellant**

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- -

Steven Kovats QC, Patrick Goodall QC and **Julian Blake** (instructed by **The Government Legal Department)** for the **Appellant**
Michael Brindle QC, Timothy Otty QC and **Amy Rogers (**instructed by **Zaiwalla & Co)** for the **Respondent**

Hearing date: 1 and 2 March 2016

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Judgmen

t**Lord Thomas of Cwmgiedd, CJ:**

1. In June 2013 the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 decided by a majority that HM Treasury had breached the human rights of Bank Mellat, a large Iranian bank, under Article 1 Protocol 1 (A1P1) of the European Convention on Human Rights. The rights in question were the peaceful enjoyment of its possessions which the Supreme Court held were violated by making an Order in Council, the Financial Restrictions (Iran) Order (the 2009 Order), on 9 October 2009 under s.62 and Schedule 7 of the Counter-Terrorism Act 2008. HM Treasury had made the 2009 Order because it believed that Bank Mellat was engaged in facilitating the development of nuclear weapons by Iran. The majority of the Supreme Court held in essence that the 2009 Order was irrational in its incidence and disproportionate to any contribution it could rationally be expected to make to its objective: see in particular the judgment of Lord Sumption at paragraphs 25-27.

2. The effect of the 2009 Order was, as HM Treasury intended, to shut Bank Mellat out of the UK financial sector. Mitting J, who had initially heard the claim, had found that Bank Mellat had suffered some damage to its possessions. The Supreme Court remitted to the High Court the claim made by Bank Mellat. That claim has been allocated to the Commercial Court and is due for trial in October 2016.

3. Bank Mellat claims that the losses it sustained because it was prevented by the 2009 Order from carrying on its business in the UK amount to $4bn. It advances the claim for that amount under s.8 of the Human Rights Act 1998 (HRA) on the basis that it has suffered that loss to its possessions as a result of the making of the 2009 Order in breach of its human rights. In determining whether to award damages and in determining the amount of the award, s.8(4) of the HRA requires the court to:

> "take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

4. Article 41 provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

5. The approach to be adopted by the courts of the UK under this provision is set out in *R (Greenfield) v SSHD* [2005] UKHL 14, [2005] 1 WLR 673 at paragraph 6, *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124 at paragraphs 57-59 and *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, [2013] 2 AC 254 at paragraph 39.

6. Included within Bank Mellat's claim as detailed in the particulars of claim as to quantum are two heads of loss:

i) The loss of 60% of the earnings before tax of Persia International Bank plc (PIB), a company in which Bank Mellat holds 60% of the shares.

ii) Loss of future business.

7. An order was made for the trial of three preliminary issues. They were heard by Flaux J. The first was determined by Flaux J in favour of Bank Mellat in his judgment given on 6 May 2015 [2015] EWHC 1258 (Comm); see paragraphs 2-25 of the judgment. It is not the subject of an appeal. The other two issues can be summarised as follows:

iii) Was Bank Mellat entitled as a matter of law to claim directly against HM Treasury 60% of the loss of earnings before tax suffered by PIB?

iv) Was Bank Mellat able to claim loss of future income? The issue as drafted was more complex, but as I explain at paragraph 45 below, Flaux J was right in expressing it in these simpler terms.

v) Flaux J decided the first of these issues in favour of Bank Mellat (see paragraphs 26-52 of his judgment), but declined to decide the second issue (see paragraphs 53-78).

8. I consider that Flaux J was incorrect in the result on the first issue, but correct on the second issue for the following reasons.

9. **Issue 1: The claim by Bank Mellat for 60% of PIB's loss of earnings before tax.**

10. HM Treasury contended that Bank Mellat was not entitled as a matter of law to advance the claim for the loss sustained by it as a shareholder in PIB for its proportion of PIB's loss of earnings for two reasons:

vi) PIB was entitled as a matter of the law of England and Wales to claim against HM Treasury under ss.7 and 8 of the HRA as a victim for losses it had itself sustained for breach of its rights under A1P1 caused by the 2009 Order. Bank Mellat as a shareholder could not make a claim as a matter of the law of England and Wales for the loss PIB had suffered. The claim for PIB's loss had to be made by PIB which had a right to bring such a claim against HM Treasury under the applicable legislation.

vii) The position under the law applied by the Strasbourg Court was to the same effect.

viii) HM Treasury had to succeed on both points to defeat this head of claim as a matter of law. Flaux J decided the first of these points in favour of Bank Mellat on the basis that PIB could not itself bring a claim under the applicable legislation for the losses it had sustained as a result of the 2009 Order. Although it was therefore unnecessary to decide the second point, he considered, contrary to the submissions of Bank Mellat, that the Strasbourg court recognised a rule equivalent to the law of England and Wales which would have prevented Bank Mellat bringing a claim had PIB been entitled to claim for the loss it had suffered.

ix) *Could PIB make a claim under A1P1 for the losses caused to it by the 2009 Order?*

11. The claim advanced by Bank Mellat for 60% of the loss of earnings of PIB was made on the basis that it had standing to bring a claim under s.63 of the Counter-Terrorism

Act 2008 and the HRA 1998, whereas PIB, although it had standing to bring a claim under s.63, did not have standing to bring a claim under the HRA.

12. Bank Mellat's claim under s.63 of the Counter-Terrorism Act 2008 was premised on the following provisions:

x) S.63(2) permitted "any person affected" by any decision of HM Treasury in connection with the exercise of its functions under Schedule 7 to apply to the High Court to set aside the decision. S.63(4) provided that if the decision was set aside, then the court could make any order or give any relief as might be made in proceedings for judicial review.

xi) The 2009 Order was a decision under Schedule 7.

xii) Article 4 of the 2009 Order contained the prohibition:

> "The Treasury direct that a relevant person must not—
>
> (a) enter into, or
>
> (b) continue to participate in,
>
> Any ransaction or business relationship with a designated person".

xiii) Article 2 defined relevant persons as:

> "The direction in article 4 is given to all persons operating in the financial sector (referred to in that article as *"relevant persons")."*

xiv) Article 3 of the Order provided:

> "(1) The direction in article 4 is given in relation to transactions or business relationships with the following persons (referred to in that article as "designated persons")—
>
> (a) Bank Mellat, whose head office is located at No. 327 Taleghani Avenue, Tehran 15817 Iran;
>
> (b) Islamic Republic of Iran Shipping Lines ("IRISL") ….;
>
> (c) a branch of Bank Mellat or IRISL.
>
> (2) In paragraph (1), "branch" means a place of business of a person, other than its head office, which has no legal personality separate from that person, and which carries out directly all or some of the transactions inherent in that person's business."

xv) Once the Supreme Court had decided that the Order could be set aside under the provisions of s.63 of the Counter-Terrorism Act 2008, then the court could

under those provisions award such relief as could be given in judicial review. The relief that can be given in judicial review includes damages under the HRA.

xvi) Bank Mellat was entitled to damages under the HRA as it had victim status under s.7 of the HRA and could therefore claim just satisfaction under s.8.

13. It was submitted by Bank Mellat that the judge was correct in deciding that PIB could not bring a similar claim, as although it had a right to bring a public law claim under s.63 of the Counter-Terrorism Act 2008, it did not have victim status under s.7 of the HRA which would entitle it to bring a claim under s.8. It was not a victim on the basis that it was not directly affected by the 2009 Order which the Supreme Court had found breached A1P1. The judge had decided (see paragraph 33 of his decision) that PIB was only a victim in a secondary sense as, although PIB was a relevant person under the 2009 Order, that Order was targeted at Bank Mellat and only Bank Mellat had the requisite standing as a victim under s.7 of the HRA and under s.63 of the Counter-Terrorism Act 2008.

14. I cannot accept this submission.

15. In my judgment there can be no doubt that PIB was a relevant person within the meaning of the 2009 Order which defined a relevant person by reference to the definition in paragraphs 4 and 6 of Schedule 7 of the Counter-Terrorism Act 2008. PIB clearly fell within that definition as it was a UK bank authorised under the Financial Services and Markets Act 2000.

16. Each relevant person within the meaning of the 2009 Order was prohibited by Article 4 of the 2009 Order from entering into, or continuing to participate in, any transaction or business relationship with Bank Mellat. As Bank Mellat had no presence in the UK, the only way in which HM Treasury could give effect to the Order was by directing, as it did by Article 4, relevant persons not to deal with Bank Mellat.

17. PIB was therefore, in my view, a person affected by the Order and thus had a right under s.63(2) of the Counter-Terrorism Act 2008 to apply to set it aside and the consequential right to seek relief under s.63(4).

18. Whether the relief which PIB was entitled to claim under s.63(4) included the right to seek just satisfaction under s.8 of the HRA depended on whether PIB had victim status for the purposes of the HRA. In my view it had that status as PIB's standing to bring a claim fell within the terms of both s.7(3) and s.7(7).

xvii) S.7(3) of the HRA provided that:

> "If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act."

19. As the terms of s.63 of the Counter-Terrorism Act permitted the court to grant such relief as might be granted on judicial review, it follows as a matter of ordinary construction of these provisions that PIB was a victim within the

meaning of s.7 of the HRA and therefore entitled to claim under s.8. That was the basis on which Bank Mellat had claimed, as I have explained, and there is no relevant distinction between Bank Mellat's basis of claim and PIB's basis of claim.

xviii) S.7(7) provided:

> "For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

20. The requirements of Article 34 are analysed in the judgments of Lord Hope (at paragraphs 24-28), Lord Brown (at paragraph 73) and Lord Reed (at paragraphs 111-112) in *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868. Applying that analysis, PIB was affected by the 2009 Order and that affect was direct for the reasons I have explained. The consequences to PIB cannot be said to be too remote as PIB was directly prohibited from dealing with Bank Mellat and that direct prohibition was one of the principal means of preventing Bank Mellat dealing through the UK. It follows therefore that PIB had victim status under s.7(7) and therefore was itself entitled to claim just satisfaction under s.8.

21. As HM Treasury were in my view right on the first point, it is necessary to consider the second point (which Flaux J would have decided in their favour) as, to succeed on the first preliminary issue before us, HM Treasury must succeed on that second point also.

22. *(b) Could PIB bring a claim under the principles decided by the Strasbourg Court?*

23. It was common ground that if PIB could bring a claim under the HRA on the basis I have set out, then as a matter of the domestic law of England and Wales, Bank Mellat could not claim for the loss it had suffered in its capacity as a shareholder because of the principle set out in *Johnson v Gore Wood* [2002] 2 AC 1 (see in particular pages 35-36, 62-66) and the helpful summary by Clarke LJ (as he then was) in *Webster v Sandersons Solicitors* [2009] EWCA Civ 830, [2009] 2 BCLC 542. This principle is sometimes described as the rule preventing the recovery of the shareholder's reflective loss; the loss the shareholder has suffered in such circumstances will be the "diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company". Where such a loss could have been made good at the suit of the company, no claim by the shareholder can lie, even if the company has failed to bring the claim for the loss the company has suffered. However the principle distinguishes the position of a shareholder where the company has no cause of action to sue for the loss; in such a case the shareholder has a right to claim. Furthermore where there are breaches of duty both to the shareholder and the company, the shareholder has a right to claim but only in respect of any loss that is separate and distinct from the loss suffered by the company.

24. *The basis of the rationale for Bank Mellat's inability to claim as a shareholder under the law of England and Wales*

25. Although that outcome was common ground, the reason for it was not entirely common ground. Bank Mellat contended that it was necessary to distinguish between:

xix) The rule that a shareholder did not have a cause of action where the company had a claim; the basis of this rule was that the shareholder had no standing to bring a claim.

xx) The position of a shareholder who had standing to bring a claim, as it had an independent right to claim for a wrong done to it, but was not entitled to recover the loss suffered by the shareholder as a shareholder where the company could bring a claim for the loss. There the basis of the rule was to prevent double recovery or recovery that would prejudice the creditors of the company.

xxi) It was submitted that Bank Mellat had a claim as a direct victim of the unlawful 2009 Order and therefore had standing to bring a claim and could include in that claim the loss it had suffered in its capacity as a shareholder. As PIB had not brought a claim, HM Treasury was not at risk of double recovery.

26. Bank Mellat relied on a passage in the judgment of Lord Millett in *Johnson v Gore Wood* at page 62:

> "The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, insofar as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder."

27. Although it is not necessary, for the reason I give at paragraph 28 below, to express a final view on this contention, it does not seem to me to be correct. The explanation by Lord Bingham at pages 35-36 of the circumstances where a shareholder can bring a claim in relation to a loss suffered by the shareholder and the company is premised on the existence of a separate duty to the shareholder and a loss to the shareholder distinct and separate from the loss suffered by the company. This is also clear from the judgment of Lord Hutton at pages 51-55 where he discusses the reasons for following what was established in *Prudential Assurance v Newman* [1982] Ch 204. Moreover, I do not read the judgment of Lord Millett as supporting the contention put forward by Bank Mellat. The loss suffered by PIB through a reduction in its earnings before tax was a loss it suffered; Bank Mellat's loss from this reduction in PIB's

earnings was not a distinct loss, but a loss that was suffered by it as a shareholder. As Lord Millett makes clear at page 66 the fact that the shareholder has suffered loss because the company has not brought an action is caused by the decision of the company not to pursue its remedy and not by the wrong of a defendant.

28. It is not in my view desirable to express a final view on this point in a case where the issue arises only tangentially. That is because, in my view, it matters not whether Bank Mellat is right or wrong in its argument as to the reason it cannot maintain a claim as a matter of the law of England and Wales. It is common ground that the claim cannot be brought as a matter of the law of England and Wales. Why it cannot is irrelevant to the determination of the question of whether, under the principles applied by the Strasbourg Court, it could, for the courts of the UK are directed by s.8 of the HRA to take account of that case law.

29. *The Strasbourg case law*

30. Bank Mellat submitted that it would have a right to claim under the principles established by the Strasbourg Court in its case law, principally *Agrotexim v Greece* (1996) 21 EHRR 250, *Olczak v Poland (*Application 30417/96, judgment of 7 November 2012)*, Ankarcrona v Sweden* (Application no 35178/97, judgment of 27 June 2000) and *Khamidov v Russia* (2009) 49 EHHR 13:

xxii) There was no decision of the Strasbourg court that restricted a victim's right of recovery once it could establish victim status.

xxiii) As Bank Mellat had victim status in respect of other losses, nothing restricted its right to recover all its losses, including those it sustained in its capacity as a shareholder in another company. The decisions were solely concerned with the threshold question as to whether a claimant had victim status.

31. Flaux J concluded (at paragraphs 35 to 52 of his judgment), after a review of *Agrotexim, Olczack* and *Khamidov,* that the contention of Bank Mellat was wrong and the principles established were clear. Bank Mellat would not have had victim status under Article 34 to bring the claim in respect of the loss of earnings before tax suffered by PIB.

32. It is necessary to examine each of the cases to which I have referred in the context of the underlying Convention provisions that what is recoverable as just satisfaction under Article 41 is in respect of the loss of possessions under A1P1.

33. In the first of the cases principally relied on, *Agrotexim v Greece* decided in 1996, the applicants were shareholders in a brewery company. The Athens municipality had taken steps to prevent the company using the site of its breweries for a development which had resulted in the insolvency of the company. It was contended that the actions of the municipality were a breach of A1P1 as it had prevented the shareholders from enjoying their possessions. One of the issues before the Strasbourg court was whether the shareholders could maintain the claim as shareholders. The court held they could not draw a clear distinction between claims for actions that affected rights vested in them as shareholders and claims as shareholders in respect of a violation of the rights of the company. The court characterised the claim as an attempt to pierce the corporate veil and concluded that:

> "the Court considers that the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or—in the event of liquidation—through its liquidators. The Supreme Courts of certain Member States of the Council of Europe have taken the same line. This principle has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice."

34. The reference to the International Court of Justice was to its well-known judgment of 5 February 1970 in *Barcelona Traction, Light and Power Company (Belgium v Spain)*.

35. This clear principle has been applied in a number of cases, including *Olczak v Poland*, decided in 2002. The applicant was a shareholder in a bank to which a board of receivers had been appointed by the National Bank of Poland. The board of receivers under the authority of the National Bank passed various resolutions which had the effect of reducing the applicant's shareholding from 45% to 0.4%. The court, after referring to *Agrotexim,* distinguished it at paragraph 58 of the judgment, on the basis that in *Agrotexim* the company had been the direct victim whereas in the present case the measures were directed at the applicant's rights as a shareholder which were accordingly directly affected. It said at paragraph 59:

> "… as regards the distinction between the shareholder's interests and those of the company, it should be recalled that the concept of the public company is founded on a firm distinction between the rights of the company and those of its shareholders. Only the company, which has legal personality, can take action in respect of corporate matters. A wrong done to the company may indirectly cause damage to its shareholders, but this does not mean that both are entitled to claim compensation. Whenever a shareholder's interests are damaged by a measure directed at the company, it is up to the latter to take appropriate action. An infringement of the company's rights does not entail liability to the shareholders, even if their interests are affected. Such liability is incurred only if the act complained of is directed at the rights of the shareholder as such (*International Court of Justice, Barcelona Traction, Light and Power Company Limited*, pp. 39 and 41, paras. 56-58 and 66), or if the company has been wound up."

36. The court then analysed the effect of what had happened and concluded that the measures had reduced the applicant's shareholding to 0.4% and that his powers to influence the company and to vote had been significantly curtailed. He could claim the loss so caused.

37. The court has, however, made exceptions in what can properly be described as exceptional cases.

xxiv) In *Ankarcrona v Sweden*, decided in 2000, the applicant was the sole shareholder in a Swedish limited liability company which had a licence to trade in specified military equipment; it was in effect his business carried on through a company he wholly owned and controlled. The company's application to extend the licence to cover other equipment it had purchased was refused. The applicant contended that he and the business were in practice the same and he could therefore be regarded as a victim under Article 34 of the Convention. The court distinguished *Agrotexim* on the basis that in that case the applicants owned only about half the shares. It said of the present application at paragraph 1:

> "There is no risk of differences of opinion among shareholders or between shareholders and a board of directors as to the reality of infringements of the rights protected under the Convention and its Protocols or concerning the most appropriate way of reacting to such infringements.
>
> Having regard to the absence of competing interests which could create difficulties, for example in determining who can apply to the Court and in the light of the circumstances of the case as a whole, the applicant can, in the Court's opinion, reasonably claim to be a victim within the meaning of Article 34 of the Convention, in so far as the impugned measures taken with regard to the company are concerned."

38. The applicant's application under A1P1 was nonetheless dismissed by the court on the basis that the applicant had not been deprived of any property.

xxv) *Khamidov v Russia,* decided in 2007, was a similar case. The applicant was co-owner with his brother of land in Chechnya; he and his brother had established a bakery operated by a limited liability company which they had incorporated and owned; the business was the main source of income. As a result of fighting in Chechnya the applicant had to leave all of the land. When he tried to return in 1999 he was prevented from doing so by Russian police and the land continued to be occupied by Russian authorities until possession was recovered between 2001 and 2002. The land in respect of which a claim was made comprised land transferred to the company for the bakery business, some land owned by the applicant and some land owned by his brother. The brother had provided the applicant with a power of attorney to bring the original claim in Russia for compensation which was rejected by the Russian authorities. An issue arose as to the entitlement of the applicant to maintain the claim before the Strasbourg Court. Bank Mellat relied particularly on this decision as it contended that it showed that the applicant was entitled to recover damages by way of just satisfaction to the extent of his half interest in the company. The court re-stated the general principle:

> "The Court reiterates that where the acts or omissions complained of affect a company, the application should be brought by that company. Disregarding a company's legal personality as regards the question of being a "victim" will

> be justified only in exceptional circumstances [citing *Agrotexim* and other cases]. On the other hand, the sole owner of a company can claim to be a "victim" within the meaning of art. 34 of the Convention in so far as the impugned measures taken in respect of his company are concerned, because in the case of a sole owner there is no risk of differences of opinion among shareholders or between shareholders and a board of directors as to the reality of infringement of Convention rights or to the most appropriate way of reacting to such infringement [citing *Ankarcrona* and other cases]."
>
> **39.** The court concluded that on the facts of the case the applicant and his brother were the sole co-owners of the bakery company and the land on which the company carried out its business; the applicant and his brother did not have competing interests. The applicant could therefore be considered as having victim status in respect of the land owned by the company to the extent of his interest.

40. In my view the general principle applied by the Strasbourg Court is clear. Save in exceptional circumstances, it is the company and not its shareholders who have the status and standing as a victim to bring the claim for the loss sustained by the company; the principle established by *Agrotexim* is very clear. This view is the same as that reached by Flaux J in this case and by Neuberger J *in Humbercycle Finance Group v Hicks* [2001] EWHC 700 (Ch) at paragraph 45. As this is the clear principle there is no basis for contending that Bank Mellat is entitled to recover as a shareholder for the loss sustained by PIB, simply because it has other claims which confer on it victim status. PIB's loss is recoverable by PIB and no one else.

41. The exceptional cases turn on their own special facts. The first of these, *Ankarcrona*, was a case where the property affected by the impugned measures was treated in reality as the business of the applicant because he was the sole shareholder. The second, *Khamidov,* turned on the very special circumstances to which I have referred – the complexity and intertwined nature of the different ownership interests, the position taken by the brother and the fact that he and his brother were the sole co-owners of the company.

42. Bank Mellat is not the sole shareholder of PIB. PIB is a financial institution licenced under the Financial Services and Markets Act 2000 and operated by a board of directors who were and are responsible to the regulatory authorities of the UK. Its business and interests were quite distinct from the business of Bank Mellat. The loss sustained was a loss sustained by PIB in the business carried on by it as a company and not by the shareholders. There was no reason to pierce the corporate veil; there was no diminution of Bank Mellat's rights as a shareholder. Bank Mellat had simply suffered a loss of income from its shareholding in PIB as a consequence of the loss of income sustained by PIB as the result of the direction to PIB made by HM Treasury under the 2009 Order. The victim for the loss suffered was PIB. Bank Mellat has no standing to bring the claim for that loss as a victim under the Strasbourg case law.

43. This issue should therefore be decided in favour of HM Treasury and that part of the claim struck out.

44. Issue 2: Should the assessment of just satisfaction include Bank Mellat's loss of income?

45. *(a) The issue*

46. The issue as drafted was:

> "(a) Whether the only "possessions" of the Claimant within the meaning of A1P1 with which the 2009 Order could have interfered are (i) any "unperformed concluded transactions" as defined in paragraph 40.4.2 of the Amended Defence and (ii) marketable goodwill to the extent (if any) that it was represented by or referable to any such "unperformed concluded transactions".
>
> (b) If not, whether the 2009 Order could in law have interfered with each of the categories of "possessions" identified in the Claimant's schedule served on 5 December 2014 pursuant to paragraph 4 of the Order of Eder J made on 31 October 2014."

47. This formulation did not reflect the real issue between the parties. The opposing contentions were summarised by Flaux J as:

xxvi) Bank Mellat contended that, as the Supreme Court had decided that the 2009 Order was an unlawful interference with its right to peaceful enjoyment of its possessions, there was no scope to limit the right of recovery by a technical argument about what was meant by possessions. The fundamental position adopted by the Strasbourg Court was that there should be *restiutio in integrum,* including loss of profits (or in the terms of Strasbourg case law, *lucrum cessans)* as compensation for loss of profits was required to ensure just satisfaction.

xxvii) HM Treasury contended that damages were recoverable only in respect of "possessions" as that term was used in A1P1. Although it was established by the Strasbourg case law that there could be a recovery for a diminution in goodwill, as that was a possession, ordinary loss of income and loss of profit were not to be characterised as a loss of goodwill, were not therefore a possession and there could be no recovery in respect of them. An examination of Bank Mellat's claims showed that the claims were mostly for loss of future income, save for loss of its return on sums deposited with PIB and default penalties for not performing contracts concluded before the 2009 Order came into force. The claims pleaded included loss of profitable business (including international trade finance business), loss of customers and correspondent banking relationships, loss of key delivery services (including Reuters and SWIFT) and loss of profits from international foreign currency denominated letters of credit and the opportunity to earn such profits from the expansion of these businesses.

48. It was not substantially in dispute before Mitting J or the appellate courts in relation to the issue on liability that Bank Mellat had been unable to make use of the goodwill

which it had established in the United Kingdom after the date on which the 2009 Order came into force. Mitting J found it unnecessary to determine the extent to which Bank Mellat's enjoyment of its possessions and its business had been affected by the 2009 Order (see paragraphs 2 and 20 of his judgment, [2010] EWHC 1332 (QB), [2010] Lloyd's Rep FC504). There was therefore nothing in the decisions on the liability of HM Treasury that in any way delineated the extent of the amount that Bank Mellat was entitled to recover as just satisfaction.

49. Flaux J expressed the view that he would expect that consequential loss would be recoverable, unless under the case law of the Strasbourg Court there was a rule of law which precluded such recovery (paragraph 55). Having reviewed the Strasbourg case law he concluded at paragraph 67 that:

> "once it is established that there has been an unlawful interference with the applicant's "possessions" so as to establish a violation of A1P1, damages are recoverable for whatever loss and damage can be established as having been suffered as a consequence of the unlawful interference, including consequential losses such as loss of future earnings or profits, not constrained by whether what is claimed by way of loss is itself a "possession", but only by whether the loss claimed was caused by the unlawful interference with the relevant "possessions" which the court has found."

50. However, he then considered the cases decided in England and Wales and the summary of the relevant principles to be derived from both the UK and Strasbourg case law by Lord Dyson MR in *Department of Energy and Climate Change v Breyer Group plc* [2015] EWCA Civ 408, [2015] 1 WLR 4559, at paragraph 23:

> "(i) loss of future income is not a possession protected by A1P1; (ii) loss of marketable goodwill may be a possession protected by A1P1; (iii) a number of factors may point towards the loss being goodwill rather than the capacity to earn future profits: these include marketability and whether the accounts and arrangements of the claimant are organised in such a way as to allow for future cash flows to be capitalised; (iv) goodwill may be a possession if it has been built up in the past and has a present day value (as distinct from something which is only referable to events which may or may not happen in the future), and thus (v) if there is interference which causes a loss of marketable goodwill at the time of the interference, and if that can be capitalised, then it is *prima facie* protected by A1P1."

51. Flaux J concluded at paragraph 78:

> "… it would be wrong to lay down prescriptions at this stage (before any evidence has been heard) as to what damages will be recoverable by the Bank for the unlawful interference with their possessions. Whilst it is correct that the possessions with which there was unlawful interference cannot include future loss of profits, rather than the goodwill which the Bank had

> built up in this country, which Mitting J has found was a "possession", the issue as to what damages are recoverable for that unlawful interference with the Bank's possessions will depend, not upon an artificial restriction to the effect that, for example, the loss of future profits claimed could not itself be a "possession", but upon issues of causation. Those issues of causation will include whether it can be established that the damages claimed were "demonstrably and directly caused by the violation of A1P1" (see per Coulson J in *Breyer* at [152 (c)]), which is an issue for the full trial, not to be determined at the preliminary issue stage. For present purposes, it is only necessary to record that to the extent that, by the third preliminary issue, the Treasury sought to limit at this stage the damages recoverable by the Bank, I find against the Treasury."

52. It was submitted to us by HM Treasury that Flaux J was wrong.

xxviii) It was possible now to decide that the only possessions in respect of which Bank Mellat could in principle claim just satisfaction were (1) contracts concluded before the 2009 Order was made and (2) marketable goodwill; the trial judge would then only have to consider the value of marketable goodwill and whether there was any loss for contracts concluded before the 2009 Order was made, as Bank Mellat could have applied for a licence which would have been granted if the contracts were not connected with nuclear proliferation; if the contracts had been connected with nuclear proliferation they would have been illegal on ordinary principles of contract law.

xxix) Future income which had not been earned and for which no enforceable claim existed was not a possession. There would therefore be no need to explore these claims at trial.

xxx) The conclusions of Coulson J (at paragraphs 84-86) and of the Master of the Rolls (at paragraph 23(iii)) in *Department of Energy and Climate Change v Breyer* made clear that Bank Mellat was not entitled to claim for loss of future income attributable to contracts that had not been concluded when the 2009 Order was made.

53. Bank Mellat, whilst accepting that under the case law of the Strasbourg Court just satisfaction would not include loss of future income (as it was not a possession), contended that a wide range of economic interests were protected by A1P1 including all forms of property and tangible and intangible interests. Therefore included within the protection of A1P1 were:

xxxi) Bank Mellat's economic interests connected with the running of the business (including goodwill and the value of the business, the bank's established clients and counterparties and the bank's working capital).

xxxii) Bank Mellat's accrued contractual rights (including credit balances and other concluded transactions).

xxxiii) Bank Mellat's reasonable and legitimate expectations as to future contractual rights. It was accepted that whether any expectations as to future business could be assessed and characterised as a loss of "possessions" was a question of fact for trial, as Bank Mellat would have to establish it had a legitimate expectation sufficient to amount to a possession or asset.

xxxiv) Bank Mellat's economic interests as a shareholder in PIB and other banks.

54. I have carefully considered the Strasbourg case law cited to us and, in particular, *In Tre Traktorer Akts. v Sweden* (1989) 13 EHHR 309, *Papamichalopoulos v Greece* (1995) 21 EHHR 439 and the more recent decisions in *Centro Europa 7 Srl and Di Stephano v Italy* (Application n.38433/09, judgment of 7 June 2012) and *Vekony v Hungary* (application 6568/13, judgment of 13 January 2015). I have also examined the domestic case law and, in particular, the analysis of goodwill in the judgment of Kenneth Parker QC (as he then was) in *R (Nicholds) v Security Industry Authority* [2007] 1 WLR 2067 at paragraphs 72-73, the judgments in *R (Countryside Alliance) v Attorney General* [2007] UKHL 719, [2008] 1 AC 719 at paragraphs 20-21 (Lord Bingham) and 128 (Baroness Hale), and the judgments of Coulson J and the Master of the Rolls in *Department of Energy and Climate Change* to which I have already referred.

55. There are plainly questions of fact to be determined as to the nature, extent and causation of the losses suffered by Bank Mellat, save those admitted by HM Treasury, and then questions as to the recoverability of such losses as just satisfaction under the case law. There is clearly force in the arguments advanced as to whether any of losses in dispute are or are not recoverable. The significant issue relates to the recovery (if any) in respect of the loss of income from future business. I do not think it helpful at this stage to try and characterise any of the matters in dispute as a threshold question, an artificial restriction or a question of causation. Nor in my view in the absence of findings of fact is it a useful exercise to try to determine as a matter of law what can constitute an equitable award of just satisfaction by further analysis of the case law of the Strasbourg Court and by attempting to reconcile its more open textured and flexible approach to just satisfaction under Article 41 with the traditional common law approach to the calculation of damages.

56. In my judgment all the points made by Bank Mellat and HM Treasury are at this stage of the proceedings fully arguable. Flaux J was right in declining to decide the issue, but as his judgment expressed views on some of the arguments and identified what he considered the issue to be, it is important to make clear that his judgment should not therefore be regarded as determining in any way any point on this issue in this litigation; I expressly decline to express a view, one way or the other, on the correctness of his views on the disputed points. All the points remain open. Until the facts are determined, it would not be helpful for this court to add further observations in relation to this case by expressing its views on what was said by Flaux J in his judgment on this issue. It follows that the trial judge should therefore approach the factual determinations and the application of the law wholly unfettered by any of the views expressed by Flaux J on this issue. The judge should determine on the basis of the facts found all the issues that have been raised in argument, including characterisation and causation.

57. Although a decision on a preliminary issue is sometimes helpful to the parties either in narrowing the issues for trial or in providing a starting point for settlement discussions, it is not therefore appropriate in this case to express any view on the issue as drafted or the issue as re-formulated by Flaux J.

Lord Justice Lewison:

58. I agree.

Lord Justice Longmore

59. I also agree.