Contentious Commentary

Hey Presto!

In theory it is possible to pierce the corporate veil, but practice may be different.

Piercing the corporate veil features in all company law textbooks but, as Lord Neuberger put it in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, the "law relating to the doctrine is unsatisfactory and confused". Indeed, this unsightly incision might in truth never have occurred since all cases in which it has supposedly happened are explicable on other bases. Nevertheless, in *Prest* the Supreme Court accepted that the possibility exists but, as usual, found that it did not apply in the instant case.

Lord Sumption gave the main judgment in *Prest*. He viewed all past cases about piercing the corporate veil as falling into two categories: concealment and evasion. Concealment involves the court investigating the true role of a company in a transaction. For example, just because a company has received money doesn't mean that it has done so as a principal: it might be a trustee or nominee. And just because a business is conducted in the name of a company doesn't mean that the business isn't really that of someone else (though how you decide whether a business is that of the company or its shareholder/director was not explained). As a result, concealment does not require the corporate veil to be pierced. The court merely analyses and gives effect to the true role of the company in the underlying transaction.

Evasion involves someone under an existing legal obligation or liability which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage they would otherwise have obtained by the company's separate legal personality. The evasion principle is limited because Lord Sumption considered that in most cases where it might be relevant, the application of the concealment principle will make it unnecessary. The corporate veil should only be pierced if there is a public policy imperative that justifies it.

The remaining six members of the Supreme Court split into two camps. Lord Neuberger really wanted to say that the corporate veil could never be pierced, but he was persuaded that the Sumption bifurcation and limitation probably reflected the historic legal position, and he was not inclined to part company with the past. Lord Walker seemed to be, very generally, in the same area.

The remaining four members of the Supreme Court adopted the customary cautious judicial approach of accepting Lord Sumption's general analysis of past cases but refusing to accept that concealment and evasion were necessarily the only two bases upon which the corporate veil could be pierced. Other exceptions to the principle of separate corporate personality might just exist, hiding in dusty attics or uncut law reports, even if they would be exceedingly difficult to find and searchers should not be sent out to try to do so.

The press coverage of *Prest* has mainly concerned the ability of one (ex-)spouse to avoid alimony payments to the other by corporate structures. But the case adds little of precedential value in that area. The core question for that purpose was
whether section 24 of the Matrimonial Causes Act 1973 allows the court to order a company controlled by one spouse to transfer assets of the company to the other spouse, as had been Family Division practice. The answer, confirming the Court of Appeal's decision, was a unanimous no (even from the two ex-Family Division judges in the Supreme Court). Section 24 only applies to property of the spouse. Property of a company, even a company owned or controlled by the spouse, is not in itself property of the spouse.

For section 24 to apply, it is therefore necessary to pierce the corporate veil (not possible here on the evasion basis since the properties in question had been held by the companies long before the divorce) or for the properties to be held by the companies in trust for the spouse.

Lord Sumption went through the facts and concluded that the properties in question were indeed held in trust for the spouse. In this connection, there was no evidence from the defaulting spouse, and Lord Sumption felt able to draw inferences adverse to him without let or hindrance. The spouse, now resident in Monaco, was therefore unable to escape his obligations.

As a result, the court ordered that seven properties in London held in the names of companies controlled by the spouse be transferred to the other spouse (though, it seems, subject to existing mortgages - scope for further hard Prest instalments). Whether courts in other cases will be able to circumvent the limitations on section 24 by similar means is a different question. The facts of Prest were extreme, but the Family Division might in the future look zealously for such facts. Whether higher courts will let them get away with it may be the next battlefield.

The power of incorporation

Assets of a wholly-owned company are, or are not, within the owner's power for the purposes of a freezing injunction.

The inviolability of a company’s separate legal personality was illustrated by Group Seven Ltd v Allied Investment Corp Ltd [2013] EWHC 1509 (Ch), although it relied on Prest (above) in the Court of Appeal. If C’s lawyers had seen Prest in the Supreme Court they may have put different arguments.

The sole owner and director of a company was subject to a freezing injunction. In standard form, the injunction applied to “any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. [D] is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.” The company (acting by D) settled a claim against a third party for what appeared to be a knock-down price. Had the claim been owned by D, this would have been a breach of the freezing injunction (dealing with assets). But was it a breach for D, as a director of the company, to settle the company’s claim?

According to Hildyard J, it was not. The company’s assets were the company’s assets. The company did not act in accordance with its directors’ instructions; the directors were acting as the company when making decisions on the company’s behalf, not in their own right. But if C’s lawyers had seen the Supreme Court’s judgment in Prest, they may have argued that this was a case of concealment and, as such, the corporate veil could be circumnavigated. But it does illustrate that, if you are applying for a freezing injunction, you need to be as specific as possible about the assets that are caught. If you intend the assets of a wholly-owned company to be included, say so and justify it.

But not so fast. The fragility of a company’s separate legal personality was illustrated by Lakatamia Shipping Co Ltd v Nobu Su [2013] EWHC 1814 (Comm). Burton J decided that a freezing injunction does apply to the assets of a company wholly-owned by the subject to the injunction and of which he is the sole director. A director could direct the fate of the company’s assets, and if he participated in the sale of the company’s assets he would be diminishing the value of his shareholding (not necessarily; sale for full value will not diminish the shares’ value though it would breach a freezing injunction). Higher courts must resolve which judge is right.

Jurisdiction

The race to court

The time at which proceedings are started is not decisive in forum non conveniens applications.

If proceedings are started in Texas before they are started in England, but Texas is not (aside from the proceedings) clearly the most appropriate forum, does the fact that Texas was seised first make it clearly the most appropriate forum? Put another way, in forum non conveniens cases outside the Brussels I Regulation, should the English courts move to a strict temporal test like that in article 23 of Brussels I?

No. In MacDermid Offshore Solutions LLC v Niche Products Ltd [2013] EWHC 1493 (Ch), D was served as of right in England. The forum non conveniens test, as laid down in The Spiliada, is whether there is another available forum that is clearly more
appropriate than England. D argued that Texas was an appropriate forum, and the fact that the Texas courts were seised first made it clearly more appropriate.

Warren J considered this to be a misreading of the cases. The existence of foreign proceedings in another appropriate jurisdiction was a factor to be taken into account. If the proceedings were well-advanced, they might become a decisive factor, but in most cases foreign proceedings were simply one factor for the judge to weigh. In this case, the judge weighed them with other factors, found them lacking in mass, and concluded that proceedings should continue in England (as well as in Texas).

Wider still and wider

The Supreme Court rejects the traditional view of service out.

Abela v Baadarani [2013] UKSC 44 is, on its facts, a limited case. It involved the question of whether there was good reason under CPR 6.15 retrospectively to sanction service on D through delivery of the Claim Form to D’s Lebanese lawyers in Beirut. D refused to cooperate with service, declining to give his address, but there was no doubt that he knew about the proceedings. There is no treaty allowing service of foreign process in Lebanon (it is not a party to the Hague Convention). The service effected was not proper service in accordance with Lebanese law but nor was it contrary to Lebanese law. The Court of Appeal fretted about the nature of service out, seeing it as exorbitant and to be approached with extreme caution, and decided service on D’s lawyer should not be sanctioned.

The Supreme Court reversed the Court of Appeal’s decision. The main burden of the Supreme Court’s judgment was that the Court of Appeal’s approach was anachronistic. Adjectives like “exorbitant” were no longer appropriate. Service out should not be seen as the assertion of sovereign authority akin to the despatch of a gun boat. It was now governed by a large number of treaties and similar, not to mention forum non conveniens and CPR 6.40(4) (can’t do anything illegal in the place of service). Questions of service out should therefore involve pragmatic issues in the interests of the efficient conduct of litigation in an

Public and private law

Quashing a search warrant does not necessarily make the searcher a trespasser.

If, in Judicial Review proceedings, the court quashes a search warrant issued by a judge and declares the searches, entries and seizures carried out pursuant to the warrant to be unlawful, you might think that the route to a claim for damages for trespass is clear. Especially if the party which secured the warrant, the SFO, admits liability. But can the SFO change its lawyers and its mind and deny liability for trespass in ordinary civil proceedings? Yes, according to Eder J in Tchenguiz v The Director of the Serious Fraud Office [2013] EWHC 1578 (QB).

The main question was whether the SFO was estopped (whether issue or cause of action estoppel) from denying liability because the court had already decided the point on the JR application. This turned on an investigation of what the Administrative Court, which heard the JR application, had actually decided before it had pushed the case out into the ordinary courts in order to allow the damages claim to be pursued. Eder J decided that the Administrative Court had not decided the private law question of entitlement to damages but only the public law question of whether the warrants were properly obtained. It was therefore open to the SFO to assert defences to private law claims.

The subsidiary question was whether the court should allow the admission to be withdrawn under CPR 14.1(5). Eder J was clear that he should allow the SFO to change its mind (though emphasising that just because a party changed its legal team, and the new team had a different view of the law, was not on its own a sufficient reason).

The defences to the damages claim that the SFO was allowed to raise were twofold. First, liability for trespass was to be decided as at the time the trespass took place. At that time, the SFO had a valid judicial warrant entitling it to enter the premises, and the subsequent quashing of that warrant in JR proceedings did not retrospectively render those executing the warrant trespassers or liable in damages (eg Percy v Hall[1997] QB 924). Secondly, the Constables Protection Act 1750 prevented any action for damages against the SFO. Whether either of those defences will ultimately succeed is for another day.
appropriate forum.

Specifically, the Supreme Court confirmed that the ability in CPR 6.15 to sanction service by a method not otherwise permitted by the CPR applies as much to service out as to service in. The only test is whether there is "good reason" to do so, to which no gloss should be added. The mere fact that D has learned of the existence and content of the Claim Form is not enough on its own, but it is a critical factor since the purpose of service is to inform D of the claim. Similarly, a refusal by D to cooperate in service is highly relevant.

The Supreme Court also said that the fact that the Claim Form had been issued at the end of the limitation period was irrelevant. The Claim Form was issued in time, and that was the end of the matter.

The only potential fly in the ointment is where there is a treaty or equivalent on service. The Supreme Court indicated that it might be less inclined to take such a pragmatic approach to service out if doing so was a means of getting round the requirements of a treaty. Service under the Hague Convention can be a slow and frustrating exercise. Service under the EU's Service Regulation is a bit less inclined, but still slow.

Arbitration

Cruz control

Foreign parties can be required to disclose their assets in order to allow enforcement of an arbitration award.

In Cruz City 1 Mauritius Holdings v Unitech Ltd [2013] EWHC 1323 (Comm), the court took a thoroughly robust, if not entirely convincing, approach to all issues surrounding the enforcement of an arbitration award. Any technicalities that might have obstructed the policy of seeking to ensure payment of the award were swept aside.

Orders were made under section 66 of the Arbitration Act 1996 allowing the enforcement of various arbitration awards as if they were court judgments. The judge gave permission to serve the underlying applications on the solicitors in London who had acted for D in the arbitration. C also sought an order that D disclose its assets worldwide, disclosure to be verified by an affidavit sworn by a proper officer.

D objected to service on its solicitors and, further, argued that no one outside the jurisdiction could be ordered to swear the affidavit. Field J rejected both objections.

As to service, the judge pointed to the invariable practice of the Commercial Court to allow service of an Arbitration Claim Form on the solicitors in London who had acted in the arbitration. An application to enforce an award is not, however, an Arbitration Claim Form within the definition in CPR 62.2. Further, the application for disclosure of assets was made under section 37 of the Senior Courts Act 1981, not under the Arbitration Act.

Field J considered neither of these factors to be relevant. By engaging in arbitration in London, the parties submitted to the supervisory jurisdiction of the English courts. Service of court process on D's London lawyers was the most efficient manner to serve an application that affected the arbitration even if the application did not, technically, require an Arbitration Claim Form. Field J even thought that, since what was sought was alternative service within the jurisdiction, it was not necessary to apply for permission to serve out provided that the court was informed that the defendants were outside the jurisdiction of the court.

As to the affidavit of means, Field J was satisfied that the court could order a party to provide an affidavit of means under section 37 of the Senior Courts Act 1981. This is usually done in support of a freezing injunction, but that did not mean that it could only be done in support of a freezing injunction. A little curious, perhaps.

Section 37 allows the granting of injunctions and the appointment of receivers, but has been held also to allow orders ancillary to an injunction, such as the disclosure of assets. Absent an injunction to which disclosure can be ancillary, it is not so obvious how section 37 gives jurisdiction.

Field J also decided that Masri v Consolidated Contractors International (UK) Ltd (No 4) [2010] UKSC 43 was irrelevant. In Masri (No 4), the House of Lords said that an officer of an overseas company could not be ordered to attend court to disclose the company's means under CPR 71 to assist enforcement of a judgment against the company. The difference is that CPR 71 requires an officer, a non-party, to attend court in England. This is subject to the territorial jurisdiction of the court, and there is no ground for granting service out on the officer. An order for an affidavit disclosing assets under section 37 is directed to a company already subject to the jurisdiction of the court, and the power is therefore not limited in territorial scope. This represents a potentially convenient way around the jurisdictional problems exposed by Masri (No 4), though whether an overseas company will actually comply with the order could be a different matter.
No arbitration, some comment

The court can restrain breach of an arbitration agreement even if neither party plans to arbitrate.

Ust-Kamenogorsk Hydropower Plant LSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 is a curious case. D had taken court proceedings in Kazakhstan in breach of an arbitration clause (seat, London); the Kazakh courts had ruled that the arbitration clause was void, but the English courts decided that they were entitled to ignore that decision because it was based on an errant construction of the arbitration clause; no substantive court proceedings were still taking place in Kazakhstan; and no arbitration was planned. Can the English courts nonetheless injunct D from taking court proceedings in breach of the arbitration clause? D argued that the court was prevented from doing so by, ironically, the Arbitration Act 1996. The Supreme Court was distinctly unimpressed.

The power to grant an injunction comes from section 37 of the Senior Courts Act 1981, not the Arbitration Act. Sections 30 and 32 of the Arbitration Act give the arbitrators power to decide their own jurisdiction, and only allow the court to intervene with the parties' or the arbitrators' consent. But the Act says nothing about the situation if there is no ongoing or planned arbitration. Similarly, section 44 allows the court to grant interim remedies in support of an arbitration, but does not address the position in the absence of an arbitration.

The Supreme Court was therefore faced with an issue uncontemplated by the Arbitration Act. Accordingly, the Court decided that the Act was not a complete code and that the courts were free to injunct or not as they saw fit, though in a sensitive and caring manner. Permission to serve the claim form out could be given under either PD 6B, §3.1(2) or (6)(c) or CPR 62.5(1)(b) or (c). No problem. The English courts' strong policy of protecting arbitration remains firmly in place, even if there is no extant arbitration in need of immediate protection.

Financial Services

Bigger brother is watching you

A new court forces the European Banking Authority to think again.

The European Banking Authority squats in London atop of national banking regulators in the EU. One of the EBA's functions is to ensure that the national regulators comply with EU law. But sitting above the EBA is its Board of Appeal (chaired by Blair J) whose task is to ensure that the EBA itself complies with EU law. In SV Capital OÜ v EBA (Decision EBA C 2013 002), the Board decided that the EBA had not done so.

The matter arose from a decision by an Estonian court that two "governors" of the Estonian branch of a Finish bank had not given truthful evidence. C complained to the Estonian bank regulator that these two people could not be fit and proper persons to run the branch. The Estonian regulator pointed out that this question of suitability was a matter for the Finnish regulator because Finland was the bank's home state. Finland's regulator refused to do anything because it

Guarantees

Purview per curiam

Amendments to contract can still cause problems for a guarantee.

In CMC Raffles Offshore (Singapore) Ltd v Schahin Holdings SA [2013] EWCA Civ 644 the Court of Appeal rambled generally over the problems of amending guaranteed contracts without obtaining the guarantor's agreement, merely concluding that they couldn't reach a conclusion on an application for summary judgment. The case foreshadows future debates rather than answering them.

The issues raised by the Court of Appeal included an adjunct to the rule in Holme v Brunskill (1878) 3 QBD 495. This rule provides that an amendment to the underlying agreement will discharge a guarantee unless the guarantor consents to the amendment. However, even if the guarantor does consent, is there a further rule that the underlying and amended contract must fall within the "general purview" of the guarantee?

The Court of Appeal hinted that it considered that there was no "general purview" rule. It was a matter of construction as to whether the guarantee extended to the amended obligation. However, there are suggestions in other Court of Appeal cases that "general purview" is a distinct rule of law. The Court of Appeal in Raffles could therefore only flag the issue rather than solving it.

What the case indicates is, perhaps, that drafting is key for guarantees as it is for every other form of contract. England has relatively little commercial contract law. The Court of Appeal would like to get rid of such as there is regarding guarantees, replacing it by the usual question of what is the proper interpretation of the guarantee. Most contractual questions can be answered by that means.

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had been informed that the claims were untrue.

So C complained to the EBA. The EBA has power under article 17 of Regulation 1093/2010/EU to investigate alleged breaches of EU law by national regulators. The EBA refused to investigate because, it said, the suitability of branch officers was a matter of national law and therefore fell outside its remit. According to the EBA, EU law (article 11 of Directive 48/2007) only affects the suitability of those who control the institution as a whole, not individual branches.

So C appealed to the Board of Appeal under article 60 of Regulation 1093/2010/EU, arguing that the EBA was misbehaving. Article 11 of Directive 48/2007 might refer to the institution as a whole, but article 22 referred generally to robust governance arrangements, effective processes to manage risk and adequate internal control. That was wide enough to place within EU law the suitability of key function holders at a branch. Further, the EBA had itself issued non-binding guidelines that made it clear that it saw its role in this wider manner.

The Board referred the issue of whether to investigate back to the EBA. C’s victory may, therefore, prove Pyrrhic. The Board made it clear that the EBA has a discretion whether to investigate and, further, that the Board was not commenting on whether the two individuals concerned were at a sufficiently high level to fall within article 22 of the Directive. The pointers are that the EBA will now consider the matter again with the utmost care, propriety and sagacity, and then reach the same conclusion.

Tort

Malice aforethought

The Privy Council considers that the tort of malicious prosecution applies to civil proceedings.

The tort of malicious prosecution has four features: proceedings brought against a party; the proceedings prove unsuccessful; the proceedings were brought without reasonable and probable cause; and the proceedings were malicious. According to the Court of Appeal in Quartz Hill Consolidated Gold Mining Co v Eyre (1883) 11 QBD 674, the tort only applies to criminal proceedings, not civil proceedings. However, in Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17, the Privy Council decided by 3-2 that this limitation was not justifiable and that the tort applied equally to unsuccessful civil proceedings brought maliciously (Lords Wilson and Kerr and Lady Hale; Lords Neuberger and Sumption dissenting).

The majority and the minority disagreed over just about everything, from the legal history to, more significantly, the policy issues. The majority thought that the tort had applied to civil proceedings until Quartz Hill; the minority thought that it had never done so and was really a species of misfeasance in public office. The minority thought it would destroy finality in litigation and create uncertainty; the majority saw no evidence to support this. The minority thought it meant there should be a tort of malicious defence too; the majority were not fussed. And so on and on.

The key point for England is that the Privy Council (as a Cayman appeal court) cannot overrule the Court of Appeal. Quartz Hill is therefore still binding in England until the Supreme
Court says otherwise. And for that, the makeup of the Supreme Court may be critical.

The Privy Council also explored the tort of abuse of process, ie bringing proceedings in order to gain some advantage not reasonably related to the outcome. Quite what this means is not clear - only two cases in England have ever succeeded, most recently in 1860 - but, as long as the claimant intends to take the claim through to trial and to obtain judgment, that is fine even if the intention is to use the judgment to destroy the defendant or the desire to obtain the judgment is malicious.

Courts

New times

Applications for an extension of time will be scrutinised more carefully in future.

The true impact of the Jackson revision of the overriding objective and the requirements for applying for relief from sanctions will take time to emerge. Will courts really be prepared to strike out claims just because a solicitor is late in taking a particular step?

Re Atrium Training Services Ltd [2013] EWHC 1562 (Ch) suggests not. C had made a right horlicks of disclosure, though it was an onerous exercise, and had to come back for more and more time. Henderson J recited sternly that courts must be more rigorous than they would have been before 1 April, firmly discouraging any easy assumption that an extension will be granted if it involves no obvious prejudice to the other side. However, he added limply that courts should also not encourage unreasonable opposition to extensions applied for within time and which involve no prejudice. Eating and cakes come to mind. But he went on that fixing times for disclosure was hard, involving many imponderables, and there was no real prejudice to D. So the extension was granted, though Henderson J did stiffen its sinews by making it an unless order, something he regarded as a last resort and, if a further extension is required, will bring in the harsher test in CPR 3.6.

Budget prices

Just because a budget is wrong is not a sufficient reason to change it.

The TCC is the homeland of costs management, its judges the Taliban of budgeting. For example, the TCC view is that the last minute exemption from budgeting given to the Chancery Division for high value cases is outrageous; rather than allowing the Chancery Division to follow the Commercial Court, the Commercial Court should have been bullied into budgeting. A sub-committee of the Civil Procedure Rule Committee chaired by a TCC judge, Coulson J, is even now consulting on forcing the Commercial Court into the fold. And Coulson J also is taking a hard line on amendments to budgets.

Elvanite Full Circle Limited v AMEC Earth & environmental (UK) Ltd [2013] EWHC 1643 (TCC) involved a claim for £200k in the Commercial Court involving a claim for £270k in the next question. D was approved budget was for £270k. The main issue was whether the parties' budgets were relevant to the assessment of indemnity costs. The answer seems to be no because CPR 3.18 provides that the court will have regard to budgets when assessing costs on the basis. The lack of any mention of indemnity costs indicates that the court will not have regard to budgets when assessing costs on the indemnity basis (for which, eg, proportionality is not relevant).

However, Coulson J considered that budgets should be the starting point for any consideration of indemnity costs. His main reason appeared to be that if budgets were not relevant to indemnity costs, parties would argue for indemnity costs every time. However, rather than ignoring the wording of the CPR, the more obvious solution would be for the court simply to reject unjustified applications for indemnity costs.

The real problem for D was that its court approved budget was for £270k. A month before trial, D informed C that its costs had almost doubled to £530k, the main cause being an increase in experts' fees from £30k to £200k. C fulminated in horror at the outrageous (not least because it had ATE insurance cover of only £250k), and D did not apply to the court to amend its budget. CPR 3.18 provides that, on assessment, departure should not be permitted from a budget without good reason.
Coulson J considered that D should have applied to amend its budget, even at trial. Waiting until it had won and its budget therefore became directly relevant was unacceptable. Further, Coulson J expressed the view that because the case had not changed significantly, if at all, since the time the budgets were set, there was limited scope for departing from the budget. In particular, just because a budget turned out to be wrong was an insufficient reason to allow departure. Questions of prejudice were less relevant than they might have been before the Jackson reforms (though the judge did, more plausibly, consider that C was prejudiced because it only had £250k in ATE cover).

The moral is that court budgets have to be as right as possible first time, which makes the assumptions upon which the budget is based vital. And experts need to be tied in to the budgeting process too, with quotes rather than estimates if possible.

Open justice
The Supreme Court can conduct a closed procedure hearing.

In Bank Mellat v HM Treasury (No 1) [2013] UKSC 38, the nine members of the Supreme Court split along national lines. The English majority (six) considered that the Supreme Court could adopt a closed material procedure under the Counter Terrorism Act 2008. The minority (Scots and Irish) thought otherwise.

In Al Rawi v Security Service [2012] 1 AC 531, the Court had decided that “the right to be confronted by one’s accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that.” The issue in Bank Mellat (No 1) was whether Parliament had done that for the Supreme Court in the Counter Terrorism Act 2008.

The Act allows courts to hold closed material hearings if evidence needs to be withheld from one party for reasons of national security (ie that party is not present but is represented by a special advocate for the purpose of making submissions on the evidence withheld but without the advocate being able to take instructions on the evidence). The problem was that the Act provided for this to be done in accordance with “rules of court”, which were defined as rules in the High Court and the Court of Appeal. No mention of the Supreme Court’s rules.

The majority was, nevertheless, inclined to stretch the legislation to encompass the Supreme Court, curing what looks like an obvious drafting oversight. The Celtic minority was made of sterner stuff, saying that if Parliament wants any court to adopt a closed material procedure, it must say so clearly and expressly.

On the substantive hearing (Bank Mellat v HM Treasury (No 2) [2013] UKSC 39), the Scots (Lords Hope and Reed) continued to dissent (in favour of the Government this time, rather than against it), though the Irish (Lord Kerr) moved into the majority. The case concerned orders made by HMT that, in effect, shut Bank Mellat out of the London financial markets with the aim of making it harder for Iran to finance its nuclear programme.

There were two points: substantive and procedural. The substantive point was whether the order made under the Act was disproportionate since it targeted only Bank Mellat, not other Iranian banks. Overturning the Court of Appeal, the bare majority (Lords Sumption, Kerr, Clark and Carnwarth and Lady Hale) considered that the measure was disproportionate. Why exclude one Iranian bank from the UK markets when lesser steps were sufficient for other Iranian banks?

The procedural question was whether HMT should have consulted Bank Mellat before making the order under the Act. Again overturning the Court of Appeal, this time 6-3, the majority (Lords Sumption, Kerr, Clark, Neuberger and Dyson and Lady Hale) considered that HMT should have done so. The minority considered that the Act’s provisions providing an ex post facto challenge excluded the need for prior consultation.
This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.