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Contentious Commentary

A review for litigators

Arbitration/Jurisdiction

Courting trouble

Courts can grant anti-suit injunctions to protect domestic arbitrations.

English courts may have been prevented from granting injunctions to block court proceedings in EU member states brought in breach of an arbitration clause (*West Tankers*), but they have been liberal in granting anti-suit injunctions to restrain proceedings brought outside the EU. There has, however, been doubt as to the basis upon which they do this and, indeed, whether they can do it at all. In *AES UST-Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, the Court of Appeal was lengthily clear that the English court can grant anti-suit injunctions aimed at courts outwith the EU, though whether the court will do so is a matter of discretion. The Court of Appeal also usefully liberalised another jurisdictional rule.

The Kazakh courts had decided that a London arbitration agreement was contrary to Kazakh law and public policy, though this was based on what the Court of Appeal regarded as a blatant misconstruction of the clause. C applied for an English anti-suit injunction to restrain the proceedings in Kazakhstan. The trouble was that by the time the issue got to court, the dispute between the parties had descended to a background grumble, with neither party intending to pursue the other through arbitration or the courts. But C still wanted an anti-suit injunction just in case.

The first question was the court's jurisdiction to grant the injunction. Section 44 of the Arbitration Act 1996 didn't help because it only allows interim injunctions in support of an arbitration. C wanted a final injunction, and there was no arbitration in existence or likely to come into existence for the court to support. That left the general power in section 37 of the Senior Courts Act 1981. But was this excluded by section 1(c) of the Arbitration Act, which provides that "in matters governed by this Part the court should not intervene except as provided by this Part"?

No said the Court of Appeal, rejecting a contrary decision in *Vale Rio doce Navigaceo SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep 1. The Arbitration Act had not done enough to exclude the court's general jurisdiction to grant injunctions (or declarations). When deciding if it should injunct or declare, the court would consider whether it was encroaching too much on the arbitrators' autonomy, but, given the absence of any arbitrators in this case, that was not a problem.

The next issue was the basis upon which C could serve the arbitration claim form on D in Kazakhstan. The interesting point related to C's ability to add an extra ground for service out at the inter partes stage. C originally applied for permission to serve out under CPR 62(5)(1)(c) (on which it succeeded, the court rejecting the argument that this only applied to claims under the Arbitration Act), but, for the appeal, C wished to add PD6B, §3.1(6)(c), ie contract governed by English law.

An arbitration clause forms an agreement theoretically distinct from the rest of the contract and will, if the arbitral seat is in London, generally be governed by English law even if the remainder is, as in this case, governed by Kazakh law. The problem for C was not so much whether the claim fell within §3.1(6)(c), but whether C could rely on this new ground at the inter partes hearing having

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not done so at its ex parte application for permission to serve out. The general view has been that new grounds for service out cannot be added later in the day - you have to get it right first time. The Court of Appeal rejected the conventional wisdom. The case behind this wisdom, *Parker v Schuller* (1901) 17 TLR 299, was confined by the Court of Appeal to situations where the claimant seeks to add a new cause of action. As long as the cause of action remained the same, C could, with the court's permission, rely on additional grounds on which the court could give permission to serve out when D challenged the jurisdiction of the court.

The final issue was as to section 32 of the Civil Jurisdiction and Judgments Act 1982. This provides that, outside the Brussels Regulation, judgments given in breach of an arbitration or jurisdiction agreement "shall" not be recognised, provided that the person in question did not submit to the jurisdiction of the relevant court. Section 32 is less clear what happens if the party has submitted to the jurisdiction of the offending court.

The Court of Appeal took a restrictive view of what submitting to the jurisdiction meant. In this case, C had objected to the jurisdiction of the Kazakh courts but, having lost at first instance, had no choice (especially as a Kazakh company) but to fight on the merits because it is not possible in Kazakhstan to appeal on jurisdiction only. C fought under reserve. The Court of Appeal said that this did not constitute submission within the meaning of sections 32 and 33, but in any event submission did not mean that the English court was bound to recognise the Kazakh court's decision on the validity of the arbitration agreement. The Court of Appeal considered that it had a discretion (or, as Rix LJ preferred, would make an "evaluative judgment") whether to recognise the foreign judgment. Even if C had submitted to the jurisdiction of the Kazakh courts, the Court of Appeal would not have recognised Kazakh judgment because it was transparently wrong.

So the general tone of this long judgment is of useful liberalisation, with rather less for the unwary to trip over, but equally of courts prepared to enforce compliance with arbitration agreements.

Russian dolls

A Russian arbitration award against Rosneft can be enforced even though the award has been set aside in Russia.

According to *The Economist*, "Yukos, Russia's biggest oil firm, was bankrupted by improbable tax claims and then dismembered by bogus auctions", with most of its assets being "swallowed" by the state-owned Rosneft. The view from the Kremlin is doubtless rather different. One non-Russian Yukos company that was not devoured by Rosneft secured a $425m arbitration award against Rosneft in Russia. The award was on a loan made to another Yukos company of which Rosneft was the universal successor. Realising the error in this award, the Russian courts then overturned the award.

That was, however, only the beginning, with Russian politics being played out on an international legal stage. Yukos applied to enforce its award against Rosneft in the Netherlands on the basis that the Russian court's annulment of the arbitration award should be ignored because it was not an impartial and independent decision. The Dutch courts agreed, and allowed enforcement of the award. That led to the principal on the award being paid, but not interest. Yukos came to the English courts to enforce the arbitration award to obtain payment of the interest (another $160m).

This led to a rerun in England of the arguments already rehearsed in the Dutch courts as to the nature of the Russian legal process, but with the added dimension that Yukos argued that Rosneft was estopped from disputing that the Russian court process was partial and dependent because the Dutch courts had already decided the point. Rosneft argued that the act of state doctrine prevented the English courts from making any determination. The estoppel and act of state points were determined as preliminary issues.

Despite the international complexity, Hamblen J seemed to find *Yukos Capital SarL v OJSC Rosneft Oil Company* [2011] EWHC 1461 (Comm) easy. It took him 43 pages to go patiently, even wearily, through Rosneft's numerous arguments, rejecting some, dismissing others as unreal, and preferring Yukos's argument on still more. Angst did not, however, feature greatly in his analysis.

Hamblen J had no doubt that the Dutch decision did create an issue estoppel. The decision was by a court of competent jurisdiction (Rosneft had submitted to the jurisdiction of the Dutch courts), it was final and conclusive, it was on the merits, it was between the same parties, and it was the same issue as the English court was asked to decide.

Then came act of state. Hamblen J identified three aspects of the doctrine. The first aspect is that an English court will not adjudicate on the validity of acts of a sovereign government within its territory. But the English courts were not being asked to determine the validity of the Russian court decision; no one disputed its validity in Russia. The question was whether the process met standards laid down in English law for recognition in England.

The second aspect is that an English court cannot assess foreign sovereign acts when there are no standards by which to carry out that assessment. Again, that had no application. The standards were clear. The third aspect was embarrassment to the UK, but that depended upon the Foreign and Commonwealth Office saying that it was embarrassed. The FCO maintained a diplomatic silence.

So the legal campaign by Yukos against Russia continues. Yukos also has a claim for $98bn in the European Court of Human Rights, the hearing on which took place over a year ago. An arbitration tribunal (that included Lord Steyn) has decided that the seizure of Yukos was part of a campaign to bring Yukos within state control, and involved the manifest misapplication of Russian law. Securing payment of the interest in England may provide a bit more small change to fund Yukos's continuing fight.

Tort

Economic chaos

Contractual sums due under a contract can be recovered in tort.

A driver negligently damages a railway bridge owned by Network Rail. NR can clearly recover the cost of repairin the bridge. But can NR also recover sums it is obliged to pay to train operating companies because the track is out of action during the period of the repairs? The sums were due as liquidated damages under contracts between NR and the train operating companies.

According to *Conarken Group Ltd v Network Rail Infrastructure Ltd* [2011] EWCA Civ 644, NR can recover these losses. The point at issue was that NR's loss is economic loss, a perennially vexed area in tort. NR had suffered physical damage, which gave it something upon which to pin a claim to recover economic loss, but the train operating companies did not and could not have claimed directly from the driver. Should the operating companies be able to recover through the back door?

The Court of Appeal rambled at length around the tracks, points and signals of duties of care, causation, remoteness, foreseeability, directness and kinds of loss to name but a few, before agreeing with the first instance judge that NR's economic loss was recoverable. Their Lordships just thought that NR should be able to recover the loss and, because they are judges, they allowed NR to do so. What this means for this difficult area of the law is harder to assess.

Faulty foundations

A mortgagee's valuer is not liable to the mortgagor.

Smith v Eric S Bush, Harris v Wyre Forest [1990] 1 AC 831 is wrong. Subsequent cases have recognised the decision as a "high water mark" in liability for negligent misrepresentation, and judges have suggested that it should not be extended - coded messages that the decision is, frankly, out of line. In *Scullion v Bank of Scotland* [2011] EWCA Civ 693, the Court of Appeal repeated the scepticism, and accordingly restricted the scope of the decision.

Smith v Bush decided that a surveyor carrying out a valuation for a mortgagee is liable to a mortgagor who relies on the valuation. The basis of the decision was that most buyers of low value properties do not (or, in the 1980s, did not) commission their own surveys but relied instead on their mortgagees' valuation, for which the mortgagors paid. Whether this is reasonable reliance or fair on the valuer are entirely different matters. The risks for surveyors on mortgagors' surveys differ from those on mortgagees' valuations. A mortgagee's surveyor will only have to pay out if the mortgagor defaults and the property fetches negligently less than the valuation; to be liable to a mortgagee, the valuation need only be negligently wrong.

In *Scullion*, the feature not present in *Smith v Bush* that the Court of Appeal latched on to in order to distinguish *Smith v Bush* was the mortgagor's purpose in making the acquisition. The Court of Appeal decided that mortgagees' valuers do not owe a duty of care to people who acquire properties as buy to let investments. The property might be low value and the buyer unsophisticated without his own valuation, but the Court of Appeal deemed this to be a transaction of a sufficiently commercial nature to distinguish it from *Smith v Bush*. The beginning of the end of *Smith v Bush*?

Part 36

In or out

Part 36 provides a rigid scheme for settlement offers.

C v D [2011] EWCA Civ 646 is an example of the rigidity with which the courts approach Part 36. Unless you abide strictly by the provisions of Part 36, you will not receive the goodies that Part 36 can bestow. The courts will not be generous in considering whether or not an offer is within Part 36. If the offer is within Part 36, costs etc benefits flow nearly automatically; if the offer is not, you must rely on the court's general discretion under CPR 44.3(4)(c) to take into account non-Part 36 offers.

C v D concerned whether a Part 36 offer can be time-limited. Under CPR 36.2(2)(c), an offer must specify a period of not less than 21 days within which the defendant will be liable (in the case of a claimant's offer) for the claimant's costs if the offer is accepted. The Court of Appeal decided that an offer cannot say that it may only be accepted within that 21 day period but not afterwards. If an offer is time-limited, it is not a Part 36 offer. A Part 36 offer therefore prima facie remains open for acceptance for ever, though if accepted after 21 days, the court may need to determine the costs consequences.

That is not to say that a Part 36 offer cannot be withdrawn. A Part 36 offer can be withdrawn within the 21 day period with the court's permission (CPR 36.3(5)) or after the 21 day period provided that a written notice of withdrawal is served (CPR 36.3(6) and (7)). You might struggle to spot the real difference between a scheme that, on the one hand, refuses to allow an offeror to state in its offer that said offer can only be accepted within 21 days but, on the other, allows the offeror to send a subsequent letter withdrawing the offer after 21 days. But there we are. Similarly, further offers by the same party or counter-offers do not revoke a Part 36 offer (*Gibbon v Manchester City Council* [2010] EWCA Civ 726).

If a Part 36 offer is withdrawn, it ceases to have the automatic costs consequences of Part 36 (CPR 36.11(6)(a)). The offer falls back to being merely one of the factors to be taken into account in the general costs discretion under CPR 44. Why? A party had a reasonable opportunity to accept the offer, but did not do so; why should the fact that the offer was withdrawn - circumstances change - make any difference to costs? But that again is part of the rigidity of the system, perhaps a shadow remaining from the days when defendants had to pay money into court. Yours is not to reason why; just comply with the rules.

Contributions welcome

A contribution towards a settlement can include costs.

The Civil Liability (Contribution) Act 1978 allows a court to order someone to contribute to a settlement entered into by another if that someone was also liable for the same damage. In *Mouchel Ltd v Van Oord (UK) Ltd* (No 2) [2011] EWHC 1516 (TCC), the court decided that the contribution need not be limited to damages, but could extend to any costs included in the settlement.

Contract

High endeavours

Best endeavours and all reasonable endeavours mean the same thing.

"[C and D] will co-operate together to use their best endeavours to promote [C's] low cost services from [D's airport] and [D] will use all reasonable endeavours to provide a cost base that will facilitate [C's] low cost pricing." Is best endeavours the same as all reasonable endeavours? In *Jet2.com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm), the parties were agreed that it was, doubtless because what constitutes best endeavours has always, somewhat eccentrically, been defined by the courts in terms of the reasonable. But, as the judge put it in *Jet2.com*, the same expressions in different contracts will not necessarily mean the same thing. As with all litigation, it depends upon the facts.

Drug abuse

A "first opportunity and right of first refusal" will be given legal force.

A buyer undertook that, in certain circumstances, it would "give Seller the first opportunity and right of first refusal to supply propofol [an anaesthetic] to Buyer under mutually acceptable terms and conditions." Is this just an agreement to agree, and thus unenforceable, or will courts give legal effect to it?

In *Astrazeneca UK Ltd v Albemarle International Corporation* [2011] EWHC 1574 (Comm), Flaux J was very clear that this was an obligation that had to be complied with. The parties had included this provision in their contract, and he was jolly well going to give it legal content and to enforce it.

A right of first refusal is not a term of art, according to the judge, but depends upon the circumstances. In *Astrazeneca*, it conferred a right to be given an opportunity to match any third party offer that the buyer might otherwise have been minded to accept and, if the seller matched that offer, to be awarded the contract. The fact that the contract might require some further negotiation was not sufficient to disengage the right. The buyer had an implied obligation of good faith when notifying the seller of the terms offered by anyone else, an obligation that extended into any subsequent negotiations in that the buyer could not in bad faith refuse to agree the contract. Stern stuff.

Albeit obiter, Flaux J also condemned the decision in *Internet Broadcasting Corporation v Mar LLC* [2009] EWHC 744 (Ch) as "heterodox and regressive and… not properly represent[ing] the current state of English law." *Internet Broadcasting Corporation* propounded the theory that there is a strong presumption that an exclusion clause will not apply to a deliberate breach of contract. Flaux J considered that this was an attempt to revive the discredited doctrine of fundamental breach, which the judge in *Internet Broadcasting Corporation* had done by selective, but misleading, quotations from the leading cases. Flaux J considered that the law regarding exclusion clauses remained as stated in *Photo Productions v Securicor* [1980] 1 AC 827, namely that it is all a matter of construction of the clause, and there are no artificial rules of law applicable to exclusion clauses. Flaux J considered that there was nothing unusual or unreasonable in limiting liability to the consideration under the contract in question.

Trusts

Power to do the right thing

If a settlor has a power to revoke a trust, the trust's assets might be available to the settlor's creditors.

People set up trusts for many purposes. One not entirely honourable such purpose is to shield assets from the settlor's creditors. But, equally, the settlor might not want to be deprived of his assets for ever - creditors get bored after a time or debtors migrate to enforcement-free climes. As a result, trusts sometimes include a power for the settlor to revoke the trust, restoring the trust's assets to their original owner. But the Privy Council's decision in *Tasarruf Mevduati Sigorta Fonu v Merril Lynch Bank & Trust Company (Cayman) Ltd* [2011] UKPC 17 indicates that the inclusion of a power of revocation may defeat an original purpose of the trust, rendering the trust's assets vulnerable to execution by the settlor's creditors. You can't eat you cake and have it.

Tasarruf arose from transgressions within a Turkish bank. D was accused of siphoning off money from the bank, which he controlled. C, the Turkish entity established to sort out the mess, obtained judgment against him in Turkey. D had set up a Cayman discretionary trust with himself and his family as discretionary objects of the trust. As settlor, D had also reserved to himself the right to revoke, amend, vary or alter the trusts. The trust contained almost enough money to meet the judgment debt.

C applied for the appointment of a receiver by way of equitable execution over D's power to revoke the trust. The plan was that the power should then be exercised, the assets would revert to D, and they would then be snaffled by C through execution of its judgment in the usual way. D objected to this cunning plan on the basis that a power was not property, and receivers can only be appointed over property. Further, said D, the exercise of a power was personal and incapable of delegation. The lower courts agreed with D.

The Privy Council's approach was to look at the substance. Historically, there was a distinction between powers and property, but the distinction has blurred with time. If the reality was that the holder of a power had

control of the trust's assets, the power to revoke the trust could be treated as sufficiently akin to property for this purpose. More simply, there are sound policy reasons for treating assets subject to a revocable trust as being available to creditors.

As to the ability of someone other than D to exercise the power, that depended upon whether it was a fiduciary power or an ordinary power. No one argued that the power in this case was fiduciary, so there was no obstacle to someone other than D exercising the power.

So those who have set up trusts with their creditors in mind had better look carefully at the terms of those trusts. A power of revocation may render one purpose of the trust invalid. Similarly, those pursuing the settlors of discretionary trusts might want to look at the terms of those trusts.

However, the appointment of a receiver by way of equitable execution may not be the end of the story. In *Tasarruf*, all the assets were in the Cayman Islands. If trust assets are beyond the jurisdiction of the court ordering equitable execution, there may be questions of private international law as to whether a steps taken pursuant to the order will be recognised.

Limited influence

Just because a court order has been made does not mean that it will be obeyed.

The *Masri v Consolidated Contractors* saga is an example of the limitations of court orders. Getting a judgment may only be the start of the legal process. In *Masri*, the judgment creditor obtained judgment on liability in 2006 and on quantum in 2007 but, some 26 reported decisions later, he has still to receive a penny of the now $100m plus due to him despite the judgment debtors having submitted to the jurisdiction and fought, and continuing to fight, the cases.

The judgments debtors are incorporated in the Lebanon, and seem to have one principal asset, namely rights under an English law oil concession in the Yemen. The appointment of a receiver by way of equitable execution over those rights has not generated any money. Indeed, the directors of the judgment debtors all resigned, and the Lebanese courts appointed judicial administrators to take control of the companies with instructions not to pay the judgment debt until a Lebanese exequatur was obtained. Lebanese courts at one point granted an exequatur, but it was later lost and a cassation appeal is outstanding.

In *Masri v Joujou* [2011] EWCA Civ 746, the latest attempt to procure enforcement was cut back by the Court of Appeal. The scope of the receivership was extended beyond the Yemeni oil concession to any other assets of the companies (unknown, since the Lebanese courts had blocked anyone answering questions about the companies' assets, and the Supreme Court had prevented service out of summonses requiring directors to attend the English court to answer questions), but penal notices directed to the Lebanese judicial administrators were removed. Demanding that administrators do things that were contrary to their obligations to the Lebanese courts went too far.

All this means that delay will continue, and, since the oil concession expires at the end of 2011, delay is good for the judgment debtors. Beyond the end of this year, the judgment creditor might find that all the judgment debtors' assets have gone.

Guernsey sweaters

A trustee can exclude liability for gross negligence.

Spread Trustee Company Ltd v Hutcheson [2011] UKPC 13 involved a question of Guernsey law, specifically as to the ability to exclude a trustee's liability for gross negligence. In addressing this, the Privy Council lurched around English and Scottish law on the topic and, unusually for the Privy Council, divided 3-2.

The majority considered that *Armitage v Nurse* [1998] Ch 241 set out English law correctly, namely that a trustee can exclude liability for gross negligence. But since the question was one of Guernsey law, and there were suggestions that Guernsey law might be influenced by Scottish law, the judges considered that too. Some of the majority took the view that Scottish law was the same as English law, but, in any event, they were satisfied that Guernsey law would unquestionably have favoured the rose rather than the thistle.

But it was really by the by (except for the parties and other Guernsey trustees). The Privy Council doesn't bind an English court, so it remains open for someone bold enough to take on in the Supreme Court the view of trust law set out *Armitage v Nurse*. There would have to be a lot at stake; and few take on Lord Millett on issues of equity and survive to tell the tale.

Courts

Unless we agree

If an unless order has been agreed by consent, the court may be slow to grant relief for failure to comply with it.

In *Chiu v Waitrose Limited* [2011] EWHC 1356 (TCC), the court had to consider the extent to which it could grant relief from sanctions under an unless order made with the consent of the parties.

The parties were litigating over a flood from a building site which had damaged neighbouring premises. D2 was the main contractor and, after several failures to serve documents on time, agreed that certain witness statements would be filed 14 days after the consent order. In fact they were not, and the order provided that D2's defence was to be struck out. D2 applied for relief under CPR 3.9, which sets out certain factors that the court is to take into account when considering relief from any sanction imposed for a failure to comply with any rule or court order.

But a preliminary question arose as to whether the court could give relief in any event. The parties had agreed the terms of the order, which made it fundamentally different from an order made by the court. Prior to the CPR, the court would not generally interfere, but

Ramsey J reviewed the case law and said that the court did have the ability to act in relation to a consent order, but that it "would be slow to do so and will generally hold the parties to the terms of the consent order." However, "there will be unusual cases where it will be just to extend time or grant relief from sanctions."

This was such a case, and the judge found that the factors set out in CPR 3.9 came out in favour of D2. D2 was also assisted by having made its application for relief very quickly. The statements were served on 26 April and the application made within two days. A further point in D2's favour was the fact that the statements were served by 1pm on the Tuesday, and there was no suggestion that anyone had needed them over the Easter weekend, and therefore no prejudice to the other parties.

The case does, however, raise two cautionary points. First, the consent order required witness statements to be served "within 14 days of the date of this order." That in itself offends CPR 2.9, which stipulates that times and dates should be set out in the order, rather than a time period.

Secondly, the 14 days ended on Good Friday. No problem, thought D2's solicitor – CPR 2.8(5) says that where a date falls on a day that the court office is closed, the relevant act can be done on the next day it is open, and the witness statements were filed on the Tuesday after the Easter break. But this rule only applies to an act which requires filing something at court. In this case, D2 just had to serve its witness statements on the other party, so the rule did not apply.

Consenting adults

A consent order can create an estoppel that will bar a future claim, but it won't necessarily do so.

In *Zurich Insurance Company plc v Hayward* [2011] EWCA Civ 641, D had been injured at work and made a claim against his employer, whose insurer was C. C suspected that D was exaggerating his injuries, pleaded the point and adduced video surveillance footage in support of this. Eventually, the proceedings had settled for rather less than D had claimed. The settlement was embodied in a Tomlin Order.

Three years passed, and D's old neighbours came forward to say that D had in fact made a complete recovery from his injuries during the proceedings, and had not told C. C started a new claim against D, alleging that the settlement of the claim had been obtained by false representations as to words and conduct and that C had paid £72,000 more in damages than it otherwise would have done. D applied to have the claim struck out on the basis that there was no cause of action. It had been compromised by the agreement that the parties had entered into in the earlier proceedings.

At first instance, the judge held that the allegation of fraud raised by C in the later action was essentially the same as the defence of exaggeration which had been pleaded in the first action, and that the allegation had been compromised by the settlement. The Court of Appeal agreed that a consent order is capable of creating an estoppel that would bar a party from bringing a second action, but held that it did not do so in this case. Smith LJ said that she could "see that an allegation that a disability is being exaggerated for gain amounts to fraud and that that allegation of fraud is similar to the allegation now made in the second action. However, in my judgment it is not the same allegation." The other Court of Appeal judges agreed, and held that the public interest in the integrity of the administration of justice and the private interests of C outweighed the public interest in the finality of litigation.

Tribunals of the people

Unappealable decisions of the Upper Tribunal may only be judicially reviewed in limited circumstances.

In *R (Cart) v The Upper Tribunal* [2011] UKSC 28, the appellants in conjoined appeals had failed in appeals to two First-tier Tribunals, and been refused permission to appeal to the Upper Tribunal by both the First-tier and Upper Tribunals. They sought judicial review of the refusals of permission. The Divisional Court and the Court of Appeal dismissed the appeals, with the Court of Appeal holding that decisions of the Upper Tribunal were only subject to judicial review on the ground of outright excess of jurisdiction or the denial of procedural justice.

The Supreme Court also dismissed them, but on a different basis. Rather than being restricted to cases where there was an outright excess of jurisdiction, judicial review of unappealable decisions of the Upper Tribunal should be limited to the grounds on which permission to make a second-tier appeal to the Court of Appeal would be granted – namely where an important point of principle or practice was raised or there was some other compelling reason for the case to be heard. This, said Lady Hale, "would recognise that the new and in many ways enhanced tribunal structure deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected." In these appeals the appellants did not meet the criteria. But the tribunals have been brought a little bit closer to the court system.

Crimes and misdemeanours

Time and time again

The police and politicians are in a lather about the time for which they can detain someone.

When serious luminaries like Professor Zander turn up on the radio complaining that judges should have used more commonsense in interpreting legislation, you know that something is up. That something is often that the legislation does not quite say what insiders had assumed it said or wanted it to say, and those insiders wished that the judge had contorted the words to meet their assumptions.

And so it was with *R (Greater Manchester Police) v Salford Magistrates Court and Hookway* [2011] EWHC 1578 (Admin). A smart legal adviser in a magistrates court spotted that police practice did not accord with the legislation and, as a result, that a warrant for arrest could not be extended. McCombe J looked at the legislation, and found himself with no choice but to agree.

Hookway was arrested on suspicion of murder (he called the ambulance to attend to the victim), and taken to a police station. He arrived there at 12.40pm on 7 November 2010. Under section 41(2)(d) of the Police and Criminal Evidence Act 1984, 12.40pm on 7 November was therefore the "relevant time". The police can detain a suspect for 24 hours from the relevant time (sections 41(1) and (2) of PACE). If the police need more time, a superintendent can extend the period until 36 hours from the relevant time if satisfied that detention is necessary to secure evidence (including by questioning), that the offence is indictable, and that the investigation is being conducted diligently and expeditiously (section 42(1)).

A superintendent duly extended Hookway's detention in this way, but the police wanted more time still. For this, they had to move on to section 43. This allows a magistrate to grant up to 36 hours additional detention if satisfied of the matters of which the superintendent had previously been satisfied. An application for this extension must be made within 36 hours of the relevant time (though there is some leeway if the magistrates won't sit in time).

Hookway's further detention was duly authorised for a further 36 hours by magistrates under section 43. However, Hookway was then released on police bail 8 hours and 3 minutes before the end of the additional 36 hours. He duly answered bail on five occasions, which used up another 49 minutes of his permissible detention time.

On the sixth occasion that Hookway answered bail, on 5 April 2011, the police wanted to talk to him at length, and decided that the 7 hours and 14 minutes of detention they thought they had left was insufficient. The police therefore had to move to section 44 of PACE. This allows magistrates to grant up to another 36 hours detention if satisfied on the same matters (five months on, could magistrates have been satisfied that the murder investigation was being conducted diligently and expeditiously?). But, and here's the rub, the additional period of detention under section 44 "shall not… end later than 96 hours after the relevant time" (section 44(3)(b)). The relevant time was 12.40pm on 7 November 2010. You don't need Dr Who's chronological expertise to grasp the simple fact that any date in April 2011 is more than four days after any date in the previous November. Accordingly, the magistrates told the police that there was no power to extend the detention further; Hookway must be set free unconditionally.

Cue police outrage. Murderers (allegedly) walking the streets (which they were anyway since the issue only arises if a suspect is on police bail), no one safe, custody officers confused etc etc.

Some parts of PACE are less than clear (eg the 36 hours under section 43 is not limited by reference to the relevant time, and there is a curious provision about the counting of time in section 47(6)), but it is hard to see that section 44(3)(b) is one of them. McCombe J understandably felt that that he had no choice in his decision. He went on to say that he didn't think that the decision would cause inconvenience to the police. They can re-arrest a person arrested previously if "new evidence justifying the arrest has come to light since his release". The police can't, however, detain a suspect to ask him questions that they could have asked within the original four days. This may place the police under pressure to act with haste, rather than loiter with intent for five months as in *Hookway*. For example, they can't put suspects on police bail for long periods, perhaps with severe conditions attached to the bail, before hauling the suspect in for more questioning. Is that a good or a bad thing?

Whatever it is, the Government has announced its intention to bring emergency legislation before Parliament in order to change PACE so that it says what the police thought it said all along.