Neutral Citation Number: [2023] EWCA Civ 1132

Case No: CA-2023-000464

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KB)
COCKERILL J
[2023] EWHC 118 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2023

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NEWEY
and
LORD JUSTICE POPPLEWELL

- -

Between :

(1) BORIS MINTS **(2) DMITRY MINTS** **(3) ALEXANDER MINTS** **(4) IGOR MINTS**	**Appellants/ Defendants**
- and -	
(1) PJSC NATIONAL BANK TRUST **(2) PJSC BANK OKRITIE FINANCIAL CORPORATION**	**Respondents/ Claimants**

- -
- -

Laurence Rabinowitz KC, Simon Paul and Niranjan Venkatesan (instructed by **Enyo Law LLP**) for the **Appellants**
Nathan Pillow KC, David Davies KC and Bibek Mukherjee (instructed by **Steptoe & Johnson UK LLP**) for the **Respondents**

Hearing dates: 3, 4, 5 and 6 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 6 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Sir Julian Flaux C:

Introduction

1. This appeal arises out of the Russian invasion of Ukraine on 24 February 2022 and concerns the effect of the UK sanctions regime, particularly the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA") and the Russia (Sanctions) (EU Exit) Regulations 2019 ("the Regulations") on ongoing litigation in the Commercial Court commenced in June 2019, in which the claimant banks claim against the appellants (who are the first to fourth defendants to that claim) some US$850 million, on the basis that they conspired with representatives of the claimant banks to enter into uncommercial transactions with companies connected with the appellants by which loans were replaced with worthless or near worthless bonds. Freezing orders were obtained against the appellants. The litigation is complex and had been progressing towards trial when the invasion took place.

2. The two central features of the UK sanctions regime are that first, all the assets of a designated person are frozen, which means no person may deal in them, the second is that no person may make available any assets to a designated person. To do either is a criminal offence. Four days after the invasion, the Secretary of State sanctioned the second claimant on the basis of being satisfied that it is *"supporting and obtaining a benefit from the Government of Russia"*. President Vladimir Putin is also sanctioned, as is Ms Elena Nabiullina, the governor of the Central Bank of Russia. However, the first claimant ("NBT") which is a 99% owned subsidiary of the Central Bank of Russia is not sanctioned as such, but the appellants' case before the judge and before this Court is that it is subject to the same asset freeze as the second claimant because it is *"owned or controlled"* within the meaning of Regulation 7 of the Regulations by at least two designated persons, namely Mr Putin and Ms Nabiullina. The appellants contend that the extension of the sanctions to NBT makes sense, since any recoveries it makes in these proceedings will be paid to the Central Bank which is required under Russian law to transfer 75% of its profits to the federal budget of the Russian Federation.

3. The application before the judge and this appeal raise three important issues as to the meaning and effect of the sanctions regime:

   (1) Can a judgment be lawfully entered for a designated person by the English court following a trial at which it has been established that the designated person has a valid cause of action? (the entry of judgment issue);

   (2) In circumstances where the Office of Financial Sanctions Implementation ("OFSI") can license the payment of a designated person's own legal costs, can OFSI also license (i) the payment by a designated person of an adverse costs order; (ii) the satisfaction by a designated person of an order for security for costs; (iii) the payment by a designated person of damages pursuant to a cross-undertaking in an injunction and (iv) the payment of a costs order in favour of a designated person? (the licensing issue);

   (3) Does a designated person *"control"* an entity within the meaning of Regulation 7 where the entity is not a personal asset of the designated person but the designated person is able to exert influence over it by virtue of the political office that he or she holds at the relevant time? (the control issue).

The history and current status of the UK sanctions regime

4. I propose to set out first some of the history of the sanctions regime and the current provisions of relevance. The background to the current regime is the scheme of sanctions introduced by the United Nations and continued by the European Union. The modern law of sanctions derives from UN Security Council Resolution 1267 dated 15 October 1999 in the context of the War on Terror of which the target was the Taliban, Al Qaida and similar terrorist groups. That Resolution included both the asset freeze and bar on dealing which are the central features of the current regime. Subsequent resolutions of the Security Council have required members to freeze assets of entities designated by the Sanctions Committee.

5. Initially the UK gave effect to the UN Resolutions by orders made under section 1 of the United Nations Act 1946, but in 2010 in *Ahmed v HM Treasury (Nos. 1 and 2)* (*"Ahmed"*) [2010] 2 AC 534, the Supreme Court upheld a challenge to such orders because they deprived designated persons of an effective judicial remedy and quashed the orders as *ultra vires* the 1946 Act. The UK then implemented the UN resolutions through EU Regulations starting with Council Regulation 881/2002. That Regulation was adopted to implement UN Resolution 1390 and it used the same language to identify what was to be frozen: *"funds and economic resources"* which has remained the standard wording across EU sanctions regulations.

6. The EU adopted Council Regulation 269/2014 ("the 2014 EU Regulation") in response to the Russian invasion of Crimea. Recital (6) provides:

> "This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular the right to an effective remedy and to a fair trial and the right to the protection of personal data. This Regulation should be applied in accordance with those rights and principles."

7. Article 2 set out the core principles:

> "1. All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen.
>
> 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I."

8. There was a derogation in Article 5 in respect of judicial decisions and arbitral awards:

> "1. By way of derogation from Article 2, the competent authorities of the Member States may authorise the release of certain frozen funds or economic resources, if the following conditions are met:

> (a) the funds or economic resources are subject to an arbitral decision rendered prior to the date on which the natural or legal person, entity or body referred to in Article 2 was included in Annex I, or of a judicial or administrative decision rendered in the Union, or a judicial decision enforceable in the Member State concerned, prior to or after that date;
>
> (b) the funds or economic resources will be used exclusively to satisfy claims secured by such a decision or recognised as valid in such a decision, within the limits set by applicable laws and regulations governing the rights of persons having such claims…"

9. Article 7 provides:

> "1. Article 2(2) shall not prevent the crediting of the frozen accounts by financial or credit institutions that receive funds transferred by third parties onto the account of a listed natural or legal person, entity or body, provided that any additions to such accounts will also be frozen. The financial or credit institution shall inform the relevant competent authority about any such transaction without delay.
>
> 2. Article 2(2) shall not apply to the addition to frozen accounts of:
>
> (a) interest or other earnings on those accounts;
>
> (b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 2 has been included in Annex I; or
>
> (c) payments due under judicial, administrative or arbitral decisions rendered in a Member State or enforceable in the Member State concerned;
>
> provided that any such interest, other earnings and payments are frozen in accordance with Article 2(1)."

10. The UK gave effect to the 2014 EU Regulation by the Ukraine (European Union Financial Sanctions) (No.2) Regulations 2014 ("the 2014 Regulations"). Following Brexit, the UK needed a new sanctions regime to implement the UN sanctions and

impose its own regime. This was contained in SAMLA. The judge notes in [45] of her judgment that the basic intention was to continue the approach adopted via the UN and the EU saying:

> "The Explanatory Notes state that the legislation contains "*the powers that the UK will need to carry on implementing sanctions as it currently does*". It is therefore apparent from this that the basic intention was to continue the approach adopted via the UN and EU. That theme of continuity can also be seen in an answer to a Parliamentary question on the Regulations which states in terms that *"the instrument transposes existing EU sanctions regimes; it does not add to or amend them. The process has been to transpose as identically as possible the EU regimes into what will be our law when we leave."*"

However, as the judge also noted at [46], there is an issue as to whether that intent has been carried through, with the appellants submitting, as they also did in this Court, that the UK regime is in some critical respects stricter than the 2014 EU Regulation.

11. Section 1 of SAMLA provides that an appropriate Minister may make regulations which impose "financial sanctions" which are then further defined in section 3 as imposing *"prohibitions or requirements for…(a) freezing funds or economic resources owned, held or controlled by designated persons; (d) preventing funds or economic resources from being made available to, or for the benefit of (i) designated persons…"*

12. "*Funds"* and *"economic resources"* are defined in section 60 as follows:

> "(1) In this Act "funds" means financial assets and benefits of every kind, including (but not limited to)—
>
> (a) cash, cheques, claims on money, drafts, money orders and other payment instruments;
>
> (b) deposits, balances on accounts, debts and debt obligations;
>
> (c) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivative products;
>
> (d) interest, dividends and other income on or value accruing from or generated by assets;
>
> (e) credit, rights of set-off, guarantees, performance bonds and other financial commitments;
>
> (f) letters of credit, bills of lading and bills of sale;
>
> (g) documents providing evidence of an interest in funds or financial resources;
>
> (h) any other instrument of export financing.

> (2) In this Act "economic resources" means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services."

13. Section 9 defines "designated persons" as persons designated under any power contained in the regulations and sub-section (5) provides:

> "In this Act "person" includes (in addition to an individual and a body of persons corporate or unincorporate) any organisation and any association or combination of persons."

This is a clear extension of the definition of "person" in Schedule 1 of the Interpretation Act 1978 as "including a body of persons corporate or incorporate".

14. The Secretary of State made the Regulations pursuant to the powers conferred by section 1(1) of SAMLA. They came fully into force on 31 December 2020. Regulation 7 dealing with ownership or control provides:

> "Meaning of "owned or controlled directly or indirectly"
>
> 7.—(1) A person who is not an individual ("C") is "owned or controlled directly or indirectly" by another person ("P") if either of the following two conditions is met (or both are met).
>
> (2) The first condition is that P—
>
> (a) holds directly or indirectly more than 50% of the shares in C,
>
> (b) holds directly or indirectly more than 50% of the voting rights in C, or
>
> (c) holds the right directly or indirectly to appoint or remove a majority of the board of directors of C.
>
> (3) Schedule 1 contains provision applying for the purpose of interpreting paragraph (2).
>
> (4) The second condition is that it is reasonable, having regard to all the circumstances, to expect that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P's wishes."

15. As the judge noted, the most important restrictive measures are in Regulations 11, 12 and 14. Regulation 11 is headed "Asset-freeze in relation to designated persons" and provides:

> "11.—(1) A person ("P") must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources.

> …
>
> (4) For the purposes of paragraph (1) a person "deals with" funds if the person—
>
> (a) uses, alters, moves, transfers or allows access to the funds,
>
> (b) deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or
>
> (c) makes any other change, including portfolio management, that would enable use of the funds.
>
> (5) For the purposes of paragraph (1) a person "deals with" economic resources if the person—
>
> (a) exchanges the economic resources for funds, goods or services, or
>
> (b) uses the economic resources in exchange for funds, goods or services (whether by pledging them as security or otherwise).
>
> …
>
> (7) For the purposes of paragraph (1) funds or economic resources are to be treated as owned, held or controlled by a designated person if they are owned, held or controlled by a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person."

16. Whereas Regulation 11 covers both funds and economic resources, Regulation 12 concerns only funds and provides:

> "(1) A person ("P") must not make funds available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available….
>
> (4) The reference in paragraph (1) to making funds available indirectly to a designated person includes, in particular, a reference to making them available to a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person."

17. Regulation 14 prohibits making economic resources available to a designated person:

> "(1) A person ("P") must not make economic resources available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect—
>
> (a) that P is making the economic resources so available, and

> (b) that the designated person would be likely to exchange the economic resources for, or use them in exchange for, funds, goods or services."

18. Other prohibitions are contained in Regulations 13 and 15 to 18. Regulation 19 contains a prohibition on circumventing any of the prohibitions in Regulations 11 to 18. Any person who contravenes these prohibitions commits an offence. Under section 146(1) and (1A) of the Policing and Crime Act 2017, the Treasury has power to impose a monetary penalty on the offender. It is a strict liability offence because there is no requirement that the offender must have known or suspected that he was in breach of the prohibition.

19. Regulations 11 to 15 do not apply to anything done under the authority of a licence issued by the Treasury under Regulation 64, which enables the Treasury to issue a licence for a purpose set out in Part 1 of Schedule 5, which contains specific "licensing grounds". There is no power to grant a licence except where one of those grounds applies. Within the Treasury, licences are issued by OFSI. The grounds in Schedule 5 of relevance to this appeal are as follows:

> "Legal services
>
> 3. To enable the payment of—
>
> (a)reasonable professional fees for the provision of legal services, or
>
> (b)reasonable expenses associated with the provision of legal services.
>
> Extraordinary expenses
>
> 5**.** To enable an extraordinary expense of a designated person to be met.
>
> Pre-existing judicial decisions etc.
>
> 6. To enable, by the use of a designated person's frozen funds or economic resources, the implementation or satisfaction (in whole or in part) of a judicial, administrative or arbitral decision or lien, provided that—
>
> (a)the funds or economic resources so used are the subject of the decision or lien,
>
> (b)the decision or lien—
>
> (i)was made or established before the date on which the person became a designated person, and
>
> (ii)is enforceable in the United Kingdom, and

> (c)the use of the frozen funds or economic resources does not directly or indirectly benefit any other designated person."

20. Regulation 58 contains exceptions from the prohibitions. Regulation 58(5) provides:

> "The prohibitions in regulations 12 and 13 are not contravened by the transfer of funds to a relevant institution for crediting to an account held or controlled (directly or indirectly) by a designated person, where those funds are transferred in discharge (or partial discharge) of an obligation which arose before the date on which the person became a designated person."

The judgment of Cockerill J

21. Having set out some of the history of the sanctions regime and the provisions she had to construe, the judge then dealt with the issue of statutory interpretation. She cited at [64] the key principles of statutory interpretation set out in section 11-1 of *Bennion on Statutory Interpretation* 8th edition (2020) (*"Bennion"*):

> "i) The primary indication of legislative intention is the legislative text, read in context;
>
> ii) Parliament is assumed to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner; and
>
> iii) The rules, principles, presumptions and canons which govern statutory interpretation are aids to construing the legislative text."

22. She made the point at [65] that the overarching requirement is that the court should give effect to the intention of the legislator as objectively determined, having regard to all relevant indicators and aids to construction, citing the judgment of Sales J (as he then was) in *Bogdanic v SSHD* [2014] EWHC 2872 (QB) (*"Bogdanic"*) at [48].

23. She noted at [66] to [70] that where the parties differed was in relation to special rules of interpretation, particularly as regards the applicability of the "principle of legality", that certain fundamental common law rights, specifically the right of access to the courts, will not be treated as curtailed unless this is "clearly authorised" by primary legislation. She noted that the appellants relied in particular on *R (Belhaj) v DPP* [2019] AC 593 (*"Belhaj"*) where the Supreme Court found that it was clear from the Justice and Security Act 2013 that Parliament did intend to curtail fundamental common law rights. She cited Lord Sumption at [14]:

> "This leaves little scope for any presumption that Parliament does not intend to curtail fundamental common law rights. Parliament plainly did intend to curtail them in what it conceived to be a wider public interest. The only questions are on what conditions and in what proceedings. Those questions must be

> answered on ordinary principles of construction, without presumptions in either direction."

24. She also noted that in *R (Youssef) v Secretary of State* (*"Youssef"*) [2021] EWHC 3188 (Admin); [2022] 1 WLR 2454, where an *Ahmed*-type challenge to orders under SAMLA failed, Garnham J made the point that clear words need not be express. At [71] she concluded that these authorities do justify the proposition that an intent to derogate from a fundamental right may be made sufficiently clear implicitly but said that, in those cases, the implicit proposition was clear because it was inescapable and there was no lack of clarity. Having analysed those authorities further she said:

> "In essence in both cases because there was a direct addressing of the relevant question, the answer was clear, despite the fact that it was not explicitly spelled out in words. The logical correlate of what was done could only be that access to the courts was limited."

25. At [72] she said that this was in line with earlier authorities on exclusion of rights of access "by necessary implication" as noted by Laws J in *R v Lord Chancellor ex parte Witham* (*"ex parte Witham"*) [1998] QB 575 at 585-6. Having cited further authorities on this issue, Cockerill J concluded at [75]:

> "The theme across all these cases is that Parliament can, if it wishes, plainly make inroads into fundamental rights. Where that is unambiguously done – which will generally be express, but may in certain circumstances be implicit, the courts will uphold that intent. However, because of the importance of those rights, their curtailment or deprivation will not be found unless that result is clearly authorised by the relevant primary legislation."

26. At [76], she pointed out that it was not suggested that this case was in the territory of a clear express derogation but rather what was being asserted is a clear implicit derogation. At [81] she identified the appellants' central point that the derogation from the fundamental right is "clearly authorised" by SAMLA, in particular section 3(1)(a) and Regulation 12 which provide that: "*a person must not make funds available … to a designated person*", submitting that those words cannot, by any process resembling construction, be read as if they said: "*save that a judgment debt may be made available to a designated person.*"

27. As the judge noted at [82], the claimants' broad approach to the construction of the relevant provisions is that it is informed by the backdrop which makes it either clear that judgments were not intended to be unavailable or adds a factor which prevents the appellants' approach being clear, so that the principle of legality is not engaged. She noted at [83] that the claimants' approach gains some force from the pronouncements at the time the legislation was passed which indicated that SAMLA and the Regulations, although obviously appearing rather different from the 2014 EU Regulation, were intended to continue its approach. She considered at [84] that the claimants' approach appeared to take considerable strength from the express provisions contemplating the entry of judgments in Articles 7(2)(c) and 11 of the 2014 EU Regulation.

28. The judge referred at [86] to the problem of the difference in wording between the two sets of Regulations, in particular that there was no precise equivalent of Article 11 of the 2014 EU Regulation in the Regulations and that the wording of Article 7 was not transposed into the Regulations. She noted at [88] the appellants' argument that the change in wording, specifically the omission from the Regulations of specific wording applicable to judgments or arbitral awards, was significant and should be regarded as a deliberate change, stopping the claimants from relying on continuity in this respect. The appellants noted that the same approach was taken in other post Brexit regulations such as the Cyber Attack Regulations, so that it appeared that there was a conscious decision made after Brexit to move away from the Article 7(2)(c) wording.

29. At [90] the judge rejected this argument saying that SAMLA and the Regulations do not simply replicate the wording of the 2014 EU Regulation, since the approach taken is different, with longer documents and a great deal of recasting. She said that the provision for judgments might be seen as coming within the new wording since whatever else a judgment or award does, it effectively enforces an obligation which pre-existed, so that on one view the change of wording can be seen as redrafting to remove redundancy. It might also reflect discomfort with a provision which appeared to trespass on the court's zone of operations if the legislature had taken the view that the making of a judgment would not in any event be caught by the Regulations. She considered that this was the point effectively being made by Arden LJ in *R v R* [2016] Fam 153 at [26]:

> "The UK Regulations do not transpose article 11, and this failure provides a measure of further support for the proposition that what is prohibited is not the making of a court order but the satisfaction of claims. At that latter stage a licence from HM Treasury would be required under regulation 9 of the UK Regulations. There was no need to transpose article 11 if Parliament was content that the making of a court order for the payment of money should not be caught by the measures in the Regulations."

30. In relation to Article 11, she said at [93] that, at one level, there was an oddity that it had no direct equivalent but one could see from the structure and the bulk of the Regulations that, in pursuing the stated aim of continuation, there are marked differences in mechanism. She noted that there are provisions which only seem consistent with the continuing ability of a designated person to pursue at least some claims, such as pre-existing claims. She referred to the exceptions to the sanctions contemplated by Regulation 58 and said that it was plain from 58(5) that one exception relates to making funds available when the impetus comes from a pre-existing obligation. She also referred to section 44 of SAMLA which appears predicated on civil claims being able to be brought against a person by a designated person, otherwise that person would not need the statutory defence under the section.

31. She concluded at [94] that the language did not provide the clear indication for which the appellants contended of an intention to move away from continuity in this respect and to bar entry of judgments. She went on to make the point at [95] that, aside from express pronouncements as to intent, on the appellants' approach, what would be being done would be to take the UK, a major international legal centre, fundamentally out of

step with the EU in a way which would make it a less competent jurisdiction for dispute resolution than the EU. She concluded at [96] that, if a change had been intended, it would have been more clearly signposted and it was not clear from this history that there was an intent to preclude the entry of judgments, that the 2014 EU Regulation did not do so and that there was no manifested intention to change that state of affairs.

32. The judge went on to address other background points made by the appellants to which it is only necessary to refer to the extent that those arguments were replicated before this Court. At [99], she referred to the argument that because SAMLA does encapsulate an intent to curtail certain fundamental common law rights, in particular the rights of peaceful enjoyment of property, in the wider public interest, it follows that the condition for not applying the principle as regards rights of access to the courts is met. She did not find that argument persuasive. Whilst it was correct that SAMLA does evince a clear intent to curtail or suspend some of a designated person's rights to enjoy property, it does not follow that another fundamental right should be curtailed without any indication relevant to that right. She noted that this argument depended upon what one took from the passage in Lord Sumption's judgment in *Belhaj* (which I quoted at [23] above), the appellants' argument hinging on the passage meaning that, as soon as you have established an established derogation from any of the fundamental rights, derogations from all must be assumed to be permissible subject to the question of interpretation.

33. The judge considered that approach not justified by the passage in its wider context. In *Belhaj* the focus was only on the right of access to the courts in relation to the closed material procedure, with no consideration of other rights to which the principle of legality would be applicable. She considered the argument illogical since why should it be the case that a clear intention to restrict a right of access to the courts should carry with it an intent to restrict another different fundamental right.

34. At [102] she rejected a similar argument that, because SAMLA does include some curtailment of the right of access to the courts, in that section 38 qualifies the remedies available on a challenge by a designated person to designation, there was an intention to curtail the right of access generally. The judge considered that where there was such a clear narrow specific derogation, that provides no basis for saying that the that the right of access is more generally suspended without words or clear implication to justify that wider curtailment. [61] of Garnham J's judgment in *Youssef*, which she quoted in full, did not justify that conclusion. It was clear that, in context, he was referring to the statutory scheme as limiting the right of access to the courts in relation to challenging designation and not purporting to deal with other potential forms of access to the court.

35. The other background point was that the right of access was solely a right to enter the court door, which is how Laws J described it in *ex parte Witham* at 585H, the appellants pointing out that all the cases in this area were concerned with restrictions such as court fees preventing or hindering the claimant from entering the court door, not with what happens when it enters. The judge noted at [106] that Mr Laurence Rabinowitz KC for the appellants maintained the point but sensibly accepted that there was a degree of illogic to it. The judge had no difficulty in concluding that it was wrong. As consideration of *ex parte Witham* makes clear the purpose of entry through the court doors is to pursue a purpose which finishes in a judgment as made clear in later cases including *R (UNISON) v Lord Chancellor (Nos 1 and 2)* (*"UNISON"*) [2017] UKSC 51; [2020] AC 869. The judge said at [108] that this conclusion was in line with the Article 6 authorities which are

more explicit such as *Kutić v Croatia* referring to not only the right to institute proceedings but the right to obtain a determination of the dispute by a court.

36. At [109] the judge referred to the argument of the appellants by reference to an article by Phillip Sales (as he then was) in [2002] LQR 598 that, unless Parliament was actually on notice in 2018 that a bar on the entry of judgment would amount to an infringement of the right of access to the court, the principle of legality would have no application and relying on it would actually undermine rather than promote Parliament's intention. The judge said at [110] that this argument was founded on something of an inventive reading of the source material. Having cited the relevant passage in the article, she said that what it went to was the identification of fundamental constitutional rights to which the principle is applicable not the particular narrow issue. It was rightly agreed in this case that the right of access to the courts was a fundamental constitutional right to which the principle of legality applies, unless there is a clear intent to derogate. What is not suggested by the article and finds no basis in the authorities is the proposition that the particular "micro" manifestation must be identified by Parliament.

37. The final general point made by the appellants was that, since the sanctions regime was inherently temporary, it could not impose a derogation from the right of access to the courts which would infringe the principle of legality. At [112] the judge identified two problems with this: first that temporary suspensions have been found to be incompatible with the right of access and second that the temporary suspension has no defined limit and is being used as a platform for seeking orders which may have permanent effects, for example in relation to the release from undertakings.

38. The judge then turned to the individual points of construction, the first of which was the centre of the appellants' argument, that a cause of action or judgment debt is a "fund" or "economic resource". At [114] and [115] she noted that the appellants submitted that a number of propositions were well-established: (i) both the CJEU and the Supreme Court have said that these words have a wide meaning which covers assets of every kind, tangible and intangible; (ii) this reflects the fact that SAMLA and the Regulations are intended to prevent access to financial means of any kind by designated persons; (iii) the distinction between the two depends on the nature of the asset; a "financial asset or benefit" constitutes funds and an asset of some other kind constitutes economic resources; and (iv) the expression "financial asset or benefit" is not defined in the Regulations but is not confined to cash or cash equivalents, including certain choses in action.

39. The judge went on to discuss at [117] to [119] whether a cause of action was "funds", accepting the claimants' argument that it falls outside the ambit of the term because the Regulations see funds as something a designated person can use and a designated person could not "use" its cause of action. If a cause of action were caught, that would cover making any "change" that would "enable use of" it for any purpose which would include issuing a claim in court in the hope of a financial settlement. It would potentially follow that if the court was a "person" it would be prohibited from allowing the designated person to have access to its claim, preventing the designated person from even instituting a claim.

40. However, as the judge noted the claimants accepted that a cause of action could be an economic resource on the narrow basis that it could be used to obtain funds or financial assets and goods and services, for example by assignment for money.

41. In relation to the status of a judgment debt, the judge noted at [121] that the claimants ultimately conceded that a judgment debt does fall within the wording of SAMLA as a "fund" like other "debts and debt obligations" in section 60(1), as conceded in the BVI case of *JSC VTB v Taruta* (*"Taruta"*) (2022).

42. The next question was whether the entry of judgment constitutes "dealing" with a fund. The judge noted at [123] that the appellants said the answer was simple: under Regulation 12 no person may "make available" any funds to a designated person. The expression "make available" is broad, encompassing all acts necessary for a designated person to obtain full power of disposal in respect of funds. If a court entered judgment on the claims, a judgment debt which constitutes "funds" would be made available to the claimants, which is unlawful under that Regulation. The judge recorded at [124] that the appellants also argued that it was unlawful under Regulation 11 which prohibits "dealing" in the funds or economic resources of designated persons as the changing of the cause of action into a judgment debt is "dealing" because the cause of action is extinguished and merges into the judgment debt. The judge said at [125] that, as the appellants realistically acknowledged, it would be surprising if the answer to this question turned on the English law doctrine of merger so if this were a good point it would have to depend on a broader and more fundamental reason that the causes of action are "used" to obtain the judgment.

43. At [126] the judge said that whilst one could certainly read the provisions in this way, it was not clear that one must do so. Even if a cause of action is an economic resource, it could not be realistically said that the court was itself "dealing" within the meaning of Regulation 11(5). In support of her conclusion that the appellants' logic was not inexorable, the judge relied upon the judgments to which the claimants had referred. *Taruta* concerned whether, after VTB was designated in 2022, the BVI Court could lawfully discharge a receivership order obtained by VTB in 2021. Jack J held it could not because this would affect the nature or value of VTB's judgment debt and therefore amount to a dealing in funds. He dealt with a separate application by VTB's solicitors to come off the record, which he refused, commenting: "*sanctioned entities retain all their civic rights, including full access to the Courts and an entitlement to have their rights and obligations determined by this Court*". Cockerill J accepted that the appellants were right that this observation was *obiter* without the benefit of argument to the contrary and in tension with his other observation that the receivership order could not be lawfully discharged, but said that, with arguments as to "dealing" live and present in his mind, Jack J did not see the matter as one which followed.

44. Cockerill J also referred to the observation of Arden LJ in *R v R* at [26] that the 2014 EU Regulation prohibited not the making of a court order but the satisfaction of claims. She accepted that that case was concerned with the making of a court order against a designated person, not in favour of a designated person, but said the point was to some extent in play and the concepts presented themselves to Arden LJ's mind as being clearly distinct.

45. Cockerill J considered that weight was added to the point that the entry of a judgment was not "dealing" by the position in relation to licensing. Whilst it was true that there was no power in OFSI to license the entry of judgment in favour of designated persons, in Schedule 5 paragraph 6 there was permission for it to license *"the use of a designated person's funds"* to satisfy *"a judicial…decision"*. The judge considered that this

reference specifically to decisions made before designation suggested quite strongly that the making of other judicial decisions was contemplated and permitted and also suggested that there was no provision for licensing because it is unnecessary.

46. The judge dealt briefly at [132] and [133] with ways round the problem if the appellants were right, such as a power to enter a conditional judgment or to order any judgment to be subject to a stay of execution, but she concluded that if entry of judgment was caught by SAMLA/the Regulations, these ways round were ineffective or in conflict with the primary conclusion, but this pulled into focus the need for clarity.

47. The judge's overall conclusion on the entry of judgment issue was set out at [134]-[136]:

> "134 Ultimately despite the breadth of the wording, and despite the Parliamentary intent to allow a certain degree of curtailment of some rights which the Defendants rely upon, I conclude that the requisite level of clarity in intent to derogate from the fundamental right of access to the court for determination of rights outside designation is not demonstrated. There are certainly indications consistent with the Defendants' approach to construction. There are arguments which can plainly be run. But there are also counter arguments. There are words which could allow a reader to reach the conclusion for which the Defendants contend. But altogether, even at the level of textual analysis, there is no simple route.
>
> 135 In this context one must bear in mind what the authorities require as to implication - bearing in mind too that the possibility that the drafters could have forgotten about the courts is vanishingly small. Going back to the authorities, as noted above, they require us to ask: does the exercise of construction produce a result whereby the right of access to a court "cannot stand" or whereby there is a "necessary implication" of exclusion of the right of access to the courts such that the principle of legality does not come into play? This suggests that had the legislation been intended to interfere with core judicial functions in this way, the very clearest of words or implications would have been necessary.
>
> 136 Plainly the answer to this question is that it does not. It is not a case of the language not permitting of any other meaning. The Defendants are dependent upon piling together a number of indications and asserting that, taken together, these amount to "clarity". But this is not right. In essence there are indications, but they produce no more than a confusion which prevents the position being clear. This is not about "*finding ambiguities which do not exist*", as Mr Rabinowitz KC put it in closing, it is about inherent uncertainties which prevent the finding of clarity."

48. At [137] the judge said once that question was determined the answer was clear. The attempt to suggest that even if the principle of legality came into play there was still

scope for the judge to find that the prohibition of entry of judgment was clearly or unambiguously authorised by SAMLA was doomed to failure. As she put it: "with no clear derogation from the right of access to the Courts the principle of legality compels the answer that judgment can be entered." At [138] she said that if she had to reach a conclusion as to which construction was correct without any recourse to the principle of legality at all, she would incline to the view that the claimants' approach was to be preferred.

49. At [140] to [154] the judge went on to identify a number of other matters which gave considerable force to that conclusion. It is not necessary to summarise all these, but one question she did discuss, which was the subject of submissions to this Court, was whether the Court was a "person" covered by the acts done by a "person" which are prohibited by Regulations 11 to 15 and 19. The judge said at [145] that there were a number of problems with this argument. As a matter of plain language the High Court is not a person and although the appellants' answer was that judges are people, they do not act as persons, but are a manifestation of the Crown, acting effectively as delegates of the King. If it were intended to bind the Crown in the exercise of its judicial functions, one would expect that to be made absolutely clear and not dependent on the implication of intent to derogate via multiple "indications".

50. At [146] the judge recorded the appellants' argument that this was a red herring since, even if the court is not a person, the parties are and the prohibition can bite on them. The claimants would be prevented from obtaining a judgment because they would be dealing in a cause of action and exchanging that for a judgment debt which is a fund. The judge was not persuaded by this clever argument, saying it is not the parties who would do anything active to enter the judgment. The argument is squarely directed at the court. The judge said that this latter point led her to conclude that this should not be the determinative point in the analysis, since there was scope for a difference as between the court, on the hypothesis not a person, and arbitral tribunals, more naturally seen as persons.

51. The judge then referred to Article 6 of the ECHR which she said there was no need to deal with, given her conclusion in favour of the claimants on the construction of the legislation. However, at [156] she said that she was not persuaded it added anything material. The English courts have explained that Article 6 does not confer any greater protection or access to the court than the equivalent common law principle and the Strasbourg Court has consistently said that it does not confer any absolute right of access to the Court. The CJEU had not adopted a more expansive approach. On the contrary, in *RT France* (2022) the review of Russia sanctions endorsed as proportionate some derogation from at least one fundamental right.

52. The judge then turned to consider the licensing issue, which concerns the scope of the power of OFSI to grant licences. In relation to adverse costs orders, the claimants identified Schedule 5 paragraph 3 of the Regulations as the source of OFSI's power, the provision which as the judge said OFSI itself had cited when it gave the claimants a licence to pay adverse costs awarded to the first to third defendants by Foxton J following an unsuccessful summary judgment application.

53. The judge noted at [164] the appellants' argument that this was concerned only with payments by a designated person to its own lawyers for legal services, not payments to another party to satisfy a costs order. The judge held in [167] that there was nothing in

the language of the paragraph to limit the licence to the professional fees of the designated person's own lawyers. She considered that the fact that paragraphs 2, 5 and 9M of Schedule 5 all specifically refer to the needs of, or fees incurred by, a designated person whereas paragraph 3 does not so limit itself indicates that it is intended to be different and unlimited as to the recipient of the services.

54. In relation to the appellants' reliance on the language of the equivalent EU provision: "*reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services*", the judge noted at [169] that it might be said that the use of the word "reimbursement" suggests that this was intended to capture only payments to the designated person's own lawyers to reimburse them for expenses they incurred in providing legal services to him, not payments to another party to satisfy a costs order. However, as she went on to say, there is no determination in the authorities on this point and concentration on a single word in a document of this nature is probably unwise. At [170] she said that the fact that the 2014 EU Regulation appears to contemplate an application by *"any interested natural or legal person"* tended to suggest otherwise and that the legal fees and other expenses can range beyond those of the designated person. The judge pointed out that it was matter for OFSI whether to grant a licence which provided for the policing of inapt applications, such as that posited by the appellants of paying for an acquaintance's unrelated legal expenses.

55. The judge said at [172] that her greatest hesitation was caused by paragraph 6 of Schedule 5 concerned with "Pre-Existing Judicial Decisions". She concluded that the drafters of that paragraph did not have costs orders in mind and should not be taken to think of a costs order as a judgment debt.

56. She then considered the overall intention of the Regulation as regards licensing which must be a scheme to achieve some sort of workable situation, saying it would make no sense to allow some parts of litigation to progress only for the overall progression to be stymied by a bar on other parts. Adverse costs orders are a routine and necessary feature of adversarial litigation, with a party which is successful overall in complex litigation being expected to pay at least the occasional costs order to the other side in respect of interim applications and the legislators must be taken to have been well aware of this.

57. At [176], the judge said there was no rational reason aligned with the scheme of sanctions why a designated person should not be made to pay the costs of existing litigation. An adverse costs order does not benefit the designated person but on the contrary diminishes its assets, so that it might be said to further rather than undermine the object and purpose of the Regulations. She went on to reject the appellants' argument that paragraph 3 is an exemption to be interpreted narrowly, concluding at [179] that the payment of an adverse costs order is licensable under that paragraph.

58. At [182] to [187] she concluded that the same position pertained in respect of the provision of security for costs as in respect of adverse costs orders. Since it was accepted before this Court that the two stood or fell together, it is not necessary to consider her reasoning further.

59. The next sub-issue concerned damages on the cross-undertaking. The judge explained at [189] that the claimants obtained a worldwide freezing order in June 2019 subsequently replaced by undertakings by the appellants. At the return date hearing before Jacobs J in July 2019, the claimants were ordered to fortify the cross-undertaking

by providing security of US$2 million, which is now sitting in the appellants' solicitors client account. In 2021 an application to increase the level of fortification to US$20 million was rejected by Calver J.

60. The question was whether damages on the cross-undertaking could be ordered to be paid. Ordinarily if damages were awarded to the appellants, the security would be immediately available to them for enforcement. The judge noted at [192] that the claimants argued that a payment of damages on the cross-undertaking pursuant to a court order was either a payment of *"reasonable expenses associated with the provision of legal services"* within paragraph 3(b) or *"to enable an extraordinary expense of a designated person to be met"* within paragraph 5.

61. The judge accepted the appellants' argument that paragraph 3 does not apply, concluding that an award of damages on a cross-undertaking has nothing to do with legal services provided to the person who gave the cross-undertaking. She noted at [194] that the appellants contend that there is nothing extraordinary or unexpected about a liability to pay damages on a cross-undertaking. Where one is given, it is always possible that it will be enforced. However, at [195] the judge said she was minded to see it as an appropriate characterisation. It is not an ordinary or routine cost but only occurs after an enquiry as to whether there should be a liability. The judge said that anyone who had been involved in one would be likely to regard it as out of the ordinary. Furthermore, she said how could OFSI refuse a licence when *ex hypothesi* money is to be paid to a defendant who is not sanctioned who is entitled to compensation pursuant to a decision of the English court. The diminution of the designated person's assets would further rather than undermine the object and purpose of the Regulations.

62. The judge dealt with the issue of whether OFSI could licence the payment of a costs order in favour of a designated person later in her judgment but it is appropriate to summarise her reasoning and conclusion here. The issue arose following the withdrawal of two of the defendants' jurisdiction challenges. The claimants relied again on paragraph 3 of Schedule 5. Although the judge identified problems with this argument, ultimately, however, at [258] the judge found that a favourable costs order should attract the same treatment as an adverse costs order. She said the wording of paragraph 3 was wide and on its face covered payment of a costs order in either direction. Both adverse and favourable costs orders will involve payment of costs either paid by or billed to the receiving party. She concluded that on the benefit issue there was no distinction in principle relevant to the issue of sanctions. A favourable costs order does not give anything to a designated party but at most reduces the amount it has to spend on an argument on which it was right and which OFSI will have licensed. It puts the designated person in the position it would have been in but for a bad point being taken by the other side. She said that were matters otherwise it would open the door to abusive conduct by non-designated litigants who could take free shots at a designated person safe in the knowledge they would not be visited with real world consequences. So she concluded that payment of favourable costs orders to the second claimant is licensable.

63. This left the third, control issue. As the judge noted at [200] this issue was of less moment than it would have been if she had found in favour of the appellants on sanctions. At [202] she recorded the sensible and realistic concession by the claimants shortly before the hearing that, if control extends to control via office by one means or another, the control test would be satisfied in relation to NBT at least pursuant to

Regulation 7(4), in that either Mr Putin or Ms Nabiullina could exercise influence over it in significant respects.

64. The judge set out some details of which persons and entities were designated including Mr Putin. She noted at [210] that 18 banks had been designated and mentioned at [211]-[214] specific banking or capital markets sanctions in Regulations 16-17, the wide definition of "Government of Russia" in Regulation 6(7), the specific sanction to which the Government of Russia is subject and separate financial services sanctions applying to the Central Bank of Russia. She concluded at [215] that whilst the terms "Government of Russia", "Presidency of the Russian Federation" and "Central Bank" are used in the sanctions legislation, none of them is listed for the purposes of the asset freeze.

65. She then turned to consider the key concepts of ownership and control within the UK sanctions regime. At [218] she set out the relevant provisions of Regulation 7 which I quoted at [14] above and then at [219] the provisions of Schedule 1 applicable to the "first condition" in Regulation 7(2):

> "i) A person is treated as "holding a right" or "holding a share" indirectly where, amongst other things, they have a 'majority stake' in the person who holds the right or holds the share: Schedule 1, para 9(1)(a)-(b); para 9(2)(a)-(b).
>
> ii) The concept of "majority stake" is defined at para 9(3)(c) as including a situation where A "has a right to exercise, or actually exercises, dominant influence or control over B".
>
> iii) By Schedule 1, para 11(1), "where a person controls a right, the right is to be treated as held by that person (and not by the person who in fact holds the right, unless that person also controls it)".
>
> iv) By Schedule 1, para 11(2), a person "controls a right if, by virtue of any arrangement between that person and others, the right is exercisable only—
>
> a) by that person,
>
> b) in accordance with that person's directions or instructions, or
>
> c) with that person's consent or concurrence."

66. The judge noted that Mr Putin was designated on 25 February 2022 and Ms Nabiullina on 30 September 2022 and quoted a Foreign Office press release at the time of her designation which stated that the UK Government did not consider that Ms Nabiullina owns or controls the Central Bank of Russia for the purposes of Regulation 7.

67. The judge dealt with the relevant legal principles which had two aspects, first the common law presumption against doubtful penalisation, in relation to which at [223] she cited the summary by Simon Brown LJ in *Ricketts v Ad Valorem Factors Ltd* [2004] BCC 164 at [30]:

> "…the court should strive to avoid adopting a construction which penalises someone where the legislator's intention to do so is doubtful, or penalises him in a way which is not made clear."

68. The second aspect was Article 7 of the ECHR which provides:

> "No punishment without law
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

69. The judge cited passages from the judgments in *R v Misra* [2005] 1 Cr App R 21 and *R v Rimmington* [2006] 1 AC 459 on which particular reliance was placed. She then summarised the submissions, recording at [227] the claimants' overall submission that, bearing in mind the scheme of the Regulations and the deliberate limits imposed on sanctions against the Russian Government they should be interpreted as not covering control by reason of office or employment. The limits could only reflect a deliberate decision not to subject the Russian Federation, the Government or the Central Bank to the asset freeze and it would have been a straightforward thing to list them specifically.

70. At [229] the judge noted the appellants' submission that the claimants' approach implied a qualification into the statutory wording which was not justified and that there was a difference between what Regulation 7(2) and Regulation 7(4) covered and no logical justification for regarding Regulation 7(4) as directed to ownership. They also submitted that the Article 7 jurisprudence uncertainty is by reference to the elements of the offence, a point made at [63] of *Misra* and this uncertainty was not likely to arise in the case of a statutory offence.

71. At the beginning of her discussion of this issue, the judge said ultimately this was a fairly narrow point turning on the extent to which one "pans out" from the words of the Regulation. Having cited Sales J in *Bogdanic* she said at [236] that this highlighted that intention is all and that is to be discerned having regard to all relevant indicators and aids. She said that although the wording of Regulation 7(4) is wide, it must be looked at in full context and not surgically removed and looked at in isolation.

72. At [237] she said that the first piece of context was the rest of the Regulation. Regulation 7(2) with its terminology of "holding" is essentially about ownership directly or through a chain of companies or via a nominee which lends force to the submission that 7(4) is essentially "backstopping" any form of ownership or control which falls slightly outside 7(2). The judge gave the example of a designated person establishing a discretionary trust, the trustees of which own various companies which in turn own underlying assets and where the designated person might have retained effective control of the companies and be able to cause their affairs to be conducted in his wishes. She described this as a paradigm which would be expected to fall within the intention demonstrated by the earlier parts of Regulation 7.

73. The judge considered it significant that the sanctions were not drafted to take aim directly at the Russian state or its main entities and, so far as concerns the asset freeze,

appears primarily designed to operate at a personal level against those associated with the Russian regime. There is significance in the use of the list mechanism throughout the sanctions regime's genesis which draws a line which contradicts the submission that avoiding circumvention of the sanctions regime is by any means an overriding consideration.

74. At [240] she made the point that it appears odd if banks *de facto* controlled by the Central Bank or Mr Putin are covered by sanctions that certain banks are sanctioned separately by name. Although this could not go to the exercise of construction, as the post legislation use of powers may have got the ambit of the powers wrong, the approach by those who must have had a close input into the drafting does give pause for thought. At [241] she said that it seemed implausible that it was intended that major entities such as banks or Gazprom were intended to be sanctioned by a sidewind, with no notice of the sanction or ability to challenge the designation under section 38 of SAMLA.

75. Given that this is legislation which imposes not insignificant criminal sanctions, commercial people need to know if a particular company such as Gazprom or NBT is sanctioned. The judge considered that this approach aligned with the OFSI Guidance which she quoted at [243]. The judge concluded this issue in the claimants' favour, that NBT was not controlled by Mr Putin or Ms Nabiullina for the purposes of the Regulations.

76. The judge went on to conclude finally at [247]-[248] that it was only political office which fell outside Regulation 7(4) and that control via corporate office would be sufficient referring to the indication to that effect in *Syriatel Mobile Telecom v Council of the European Union* (Case C-159-19).

77. For all these reasons the judge dismissed the appellants' applications.

Grounds of appeal and Respondents' Notice

78. There are seven grounds of appeal which can be summarised as follows. The judge erred in law:

(1) in failing to hold that it would be unlawful under SAMLA and/or the Regulations for a money judgment to be entered in favour of a designated person.

(2) in holding at [179] that payment of a post-designation adverse costs order was licensable under Schedule 5, para 3 of the Regulations.

(3) in holding at [183] that payment of security for costs was licensable under Schedule 5, para 3 of the Regulations. The Judge's reasons for this conclusion were parasitic upon her reasons for concluding that payment of post-designation adverse costs was licensable, which conclusion was wrong.

(4) having correctly held that payment of damages under a cross-undertaking is not licensable under Schedule 5, para 3 of the Regulations, the Judge erred in holding at [195] that it is nonetheless licensable under Schedule 5, para 5 as an '*extraordinary expense*'.

(5) in holding that, had the point arisen, NBT is not owned or controlled by a designated person, namely Mr Putin and/or Ms Nabiullina within the meaning of Regulation 7 of the Regulations, because ownership or control by virtue of political office falls outside the scope of that Regulation.

(6) in holding at [264] that she could lawfully make an order that the first appellant pay costs to the Banks (following the grant of a licence to him to make such payment) in circumstances where: (a) she correctly held at [253] that (i) making an order that Mr Boris Mints pays anything to the second claimant is making funds or economic resources available to or for the benefit of a designated person contrary to regulations 12-15 of the Regulations, (ii) there is no exception under regulation 58, and (iii) therefore, '*unless there is a licensing ground for authorising the making of such an order (and it is then so authorised) the Court cannot make a Favourable Costs Order which encompasses*' the second claimant; but (b) she did not then go on to identify any licensing ground for authorising the making of such an order (as distinct from for making payment pursuant to such an order) and there is no such ground, as the Judge rightly appears to have accepted at [264].

(7) even if, contrary to the above, there was a proper (unidentified) basis for making a favourable costs order, the Judge also erred in holding at [260-261] that the payment of a favourable costs order in so far as it relates to the Banks' costs (and therefore, on her approach, also the related Russian VAT) is licensable under para 3 of Schedule 5 to the Regulations.

79. By their Respondents' Notice the claimants seek to uphold the judge's order on nine additional grounds:

(1) that the High Court is not a '*person*' for the purposes of regulations 11 to 15 and/or 19 of the Regulations and, as such, it is not prevented from entering a judgment in favour of or against a designated person or making a costs order in favour of or against a designated person.

(2) because the High Court or any individual judge thereof acts on behalf of the Crown and forms part of it when exercising his or her judicial role and is therefore not bound by SAMLA or the Regulations.

(3) because under the Regulations a person, including a designated person, does not '*deal*' with a fund or economic resource if the court enters judgment in favour of a designated person. The court does the act in question, which is not dealing, and a cause of action is not a '*fund*'.

(4) on the basis that, were the appellants' case correct, there would be an illogical distinction between court judgments and arbitral awards.

(5) because even if entering a judgment is contrary to or prohibited by regulations 11 to 15 and/or 19 of the Regulations, the court is not prohibited from (i) entering judgment in favour of a designated person conditionally on the judgment creditor ceasing to be designated; (ii) ordering a judgment to be subject to an immediate stay on enforcement or execution; and/or (iii)

extracting undertakings from the judgment creditor as to what it will do with any judgment entered.

(6) even if the court cannot enter judgment in favour of a designated person on any terms, the Judge's order should be upheld because it remains possible to (i) proceed to and hear a trial; (ii) determine liability; and/or (iii) deliver a reasoned judgment, and it would be appropriate so to proceed.

(7) the Judge's conclusion that a designated person can pay an adverse costs order and/or satisfy an order for security for costs should be upheld (and thus the order dismissing the stay application upheld) on the further ground that OFSI can license such acts pursuant to Schedule 5, para 3(b), i.e. to enable the payment of '*reasonable expenses associated with the provision of legal services*'.

(8) as to the application to discharge the undertaking, even if there was no licensable basis on which a designated person could make a payment under a cross-undertaking as to damages, the Judge's order dismissing the discharge application should be upheld on the further ground that the court should exercise its discretion not to discharge the appellants' undertakings.

(9) that '*control*' under regulation 7 of the Regulations extends only to personal control; it relates neither to control by virtue of political office nor to control by virtue of corporate office.

The submissions of the parties

80. Mr Rabinowitz KC on behalf of the appellants began his submissions by referring to the summary of the approach to statutory interpretation set out in [11.1] of *Bennion* as cited by the judge at [64] of her judgment (set out at [21] above) and the various authorities referred to in that textbook. He submitted that the language of SAMLA and the Regulations should be the primary source for determining the meaning of the phrases under consideration here and when this was done, it became clear that the judge's conclusion was wrong. He placed particular emphasis on the decision of the House of Lords in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 and in particular the speech of Lord Diplock drawing the distinction between the interpretation of a statute and its application. At 157H-158C he said:

> "But, except by private or public hybrid Bills, Parliament does not legislate for individual cases. Public Acts of Parliament are general in their application; they govern all cases falling within categories of which the definitions are to be found in the wording of the statute. So in relation to section 13 (1) of the Acts of 1974 and 1976, for a judge (who is always dealing with an individual case) to pose himself the question: "Can Parliament really have intended that the acts that were done in this particular case should have the benefit of the immunity?" is to risk straying beyond his constitutional role as interpreter of the enacted law and assuming a power to decide at his own discretion whether or not to apply the general law to a particular case. The legitimate questions for a judge in his role as interpreter of the enacted law are: "How has Parliament, by the words that it has used in the statute to express its

> intentions, defined the category of acts that are entitled to the immunity? Do the acts done in this particular case fall within that description?"”

81. Relying on what Lord Diplock said, Mr Rabinowitz KC submitted that the task of statutory interpretation is concerned with identifying the meaning of the categories defined in the legislation but that, once identified, the question of whether a particular case is within the categories identified is one of application of the statute, to which the question of what Parliament intended is irrelevant. He submitted that both the judge and the claimants were wrong to say that, because Parliament cannot have intended a particular consequence, the legislation does not apply to that consequence, without explaining what alternative meaning of the words used excludes that consequence whilst including others.

82. Having set out the *Duport Steels* principle, Mr Rabinowitz KC developed his principal submission that entry of judgment on the claimants' causes of action would be unlawful as an infringement of Regulations 11 and 12. He drew attention to the definitions of "funds" and "economic resources" in section 60 of SAMLA as encompassing all assets, which he submitted would include a judgment debt. He noted that it had been ultimately conceded by the claimants before the judge that a judgment debt was a "fund" and that a cause of action was an "economic resource". In the light of that common ground, he submitted the entry of judgment was the making available of funds in breach of Regulation 12. The judge rejected this submission, but nowhere did she put forward an alternative interpretation of the provision. He submitted that her conclusion was impossible to reconcile with the language of Regulation 12.

83. The claimants' contention that funds are only made available when the judgment debt is paid or enforced not when the judgment debt is entered confuses a fund with subsequent transfer of the fund. If a fund is created, for example by judgment being entered in favour of a designated person, funds are made available to that designated person within the meaning of Regulation 12.

84. Mr Rabinowitz KC submitted that if, contrary to his primary case entry of judgment was not caught by Regulation 12, then it was caught by Regulation 11. He pointed out that when a judgment is entered, the cause of action ceases to exist, being merged in the judgment. On the basis that, contrary to the judge's reasoning, the cause of action constitutes a fund, extinguishing the funds necessarily involves dealing in them within Regulation 11(4). The judge's observation that it was surprising if the sanctions regime varied according to the English law doctrine of merger misses the point, confusing the application of the Regulation, to which the doctrine of merger relates, with its construction. In any event, irrespective of the doctrine of merger, entry of a judgment involves "using" the cause of action. In answer to my question in argument as to how the claimants, as opposed to the court were using the cause of action in those circumstances, Mr Rabinowitz KC said that by litigating, the claimants were using the cause of action to get a judgment. However, in this context, it should be noted that the appellants had conceded that the pursuit of the litigation per se was not a breach of the Regulations. In answer to the Court, Mr Rabinowitz KC accepted that the claimants were not using the cause of action in issuing the claim form or in pursuing the litigation, up to and including making closing submissions. His case was that it was the entry of judgment that was prohibited, as it was only then that there was a "dealing" not just by the court but by the parties who sought judgment.

85. He submitted that by entering judgment, the court was changing the "character" of the cause of action within Regulation 11(4)(b) and was also changing its "value" because a judgment debt was worth more than a cause of action. During the course of argument, Popplewell LJ suggested to Mr Rabinowitz KC that, on the basis that one was talking about a valid cause of action (on which judgment could be obtained) as opposed to merely an asserted cause of action (when a claim form is issued), it did not change its value when it became a judgment debt.

86. In relation to Regulation 11, Mr Rabinowitz KC accepted that if, contrary to the appellants' submissions before this Court, the judge was correct that a cause of action was not a "fund" but an "economic resource", Regulation 11 was not engaged so far as the court was concerned, because the court was not exchanging the economic resource for anything else within 11(5). However, the claimants would have dealt with the economic resource of the cause of action within 11(5)(b) by using it in exchange for a fund, namely the judgment debt. In rejecting this argument, the judge wrongly assumed that the claimants had to do something active to enter the judgment, but even if the claimants were only passive, in obtaining the judgment, they would be using and thus dealing with the economic resource, the cause of action.

87. As to why the appellants contend that a cause of action is a "fund", Mr Rabinowitz KC submitted that a cause of action was a "financial asset" and therefore a fund within section 60(1) of SAMLA, since it was similar to some of the financial assets identified in that non-exhaustive definition, particularly rights of set-off and guarantees within (e). In answer to the point that if a cause of action were a fund, that would have absurd and far-reaching consequences, he submitted that the use etc of a fund under Regulation 11(4)(a) was qualified by the words in (b): "in any other way that would result in any change in volume" etc. He submitted that this was an instance where the concept of continuity with the 2014 EU Regulation helped the appellants, since Article 1(f) of the 2014 EU Regulation contains that qualification of "use" etc:

> "'freezing of funds' means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or any other change that would enable the funds to be used, including portfolio management."

88. Turning to the issue of continuity generally, Mr Rabinowitz KC dealt first with Article 11 of the 2014 EU Regulation. He submitted that the judge's conclusion at [43] of her judgment that the first three lines of the Article give rise to the necessary implication that there are claims which a sanctioned person can pursue to judgment was wrong. To begin with the Article is a prohibition, not a permission. It does not say that you are allowed to have a judgment if you are sanctioned. It is a further prohibition beyond that in Article 2(1) and 2(2) which are the precursors of Regulations 11 and 12. Mr Rabinowitz KC emphasised what he described as the important point that Articles 2(1) and 2(2) as well as Regulations 11 and 12 are temporary prohibitions which only apply for as long as sanctions are in place. In contrast, Article 11 is a substantive provision which extinguishes for all time claims falling within it, i.e. claims under a contract the performance of which was affected by sanctions, for obvious reasons. The judge had rejected that submission about Article 11 but her conclusion was contrary to appellate authority, most recently the decision of the Court of Appeal in *MODSAF v International Military Services Ltd* [2020] EWCA Civ 145; [2020] 1 WLR 1726.

89. The other provision under the 2014 EU Regulation on which the judge relied in finding there was no prohibition on judgments under that Regulation was Article 7(2)(c). That is concerned with satisfaction or enforcement of a judgment, but the judge effectively concluded that it was necessarily implicit that entry of a judgment is also not precluded. Mr Rabinowitz KC submitted that the judge was wrong about this, because the Article does not imply that entry of a post-designation judgment is lawful. In support of that submission he relied on Article 7(2)(b), but as the Court pointed out, that permits payments under contracts which give rise to pre-designation obligations, as is the present case. If the non-designated party did not pay and has been fortunate to get a judgment before sanctions, then payment under that judgment can be made under Article 7(2)(c). Furthermore, as Popplewell LJ pointed out, what happens under the Article is not satisfaction of the judgment, in the sense that the whole Article is predicated upon the payments being made into a frozen account. Mr Rabinowitz KC submitted that the judge's approach under which Article 7(2)(c) would permit a judgment in respect of a post-designation obligation would undermine Article 7(2)(b) under which only payments in respect of pre-designation obligations may be made.

90. He also made the point that, whatever Article 7(2)(c) means, it was not transposed into UK law. Regulation 58(3) is the equivalent of Article 7(2)(a) and Regulation 58(5) the equivalent of Article 7(2)(b) but there is no provision in the Regulation corresponding to Article 7(2)(c). That was not a coincidence because there were a number of other post-Brexit Regulations, such as the Cyber (Sanctions) (EU Exit) Regulations 2020, which also excluded Article 7(2)(c) when it had been in the previous pre-Brexit Regulations. The judge had concluded that the reason for the omission was that the provision was unnecessary in the light of Regulation 58(5) but Mr Rabinowitz KC submitted that the judge was wrong. On her reasoning, a judgment could be satisfied even after designation by virtue of Regulation 58(5) which went further than even the claimants' submissions. He submitted that payment under a court order or judgment issued after designation is not transferred in discharge of a pre-designation obligation. Rather, it is discharging the judgment debt. In terms of the implication for Article 7(2)(c), he submitted that the judge's reasoning would render it redundant except in cases where it was used to circumvent the temporal restriction in Article 7(2)(b). Her reasoning was also contrary to what was common ground in *MODSAF*, recorded in [2] of Newey LJ's judgment, that payment of the arbitral award in that case would have been unlawful, on the premise that it could not be paid even though the underlying obligation arose prior to designation. For all those reasons, Mr Rabinowitz KC submitted that the European backdrop made no difference to the interpretation of the Regulations.

91. Turning to the principle of legality, Mr Rabinowitz KC accepted that the right of access to the courts was a fundamental common law right within that principle. The dispute between the parties was as to the scope of that right of access. For a number of reasons he submitted that the principle of legality was not engaged in this case. First, he submitted that under the sanctions regime, any prohibition on entry of a judgment was only a temporary prohibition for as long as the sanctions exist. Although he accepted the period for which the sanctions might last was indefinite, this was still only temporary, not an expropriation of rights. He submitted that a temporary as distinct from a permanent restriction on the ability to obtain a money judgment was not an infringement of the access to justice and did not engage the principle of legality.

92. Mr Rabinowitz KC referred to other temporary restrictions on the right to obtain judgment imposed by the Court itself, some of which were indefinite, such as a case management stay pending mediation. Where the principle of legality is engaged, it is common ground that any infringement of the common law right of access can only be authorised by primary legislation. However, the power of the court to grant a stay arises out of the inherent jurisdiction not a statute. If the judge were right at [112] of her judgment that a temporary suspension of the right of access could infringe the principle of legality, the inherent jurisdiction to grant a stay could not exist.

93. The second reason why Mr Rabinowitz KC submitted that the principle of legality was not engaged derived from the decision of the Supreme Court in *Belhaj*, which rejected the contention that the closed material procedure under the Justice and Security Act 2013 infringed the principle of legality, so that the Act should be given the narrowest possible construction. He cited the judgment of Lord Sumption, including the passage at [14] which I quoted at [23] above. The present case was an example of the point Lord Sumption was making there, because it is evident on its face that SAMLA is intended to curtail a fundamental common law right to the peaceful enjoyment of property. The restriction on a designated person dealing with a cause of action for which the appellants contend was as much a restriction on dealing with his property as any other and obtaining a judgment debt constitutes a dealing in property. Given that, in SAMLA, Parliament plainly intended to restrict the right to property, for example by assigning a cause of action, there could be no presumption that Parliament did not intend to restrict other ways of turning the cause of action into money, such as entering judgment on it.

94. Furthermore, Mr Rabinowitz KC submitted that SAMLA revealed on its face an intention to restrict the right of access to the courts. He referred to the decision of Garnham J in *Youssef*, following the Supreme Court decision in *Ahmed*, which determined that Parliament did intend to restrict the right of access to the court to challenge designation under the sanctions regime to the deployment of the mechanism under sections 25 and 38 of SAMLA. In circumstances where Parliament has shown a willingness to restrict the right of access in that way, there could be no presumption that it did not intend to restrict the right of access in other ways, such as in the present case.

95. Mr Rabinowitz KC's third reason why the principle of legality was not engaged concerned the legislative history of SAMLA and the Regulations which use words and phrases such as "dealing" "funds" "economic resources" and "making available" which are not peculiar to English legislation but draw from the language of the international sanctions regime introduced in 1999. In effect, what he was arguing was that, given the use of this "international" language there was no room for the common law principle of legality. Mr Rabinowitz KC accepted that there was a tension between this argument and his argument about the Regulations not being in continuity with Article 7(2)(c) of the 2014 EU Regulation. In support of his argument that the words should bear the same meaning as in the UN Resolutions and EU Regulation he relied upon the judgment of Lord Hoffmann NPJ in the Hong Kong Court of Final Appeal in *Peconic Industrial Development Ltd v Fai* [2009] 5 HKC 135 at [19] determining that the language of section 20 of the Hong Kong Limitation Ordinance was intended to have the same meaning as the UK Limitation Act 1939, from which it was taken, word for word.

96. Mr Rabinowitz KC's fourth reason why the principle of legality is not engaged is that it does not apply unless Parliament can be said to have been on notice, when the legislation was enacted, that the common law fundamental right allegedly infringed

existed. He accepted that Parliament must be taken to have known about the fundamental right of access to the courts, but the issue was whether they must be taken to have known that the right extended to the entry of judgment. He relied upon the judgment of Laws J in *ex parte Witham* describing the right as one to enter the court door and submitted that, until the present case, no authority had decided that a temporary bar on entry of judgment as opposed to a bar on commencing and pursuing proceedings was an infringement of the common law right of access.

97. He submitted next that, even if the principle of legality was engaged, Parliament has clearly authorised infringement on the right of access to the courts in the wording of SAMLA, specifically section 3(1)(d) which prohibits: "funds or economic resources from being made available to, or for the benefit of…designated persons". As he had already submitted, there was no possible construction which would allow excluding a judgment debt and words to that effect could not be read into the statute. He relied on what Philip Sales said in his LQR article at 610-611.

98. Mr Rabinowitz KC made submissions next about Article 6 of the ECHR, raised by the Respondent's Notice, which as he pointed out, only arises if this Court concludes that the legislation, construed according to English principles of statutory construction, does prohibit entry of judgment whilst sanctions are in force. Once the legislation has been so construed, the question for the Court is whether it is compatible with the ECHR in that is it imposed for a legitimate purpose and proportionate.

99. He accepted that a temporary stay on the ability to obtain a judgment could engage Article 6. However, unlike the common law right of access to the court, Article 6 is not an absolute right. Importantly, the European Court of Human Rights has already decided in *RT France* (27 July 2022) that the EU sanctions imposed on Russia after the invasion of Ukraine, which are broadly similar to the Regulations are lawful and constitute a proportionate interference with certain fundamental rights protected by EU law, in that case the right to freedom of expression. Mr Rabinowitz KC submitted that the direction of travel was clear, that these sanctions are regarded as legitimate and proportionate even if they infringe fundamental rights.

100. He then dealt with the issue also raised by the Respondent's Notice, whether the Court is a "person" for the purposes of Regulations 11 to 15. He submitted that the claimants' argument that the Court was not a person was wrong. There was a very wide definition in section 9(5) of SAMLA (quoted at [13] above). A judge sitting the High Court is plainly a person within that definition and the High Court as an entity is also within the definition. Mr Rabinowitz KC relied on the CJEU case of *Möllendorf and Möllendorf-Niehuus* [2008] 1 CMLR 11 in which the German Land Registry was held to be prohibited from "making available" funds under Article 2 of the 2014 EU Regulation, but as I pointed out in argument, that case does not address whether the Land Registry is a "person", because the 2014 EU Regulation does not frame its prohibitions by reference to persons.

101. Mr Rabinowitz KC submitted that the claimants' approach led to an anomalous distinction between courts and arbitrators, since there is no possible linguistic basis for suggesting that private arbitrators do not constitute persons as defined by the Regulation. The individual arbitrators are each a "person" and the tribunal would be an association or combination of persons. This distinction between courts and arbitrators is not rational.

102. He also submitted that there was authority for the proposition that the Court was a person in the decision of the Court of Appeal in *R v R.* In that case the issue was whether Mr Rotenberg, who was sanctioned, could pay maintenance to his wife and children from a Russian bank account into the wife's Russian bank account. The judge had made an order against him and on appeal he argued that the order was contrary to the then UK 2014 Regulations, since its effect was to circumvent the prohibition in Article 2 on dealing with frozen funds. He argued that, by making the order, the court was participating in a circumvention of that prohibition, in breach of Article 10(2) of the 2014 Regulations which refers to a person who circumvents the prohibition committing an offence (see [15] of the judgment of Arden LJ). If the court was not a person that would have been a complete answer to the appeal but this Court did not proceed on that basis but decided that the court order did not circumvent the prohibition for other reasons: see [29] of her judgment.

103. Mr Rabinowitz KC submitted that the answer to the claimants' suggestion that if the court was a person, it would be exposed to criminal financial penalties is to be found in section 52 of SAMLA under which the Crown (of which on this hypothesis, the court is an emanation) cannot be made criminally liable under the Regulations even though it may be bound by them. The claimants were arguing that the Regulations do not apply to the Crown, but if this was correct, then the law has changed dramatically post-Brexit. Regulation 17 of the 2014 Regulations expressly provides that those Regulations bind the Crown although their contravention by the Crown cannot make it criminally liable. There would be no reason why the post-Brexit Regulations should deal differently with the Crown. The claimants had identified no reason why they should do so and the contention that they did would be contrary to the claimants' continuity argument. He accepted that the Regulations did not contain a provision equivalent to Regulation 17 of the 2014 EU Regulation and the closest one got to such a provision was section 52 of SAMLA. He submitted that if the Crown were not bound by the Regulations, that would mean the executive were not bound and government ministers or civil servants would be free to send money to President Putin, which would frustrate the purpose of the legislation.

104. In relation to the second, licensing issue, Mr Rabinowitz KC submitted that it was clear from Schedule 5 paragraph 6 of the Regulations that OFSI could only licence the satisfaction of a judicial decision, therefore a court order, if the decision or order was made prior to designation. There would have been no point in including that temporal requirement if the intention was that the funds of a designated person could be used to satisfy a court order made after designation. The judge had concerns about that paragraph but dismissed them on the basis that the paragraph was not concerned with costs orders. Mr Rabinowitz KC submitted that this was wrong, as there was no basis for excluding the award of a costs order from judicial decisions. However, on this basis, as I pointed out during the course of argument, if a designated person failed to pay his own solicitors' fees and the solicitors obtained a court order for the payment of the fees, that would be excluded under paragraph 6. Mr Rabinowitz KC accepted that this was the logical consequence of his argument: that whilst a designated person could obtain a licence to voluntarily pay his solicitors' fees under Schedule 5 paragraph 6, he could not obtain a licence to pay a costs order in favour of his own solicitors. That would be a very odd outcome, as he also accepted.

105. In relation to adverse costs orders, Mr Rabinowitz KC did not elaborate orally on the reasons set out in his skeleton argument as to why Schedule 5 paragraph 3 only covered licensing for the designated person's own lawyers' fees. The written submissions largely reiterated the points made in the appellants' submissions before the judge. In particular, it was submitted that the judge's approach was inconsistent with the legislative history, since the equivalent of paragraph 3 in the 2014 EU Regulation provides: "reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services". The word "reimbursement" suggests this was only intended to capture payment to a designated person's own lawyers and given the claimants' reliance on continuity, it would be odd if the UK provision was broader.

106. Mr Rabinowitz KC submitted that the judge's suggestion in [175] of her judgment that the appellants' construction of paragraph 3 would cut across the designated person's right of access to the court was misconceived, since there was nothing precluding the designated person from paying their own lawyers. As I pointed out, the judge's point was that if there were a series of adverse costs orders against a designated person which were not paid, the other party could obtain a stay of the litigation. Mr Rabinowitz KC accepted this, which was essentially his case on this appeal, but submitted that the fact that there might be adverse procedural consequences for the designated person could not alter the meaning of "legal services" in paragraph 3.

107. He also submitted that payment of an adverse costs order was not payment of "reasonable professional fees for the provision of legal services" within the meaning of paragraph 3, but payment of a costs order. The other party will usually have already paid its solicitors' fees and therefore is seeking reimbursement pursuant to an averse costs order, not payment of the fees.

108. As already noted, it was common ground that the issue of security for costs stood or fell with adverse costs orders, so Mr Rabinowitz KC said nothing about that. In relation to damages on a cross-undertaking, he submitted that the judge had been right to conclude that this was not within paragraph 3 of Schedule 5 but wrong to conclude they were "extraordinary expenses" within paragraph 5. Her conclusion cuts across paragraph 6 since, on the judge's reasoning, damages on a cross-undertaking can be licensed whereas damages pursuant to any other judicial decision cannot under paragraph 6 unless that decision predates designation.

109. He submitted that "extraordinary expenses" were expenses which were unanticipated. He referred the Court to an FCO Policy Note in 2018 on the Sanctions and Anti-Money Laundering Bill, [14] of which says:

> "EU legislation currently enables licences to be issued for payments by designated persons that cannot be easily anticipated and are not recurring. We anticipate preserving the ability to do so in the future, however, for this licencing ground to apply, the transaction must be both "extraordinary" and an "expense"."

This demonstrated that "extraordinary" meant unanticipated or out of the ordinary, which an award of damages on a cross-undertaking was not.

110. In relation to favourable costs orders (i.e. orders in favour of a designated person) Mr Rabinowitz KC did not develop his submissions beyond his skeleton argument. He accepted in answer to Newey LJ that this point did not help the appellants in relation to their application to stay the proceedings which was why he did not spend time on it.

111. In relation to the control issue, Mr Rabinowitz KC made five points arising out of Regulation 7. The first was that this Regulation had been in existence since the Regulations came into force on 10 April 2019, so that the judge's carve-out for control exercised by virtue of political office must be shown to have existed when the Regulations were enacted. Second, the meaning of the Regulation cannot change depending upon individual designation decisions made by the UK government. The judge erred in seeking to draw inferences from such individual designation decisions. Third, the opening words of Regulation 7(1) make it clear that there is control if either of the two conditions is met. It follows that whilst there may be circumstances in which both conditions apply, the legislature envisaged that one might apply, but not the other.

112. Fourth, the claimants place emphasis on the word "holds" in Regulation 7(2) as demonstrating that it is concerned with control through personal ownership and personal rights, which seems to be accepted by the judge at [237]. Mr Rabinowitz KC accepted that Regulation 7(2) includes within its scope control through ownership, direct or indirect, but submitted that it was not correct that that was as far as the first condition went. The claimants' approach misinterprets the meaning of "holds" which, as Regulation 7(3) makes clear, is elaborated by the rules of interpretation in Schedule 1. Paragraph 9(2) of Schedule 1 provides that a person holds a right "indirectly" if the person has a majority stake in another person. The concept of "majority stake in another person" is defined in paragraph 9(3) and includes at (d): "a person ("A") has a "majority stake" in another person ("B") if: (d) A has the right to exercise, or actually exercises, dominant influence or control over B." Mr Rabinowitz KC submitted that this was apt to cover the case of a designated person who, for whatever reason, is able to exercise control over another, a company, irrespective of whether the designated person has ownership of the company. He also referred to paragraphs 11 and 12 which provide:

> "11.—(1) Where a person controls a right, the right is to be treated as held by that person (and not by the person who in fact holds the right, unless that person also controls it). (2) A person "controls" a right if, by virtue of any arrangement between that person and others, the right is exercisable only— (a) by that person, (b) in accordance with that person's directions or instructions, or (c) with that person's consent or concurrence.
>
> 12. "Arrangement" includes— (a) any scheme, agreement or understanding, whether or not it is legally enforceable, and (b) any convention, custom or practice of any kind."

113. He submitted that these were apt to catch the case of a designated person who, without being an owner, has sufficient influence or power, possibly by virtue of a contract, to control the exercise of a right held by another. Contrary to the claimants' argument this was not analogous to the situation where a company is owned through a nominee, not least because that is not what paragraph 11 says and because paragraph 10 deals separately with nominee ownership.

114. Mr Rabinowitz KC's fifth point concerned Regulation 7(4) which sets out the second condition. He submitted that the use of the words: "all the circumstances" and "by whatever means" demonstrate that the Regulation does not have any limit as to the means or mechanisms by which the designated person is able to achieve the result of control, that the affairs of the company are conducted in accordance with his wishes, by whatever means. As he put it, Regulation 7(4) applies if the designated person calls the shots, or can call the shots, but how he does so is irrelevant.

115. At [237] the judge concluded that Regulation 7(4) was essentially backstopping Regulation 7(2), ancillary to it, falling "slightly outside" it, so also about ownership. This argument is also run by the claimants, who talk about Regulation 7(4) being intended to "plug the gap" where the designated person has effective personal control. Even if they were right about that, which Mr Rabinowitz KC submitted they were not, it is still necessary to construe the language of Regulation 7(4). The suggestion that it is dealing only with the situation where the designated person has "effective personal control" involves impermissibly rewriting the provision and, in any event, it is not clear what the claimants suggest "personal control" means and how it differs from other sorts of control. The example they give in their skeleton is of a discretionary trust set up by a designated person which owns various companies which in turn own underlying assets and although the designated person does not have any ownership interest in the companies, he has effective control over them and is able to cause their affairs to be conducted in accordance with his wishes. However, Mr Rabinowitz KC pointed out that once it is accepted, as this example does, that Regulation 7(4) can apply irrespective of any ownership link, the concept of personal control becomes meaningless, because one form of non-ownership control is no more or less personal than another.

116. He submitted that, furthermore, nothing in the language of Regulation 7(4) suggests that it is somehow ancillary to Regulation 7(2) or intended to plug a gap left by Regulation 7(2). Rather Regulation 7(4) is clearly a further and independent limb of the control test. He referred to the decision of the CJEU in *HTTS* (2019) which makes it clear that the concept of control under the equivalent provision of the 2014 EU Regulation is not just about ownership but also a practical ability to influence the affairs of an entity absent ownership.

117. In relation to the judge's carve-out for control exercised by virtue of political office, Mr Rabinowitz KC submitted that there was nothing in the wording of any of the Regulations, including Regulation 7, which supported this. The carve-out would involve rewriting Regulation 7 to insert a proviso. As he had already submitted, there was nothing in the Regulation to distinguish between different forms of non-ownership control or calling the shots. As he said it is the outcome which matters, not the mechanism.

118. Mr Rabinowitz KC also submitted that the political carve-out was unworkable in practice since it was unclear what counted as political office and it would also be unclear when control arose out of political office as opposed to something else. If there had been such a carve-out, these questions would have needed to be carefully addressed by the legislation. He submitted that this political carve-out would be contrary to the rationale of the control test in Regulation 7(4) which is anti-circumvention.

119. He submitted that the corporate carve out going further, which the judge rejected and which the claimants seek to support in their Respondent's Notice, suffers from all the

same problems. It is also inconsistent with EU authority and guidance in a European Commission opinion dated 8 June 2021 to the effect that corporate management control is caught by the 2014 EU Regulation. Mr Rabinowitz KC accepted that this was not binding on this Court, but it provides reasoned guidance as to what the concept of control means under the EU sanctions regime and the claimants do not suggest that it means anything different under the Regulations.

120. In relation to the presumption against doubtful penalisation, on which the claimants rely, he submitted that it was not entirely clear what the judge had made of this, but it did not support the political office carve-out for three reasons. First, the presumption is not engaged unless there is uncertainty in the elements of the criminal offence as distinct from uncertainty as to the outcome of individual cases concerning the offence. Mr Rabinowitz KC referred to *R v Misra* [2004] EWCA Crim 2375; [2005] 1 Cr App R 21 at [63]. Second, even in relation to the elements of an offence, the presumption only applies if there is genuine ambiguity going beyond disagreement about what the words mean. He referred to *A-G's Reference (No 1 of 1988)* [1989] AC 971 at 991C-F per Lord Lowry, citing Lord Reid in *R v Ottewell* [1970] A.C. 642 at 649. Third, the claimants' construction of Regulation 7 would lead to greater uncertainty rather than resolving any uncertainty.

121. Mr Rabinowitz KC also dealt with the claimants' submissions as to the absurd consequences of the appellants' construction of Regulation 7, namely that, in consequence, President Putin would control every Russian company. He submitted that the problem was not with the appellants' construction, but with the subsequent designation of Mr Putin with the unforeseen consequences that, since he is at the apex of a command economy, he controls everything.

122. Mr Nathan Pillow KC for the claimants made submissions in relation to the entry of judgment and licensing issues. He began his submissions by emphasising that the right of access to the court was a fundamental constitutional right recognised for centuries, not limited to determination of a valid claim, but applying to any arguable claim that can properly be brought before the English courts even if it turns out to be unsuccessful. He noted that the appellants' argument was that SAMLA and the Regulations mandated an indefinite stay of the proceedings immediately upon the issue by a designated person of an arguable claim or even where the claim was issued before designation. On any view, this immediate stay was not the minimum required interference with the right of access to the court, since there were many steps that could be taken closer in time to the entry of any money judgment in two or three years' time, for example there could be judgment on liability with the issue of quantum to be determined later or the court could give judgment on declarations. Claims for declarations were included in the claimants' pleaded case. Mr Pillow KC also submitted that nothing the appellants contended would prevent the court entering a judgment conditional on the claimants ceasing to be designated.

123. He submitted that the question was whether, in enacting SAMLA, Parliament unambiguously authorised the curtailment of the fundamental right of access to the court through the words it used and the intent it had. Mr Pillow KC referred the Court to the two authorities which deal with restriction on the right of access by virtue of court fees. In relation to the decision of Laws J in *ex parte Witham* although he refers to the right to enter the court door, it is clearly not limited to entering the door. As I pointed out in argument, reading his judgment as a whole, he is clearly contemplating that the

right is to enter the court door for the purpose of having the claim adjudicated through to judgment. If there were any doubt about that, the position is made clear by the decision of the Supreme Court in *UNISON*.

124. Mr Pillow KC referred to [29] of the judgment of Lord Reed JSC:

> "More fundamentally, the right of access to justice, both under domestic law and under EU law, is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication."

As Mr Pillow KC said, that makes two points. First, the point he had already made that the right of access is not limited to claims which are ultimately successful and second, that the right is to have the arguable claim adjudicated upon. It followed that Mr Rabinowitz KC was wrong to say that there was no previous authority for the proposition that the right of access goes beyond letting you through the court door.

125. Mr Pillow KC also referred to the extensive passage in Lord Reed's judgment headed: "The constitutional right of access to the courts" from [66] to [85]. He emphasised the point made by Lord Reed in the first sentence of [80]:

> "Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question."

He relied on this as the clearest authority that the court must give as much effect to the right of access to the court as possible, including every possible step up to the entry of a money judgment, unless the enabling statute has clear words limiting that right of access further. He submitted that there was no conceivable properly arguable basis for an immediate stay of the proceedings at this stage.

126. He submitted that there was no unambiguous wording in SAMLA mandating a stay. He referred to what Phillip Sales said in his LQR article, just before his citation of *ex parte Witham*:

> "In the United Kingdom, as a state subject to the rule of law, the courts have always emphasised a particularly strong presumption against depriving individuals of the right of access to the courts, and have accordingly interpreted ouster clauses very narrowly indeed."

Mr Pillow KC submitted that the appellants had not identified such an ouster clause on SAMLA. They had referred to section 38, but that was limiting the right of judicial review of the decision to designate a party. It has nothing to do with the right of a designated person to have access to the courts to pursue a civil claim. There was no equivalent provision in SAMLA limiting that right of access, the clearest possible indication that Parliament did not intend to restrict the right of access to the court other than in that narrow respect in relation to judicial review of designation.

127. Mr Pillow KC relied upon section 44 of SAMLA which provides a defence in civil claims to a party which reasonably believes that it is acting in compliance with sanctions Regulations. It provides:

> "44 Protection for acts done for purposes of compliance
>
> (1)This section applies to an act done in the reasonable belief that the act is in compliance with—
>
> (a)regulations under section 1, or
>
> (b)directions given by virtue of section 6 or 7.
>
> (2)A person is not liable to any civil proceedings to which that person would, in the absence of this section, have been liable in respect of the act.
>
> (3)In this section "act" includes an omission."

128. He submitted that it was clear from this that a designated person could bring a civil claim against another person, in which they could seek to establish that that other person had no defence under section 44 and was liable to the designated person. He referred to two Commercial Court decisions under the Iranian sanctions regime, *DVB Bank SE v Shere Shipping Company Limited* [2013] EWHC 2321 (Comm) and *Melli Bank v Holbud Limited* [2013] EWHC 1506 (Comm), in which the court entered summary judgment in favour of a designated person for a money sum because it was satisfied that the excuse for non-payment was not sanctions related. In neither case was there any suggestion that judgment could not be entered in favour of the designated person.

129. Mr Pillow KC submitted that SAMLA did not unambiguously and specifically authorise regulations to be made that had the effect of restricting the fundamental right of access to the court for the determination of civil claims. It followed that, even if the appellants were right that the Regulations meant what they contend and purported to restrict that fundamental right, the Regulations would be *ultra vires* and of no effect.

130. In terms of the construction of the relevant legislation, Mr Pillow KC submitted that the principle of legality enabled the court to "read down" legislation so that it changes what appears to be the natural meaning of words, citing the Sales LQR article at p 605. In other words, if the appellants were right in relation to Regulation 12 that a person making available funds or economic resources to a designated person was otherwise capable of catching the court entering judgment, the principle of legality would enable the court to modify the application of that regulation by reading it down, so that it did not apply to the core functions of the court in exercising its judicial function for the determination of civil rights and liabilities if that would result in a curtailment of the right of access to the court.

131. Mr Pillow KC noted that before the judge the appellants had accepted that SAMLA and the Regulations were intended to replicate and continue the EU sanctions regime. He referred to various background materials to the legislation, first the Explanatory Notes to SAMLA, which there was no dispute were admissible aids to construction. Paragraph 7 states:

> "The Act ensures maximum continuity and certainty; it sets up the powers that the UK will need to carry on implementing sanctions as it currently does."

The Government impact assessment on SAMLA (also an admissible aid to construction) was to similar effect, stating at paragraph 9:

> "As the Government's White Paper: Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions (Cm 9408) sets out, the new legislative powers need to replicate the powers currently relied on under the European Communities Act if we are to uphold our international obligations. The whole Bill is designed to bring the maximum possible continuity and certainty and is not designed to bring any substantive policy changes."

132. Mr Pillow KC also referred to a passage at the end of the impact assessment at paragraphs 44 and 45:

> "Human rights
>
> 44. We recognise that sanctions have the potential to impact upon human rights. For example, if a person is subjected to an asset freeze there is an immediate impact upon their property rights under Article 1 Protocol 1, and further potential impacts upon their family life under Article 8. We have designed the provisions of the Bill to mitigate these impacts so that they are proportionate to the legitimate objectives of sanctions (which are 91 9 designed to combat severe threats to national and international peace and security). We have ensured that there are mechanisms to enable persons affected by sanctions to support themselves and their families. We have also created robust review and challenge mechanisms to ensure that persons subject to sanctions have access to justice, can seek swift redress from sanctions, and can hold the Government to account before an independent court. We have put in place provisions to ensure that sanctions are kept under regular review by the Government so that obsolete sanctions can be identified and revoked.
>
> Justice system
>
> 45. The legislation will include procedural protections to allow designated persons to challenge their listings in the courts following an administrative re-assessment. We anticipate that this will affect the UK courts immediately post-EU Exit as such challenges are currently taken in the EU courts. The ongoing impact on the courts will be linked to the number of sanctions the Government imposes in future."

He submitted that this demonstrated that the drafters had directed their minds to the very question of which fundamental rights the Act would encroach upon and these

statements were clear evidence that they did not intend that the Act would encroach upon the fundamental right of access to the court to determine civil rights and obligations.

133. Mr Pillow KC then referred to Hansard and the Committee debate on the draft Regulations on 14 May 2019 where Sir Alan Duncan, the responsible minister, said: "the instrument transposes existing EU sanctions regimes; it does not add to or amend them. The process has been to transpose as identically as possible the EU regimes into what will be our law when we leave." Mr Pillow KC submitted that where there are infelicities in the drafting of the Regulations because they were recast in a different form from the previous 2014 Regulations (which enacted the 2014 EU Regulation) because of Brexit, they were not intended to depart from the previous position.

134. Turning to the 2014 EU Regulation, Mr Pillow KC noted Recital (6), to which Newey LJ had drawn attention, which states:

> "This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular the right to an effective remedy and to a fair trial and the right to the protection of personal data. This Regulation should be applied in accordance with those rights and principles."

He submitted that the words: "the right to an effective remedy and to a fair trial" were not limited to challenges to designation, covered by Article 14, but rather make it clear that this Regulation expressly does not impinge upon the right of access to the court for an effective remedy and a fair trial of substantive claims. That reflects Article 47 of the Charter of Fundamental Rights of the European Union. However, he accepted in answer to Popplewell LJ that the 2014 EU Regulation does prevent the court from making an order for enforcement which had the effect of payment of a judgment debt.

135. Mr Pillow KC noted that Article 2 was the dispositive prohibition and there were then derogations from it in subsequent Articles. The derogation in Article 4 includes the release of frozen funds for the payment of legal fees. He asked the Court to note that Article 4 overall is a two-way allowance, permitting both the release from the freeze of a designated person's funds for certain purposes and the making available to a designated person of funds if it is for the purpose of payment of legal fees. He submitted that this was relevant to the question of whether satisfaction of adverse and favourable costs orders is permitted under the UK licensing regime. Mr Pillow KC also referred to Articles 5 and 6 which contain further derogations from Article 2, but they are of no direct relevance and so do not need to be considered in detail.

136. Article 7(2)(b) permits payments to a designated person of sums due under a contract or another obligation, such as an obligation in tort or delict, provided that the relevant contract or obligation was concluded or arose before designation and the money is paid into a frozen account. Mr Pillow KC submitted that, if this was permitted under EU law, it would be very odd if the regime prevented a designated person from commencing and litigating proceedings to obtain the same result. He submitted that there would be no sanctions-based purpose in such a prohibition and this was, in effect, confirmed by Article 7(2)(c), which permits payments under judicial or arbitral decisions, provided they are made into a frozen account, without any temporal

restriction. He submitted that, if it was not a breach of sanctions to satisfy a judgment made after designation, it could not possibly be a breach of sanctions to obtain the judgment in the first place.

137. Mr Pillow KC submitted that the appellants' suggestion that if Article 7(2)(c) permitted satisfaction of post-designation judgments it would undermine Article 7(2)(b) was wrong. The answer was that the EU legislature clearly considered that it was not objectionable to have either a voluntary pre-designation payment or a coerced pre- or post-designation payment.

138. Article 11 is a provision which prevents claims being brought by designated persons for all time where the performance of the contract or transaction in question has been affected by the sanctions. Mr Pillow KC submitted that the mischief to which this was directed was dealt with in SAMLA by section 44. However, the provision says nothing about a designated person's right to bring a civil claim that is nothing to do with sanctions or with anyone's right to satisfy such a claim. That is why the claimants have always submitted that Article 11 is a provision which, in itself, contemplates that there must be claims by designated persons, not prohibited by that Article, that can be upheld by a judgment of the Court. This is borne out by Article 11(2) which clearly contemplates that, if the designated person establishes that the claim is not prohibited under Article 11(1), the designated person can enforce that claim.

139. Mr Pillow KC relied on what Arden LJ said in *R v R* at [28] about the fundamental right of access to the court, referring to the 2014 EU Regulation and the then UK 2014 Regulations:

> "both sets of Regulations should so far as possible be construed consistently with the EU fundamental right to effective judicial protection. The right to effective judicial protection is conferred by article 47 of the Charter of Fundamental Rights of the European Union, and includes the right of access to court. It would be contrary to the wife's fundamental right of access to court to prevent her from obtaining the valid and effective decision of the court in a member state as to the maintenance to which she was entitled, unless that right was clearly taken away by the EU Regulation. There is no reason for the EU Regulation to take away the wife's right since funds and economic resources to which the EU and UK Regulations apply (see article 17 and regulation 1(2)) cannot be used for meeting the order unless the competent authority gives its permission for using those assets. There is no express provision which takes away her right. For the reasons given the court cannot in my judgment read in such a provision."

140. Similar statements appear in the other judgments. Mr Pillow KC referred to [42] in the judgment of Ryder LJ:

> "[42] I agree with Briggs LJ that it is no part of the sanctions regime to prevent judges in the EU from making regular orders in favour of persons who are entitled to seek the court's determination of an issue within the competence of that court. Neither the EU Regulation nor the UK Regulations purport to have that effect."

141. Mr Pillow KC also referred to [45] in the judgment of Briggs LJ (as he then was):

> "[45] I also agree with Arden LJ's analysis, to the effect that it is implicit in article 5 of the EU Regulation that it is not part of the objectives or purposes of the sanctions regime which it creates that the courts of member states should be inhibited in making orders within the scope of their jurisdictional powers requiring scheduled persons to make payments, even out of frozen funds and, a fortiori, where the order does not specify the funds from which the scheduled person must make the payment. Thus the judge could have ordered the husband to pay the wife in England, but payment could not then have been achieved in compliance with that order without authorisation from HM Treasury…"

142. Mr Pillow KC submitted that these statements demonstrate that the sanctions regime does not stop the Court doing its job. No amount of word play with the concepts of funds and causes of action and "making available" can override these clear statements as to what the limits of the sanction regime were supposed to be. *R v R* happens to be a case in which the designated person was on the other side, making the payment, but the principles cannot be distinguished. This is the Court of Appeal saying the sanctions regime says nothing about the role of the court in dispensing justice to those to whom access to justice is required to be given. He submitted that it is implicit in the decision that the Court of Appeal did not regard the court as a person within the meaning of the Regulations or at least did not regard the Regulations as applying to the court at all.

143. He submitted that even though Article 7(2)(c) has not been carried through to the Regulations, there is no evidence that the drafters of SAMLA or the Regulations had any inkling that in passing the Regulations they were changing the substantive impact of sanctions as they apply to the court's ability to enter judgment for people who come within the court's jurisdiction. He submitted that there was no need to say in the Regulations what was obvious and is clear from *R v R* that the court is not affected in its ability to enter judgments by anything which SAMLA says.

144. Mr Pillow KC relied upon the OFSI Guidance in August 2017 not long before SAMLA as a Bill had its first reading in the House of Lords in October of that year as relevant as to what Parliament can be taken to have understood the regime to be when it passed SAMLA and hence admissible as to context and purpose in aid of construction of SAMLA. He referred to 2.14 of Chapter 10 of the Guidance, Frequently Asked Questions, answering a question as to how someone should respond to a claim by a designated person without being in breach of sanctions, from which he submitted that it was clearly understood that a designated person could get a judgment:

> "How sanctions apply to your situation will depend on the exact circumstances of the claim and you should consider taking independent legal advice.
>
> You may be able to make a payment into a frozen account of the designated person for obligations arising under a contract prior to them being designated, if the relevant sanctions regime contains such an exemption. An OFSI licence granted in respect of the contract would enable you to complete on the contract.

> If you do not want to complete on the contract, or are in dispute about whether you have completed the contract, it is not a breach of sanctions for the designated person to bring a claim against you.
>
> However, they would need an OFSI licence to pay legal representatives or to enforce any judgement in their favour which requires you to make funds or economic resources available to them.
>
> If the designated person is subject to an asset freeze implemented by EU regulations, you can't incur liability for failing to undertake an action, if financial sanctions prevent you from undertaking that action. This protection will not apply where an OFSI licence is available to allow you to undertake that action."

145. Turning to SAMLA and the Regulations themselves, Mr Pillow KC submitted that the judge was right to conclude that a claim or cause of action was not a "fund". There was some debate with the Court during his submissions about whether when a claim is issued the claimant has more than a bare right to litigate, since its cause of action, whilst it would need to be arguable to be properly pursued in court, may or may not be valid. He submitted that that right to litigate an arguable cause of action cannot possibly be described as a financial asset and hence a fund. He submitted that the examples given at (a) to (h) of a fund were all valid proven rights, not just arguable or capable of being litigated and although inclusive not exclusive, they demonstrated that to be a "fund" the relevant financial asset had to be valid and proven. To be "financial" the asset had to have an intrinsic financial value which would normally be a liquidated sum. Although, as Newey LJ pointed out, Mr Rabinowitz KC had said a claim on a guarantee is a claim for damages rather than debt, conventionally a sum of money is claimed reflective of the principal's liability, so although it is a claim for damages, it is one of a funny kind.

146. Mr Pillow KC gave the example of a claim in tort for a leg broken in an accident or a punch in the face and submitted that such a claim could not conceivably be categorised as a fund. Although the present claim in conspiracy and other torts was one for financial loss, it equally could not be categorised as a fund. Both claims have to be approached in the same way. They are either both funds or both economic resources and since they could not be funds, they are both economic resources, being rights to litigate for harm and compensation.

147. He submitted that one reason why a right to litigate or cause of action cannot be a fund is that when one gets to the definition of "dealing" in section 60(3) of SAMLA and Regulation 11(4), it would lead to the absurd consequence that under subsection (3)(a) the designated person could not "use" the cause of action to litigate. If that were right, the prohibition would apply from the moment the claim form was issued. In an attempt to avoid that consequence, Mr Rabinowitz KC had submitted that subsection (3)(a) and (b) (Regulation 11(4)(a) and (b)) were to be read together as in the 2014 EU Regulation so that (a) was qualified by (b) (see [87] above) enabling him to argue that the cause of action is only used when the Court enters judgment and changes its character. Mr Pillow KC submitted that this suggested qualification of (a) by (b) is not justified by the language of the provision and equally, any interlocutory hearing could change the amount or character of the cause of action, for example by the judge expressing a view

about the prospects of success at trial, from which it would follow logically, that the pursuit of the proceedings would be a breach of the Regulation.

148. Mr Pillow KC submitted that, in any event, the entry of judgment was not a "dealing" within Regulation 11. His central point was that entry of a money judgment is part of the core judicial functions of the court in discharging its duty to allow access to the court for the determination of civil claims. None of the meanings which can be ascribed to the words in Regulation 11 is sufficient to oust that fundamental constitutional role of the court. In answer to Popplewell LJ, he submitted that these core judicial functions might well include an order for enforcement of a judgment which so far as the court's role is concerned would be outside the sanctions regime, although he accepted that the court would not order anyone to do something which would be a breach of sanctions. I would note here that the present appeal is not concerned with any issue of enforcement of a judgment and whether that would infringe the sanctions regime.

149. Mr Pillow KC submitted that, even if, contrary to his primary case, the cause of action was a fund, when the court entered judgment on it, the designated person would not be using, altering or dealing with it, because it is an act of the court, doing its job. The court is not, on any sensible construction of the words, "using" a cause of action when it enters judgment. It is simply not an apt description of the judicial process.

150. On the basis that the cause of action or right to litigate is an economic resource, one is looking at section 60(4) of SAMLA and Regulation 11(5). Under those provisions, the dealing that is prohibited is the exchange of the economic resource for funds, goods or services or the use of them in exchange for such funds and the example given is a pledge of shares. Mr Pillow KC submitted that these provisions are equally inapt to cover the use of a cause of action to litigate or even to obtain a judgment since the two types of prohibited dealing involve in (a) an exchange which involves handing over one asset in return for another and in (b) use in exchange, which requires the retention of the asset but its employment in some way, like a pledge, in return for another. He submitted that neither concept could possibly capture asking the court to enter judgment or the court itself entering judgment. The appellants' point about merger did not assist them, since the merger destroys the first thing, the cause of action, so that there is no exchange and the court does not receive anything, it simply sets in train the operation of law that extinguishes the cause of action. Even without the doctrine of merger, it is difficult to see that the court receives anything by entering judgment.

151. Mr Pillow KC submitted that there was not a use in exchange either when the court entered judgment. The claimant is not using anything in exchange for the judgment debt, but asking the court to allow it access to justice to obtain a determination. In any event, in order to use something in exchange, you have to retain something, which the claimant does not, because the cause of action is extinguished by operation of law.

152. Turning to Regulations 12 to 15, Mr Pillow KC submitted that, even if the court was a person, it was not making funds available by entry of judgment. As in relation to Regulation 11, the judicial declaration of an obligation to pay by entering judgment is part of the core judicial function of the court dispensing justice, not, on any ordinary use of words, making funds available to the designated person. He submitted that, even if the words could be construed otherwise, they have to be read down in accordance with the principle of legality. Furthermore, there is no inconsistency between the conclusion that by entering judgment the court is not making funds available and the

policy of the sanctions regime. Mr Pillow KC referred to Regulation 58(5), which makes clear that the prohibitions in Regulations 12 and 13 do not apply to the transfer of monies into a frozen bank account of a designated person in discharge of an obligation which arose pre-designation. He submitted that this should be construed as covering an obligation reflected in a judgment entered in respect of a cause of action which accrued before designation. If the contrary conclusion were reached because of the doctrine of merger, then the creation of a fresh obligation under the judgment post-designation would make the designated person worse off than it was before the court determined that its cause of action was valid and worse off than if the other party had admitted liability and paid pursuant to its obligation as permitted by Regulation 58(5).

153. Furthermore, if Regulation 58(5) applies to the entry of judgment, the judgment debt cannot be paid out to the designated person because it will be in a frozen account. It followed that, so Mr Pillow KC submitted, by entering the judgment and creating the judgment debt, the court would not be making funds available to the designated person, since at least within this jurisdiction, the judgment debt would be subject to the sanctions regime. In so far as the judgment debt is a fund, it would be frozen under Regulation 11.

154. Mr Pillow KC also pointed out that under section 21 of SAMLA, the sanctions regime had limited extra-territorial effect. It prohibited conduct by any person within the United Kingdom and conduct elsewhere but only if that was conduct of a United Kingdom person as defined. The claimants in this case are Russian and, in so far as they are designated persons, their assets are frozen under the UK sanctions regime, but that did not purport to affect what the claimants do with their assets in Russia that do not involve a United Kingdom person. He submitted that this would also not affect seeking to enforce an English judgment in another country, nor would it prevent a designated person in Russia with a good claim against a person in England from selling and assigning the claim in Russia to a non-designated person. The proposition that the designated person could enforce in another country without a sanctions regime is supported by *R v R* although that case is the other way round.

155. Mr Pillow KC submitted that, in any event, the Court was not a "person" within the meaning of section 9 of SAMLA. He submitted that the words in section 9(5): "a body of persons corporate or unincorporate) any organisation and any association or combination of persons" were not apt to cover the Senior Courts or the High Court and a High Court judge does not act individually but as representatives of the Sovereign in right of the judiciary. He submitted that insofar as SAMLA has any application to the Crown, it does not include the judiciary as part of the Crown. Although he later accepted that the Court was an emanation of the Crown, he submitted that the reference to the Crown in modern parlance was limited to the executive in right of the Crown. He submitted that he did not need to address the question of whether the sanctions regime would bind the executive.

156. As to whether the Regulations bound the Crown, he submitted that there was a short answer: section 52 of SAMLA provided that Regulations made under the Act may make provision binding the Crown, but the Regulations make no such provision. Mr Rabinowitz KC's imaginative reading requires reading out the words: "make provision" in section 52. Mr Pillow KC submitted that the reason for section 52 was to provide statutory authority for the executive to make a statutory instrument with a provision binding the Crown without it being *ultra vires*, but if the statutory instrument does not

contain such a provision which this one does not, the Crown is not bound. Mr Rabinowitz KC had made the point that the 2014 Regulations did bind the Crown but it did not follow that the Regulations somehow bound the Crown sub silentio. Whilst that might be a wrinkle in the continuity point, the meaning of the Regulations was clear.

157. Mr Pillow KC further submitted that the fact that the prohibited acts under Regulations 11 to 15 contain a mental element: "knows, or has reasonable cause to suspect" was a strong indication that it was not intended to bind the Court or to be something about which enquiry could be made of the judge who entered judgment as to his or her state of mind.

158. Mr Rabinowitz KC had relied on two authorities in support of his case that the court was a "person". First was *R v R* but, as Mr Pillow KC submitted, there was no argument about the point and all three judges held that the 2014 Regulations were not to construed as preventing the court from exercising its judicial functions. The other was the British Virgin Islands case of *JSC VTB Bank v Taruta* (2022). There was no live issue or argument there. The point was simply assumed. However, the actual decision in that case was overturned on appeal by the Eastern Caribbean Court of Appeal in a decision dated 25 January 2023 after the judgment in the present case was handed down. At [76] Pereira CJ made essentially the same point as the Court of Appeal in *R v R*, that legislation will not oust the jurisdiction of the court to exercise its normal judicial functions unless the ouster is explicitly stated in the legislation.

159. In relation to Article 6 of the ECHR, Mr Pillow KC submitted that, if SAMLA had unambiguously authorised a prohibition on the court entering judgment on a civil claim, that would have to be read down via section 3 of the Human Rights Act 1998 as it would interfere with the fundamental right of access to the court. It is not a proportionate objective in aid of the sanctions regime to cut down the right of access to the court if that means, as the appellants contend, not just that the claimants cannot get a money judgment, but that the claim is stayed indefinitely potentially for years before it even gets to the stage of trial and judgment. He submitted that Article 6 was another route to the minimal interference point because the Article requires any intrusion into the right of access to justice to be the minimum necessary to achieve the objective. That took one back to the so-called workarounds, such as a declaratory or conditional judgment, which are fundamental answers to the stay application.

160. Mr Pillow KC then turned to the second, licensing issue. He dealt first with the appellants' argument that the licensing grounds were exceptions which had to be construed narrowly. The judge had rightly rejected that argument. The licensing grounds are not exceptions to the prohibitions but fall to be construed normally as part of the Regulations, subject to the principle of legality, because if the effect of the appellants' construction is to curtail the claimants' right of access to the court, the principle of legality would require unambiguous authorisation for that curtailment in SAMLA to give vires to those provisions in the Regulations. He relied upon the decision of the CJEU in *Peftiev* (2014) in relation to the legal fees licensing ground in the EU Regulation of 2006 which preceded the 2014 EU Regulation where the Court said that the relevant provision: "must be interpreted in accordance with Article 47 of the Charter, to the effect that a freeze of funds cannot have the effect of depriving the persons whose funds have been frozen from effective access to justice."

161. Mr Pillow KC began by making submissions about favourable costs orders, since, because they were in favour of a designated person, they are closest to the entry of judgment issue. He pointed out that OFSI had issued a licence to allow the claimants to pay their lawyers under paragraph 3 of Schedule 5. He submitted that that paragraph applied equally where the court made an order for the other party to pay the designated person's lawyers' fees. The provision is drafted neutrally as to who is the paying or the receiving party, and would enable a licence to be issued to the appellants for them to pay a costs order in favour of the claimants, even if they were all designated. There is no question of any payment under this provision or under any licence given representing a net gain to the designated person's funds, since it would either be reimbursement of the legal fees the designated person had already paid or payment enabling the designated person to discharge a liability to its lawyers. If the Court could not make favourable costs orders, it would enable the other party to take every unmeritorious point with impunity which cannot have been the intention of Parliament in making the Regulations.

162. He submitted that paragraph 3 applies in the same way to an adverse costs order in favour of the appellants. There is nothing in the paragraph to limit the licence to the reasonable professional fees of the designated person's own lawyers. By contrast, paragraphs 2 (basic needs), 5 (extraordinary expenses) and 9M (legal services to the designated person in respect of correspondent banking relationships) are all expressly limited to the designated person. The fact that the latter provision was enacted subsequently is no answer since the limitation to legal services to the designated person is in stark contrast to the general wording of paragraph 3 and if the appellants were right, one might have expected paragraph 3 to be amended.

163. Mr Pillow KC submitted that there was nothing in the appellants' reliance on paragraph 6, licences for satisfaction of pre-designation judicial decisions, and the suggestion that a licence for adverse costs orders would enable satisfaction of post-designation judicial decisions. The licensing grounds are separate and cumulative with different subjects and temporal applications. It is clear from the fact that paragraph 3 has the separate heading "Legal services" that they are a particularly important head of expenditure and, if the designated person did not have the right to pay for litigation (including adverse costs orders), it could not have access to the court in any meaningful sense.

164. As for Mr Rabinowitz KC's point that the claimants' case on paragraph 3 proves too much because if they are right, the paragraph would permit a licence for the payment of legal fees of any third party such as the designated person's cleaner or chauffeur, Mr Pillow KC submitted that it was for OFSI to decide whether to issue a licence to permit release of frozen funds and it would be unlikely to do so in an unmeritorious situation. The appellants also submitted that the reference in paragraph 3 to the reasonableness of the fees only made sense in respect of the designated person's own legal fees, but Mr Pillow KC submitted that that was not so given that an adverse costs order would only be made in respect of reasonable costs.

165. In relation to the appellants' reliance on the reference in the equivalent provision in the 2014 EU Regulation to "reimbursement of incurred expenses" as suggesting that it was only intended to capture payment to the designated person's own lawyers, Mr Pillow KC submitted that that did not follow at all. Reimbursement is only referred to in the second clause of the provision not the first and the wording is apt to cover the adverse costs situation where the receiving party has already paid its legal fees and wants them

reimbursed. In any event, under the EU provision, any interested party can apply for a licence, not just a designated person.

166. It was not necessary for Mr Pillow KC to deal in detail with security for costs since it was common ground that the licensing issue in relation to them stands or falls with adverse costs. He noted that the current OFSI Guidance says that licences can be granted for payments into court by way of security for costs under paragraph 3.

167. In relation to cross-undertakings in damages, Mr Pillow KC noted the factual background as set out at [59] above. It follows that the Commercial Court is satisfied that there is sufficient security. Mr Pillow KC submitted that, in the circumstances, the appellants had no basis for saying they were under-secured and the claimants had paid the price for the undertaking. Even if the appellants proved in due course that they had been under-secured, that would not be for several years. There was no possible sanctions-related purpose in the second claimant as a designated person not being able at that stage to get a licence to pay any shortfall in the security by way of damages on the cross-undertaking. The OFSI Guidance contemplated a licence being available in those circumstances. Mr Pillow KC submitted that the judge was right to conclude that, if it were necessary to do so, the claimants could get a licence under paragraph 5 of Schedule 5, the exceptional reasons or extraordinary expense heading. Payments under a cross-undertaking on a freezing order are pretty extraordinary, in the sense that they are rare and unusual. He submitted that, in the circumstances, the appellants were currently fully secured and even if it turned out that they were not and damages in addition to the security were payable, a licence could be obtained if sanctions were still in force in several years' time when this issue might arise. There was accordingly no realistic basis on which to discharge the undertakings given by the appellants at this point.

168. Mr David Davies KC made the oral submissions on behalf of the claimants on the third, control issue. He made some preliminary points about which persons and entities were designated and about the fact that both NBT and the Central Bank of Russia, by which it is owned, whilst not designated, are the subject of other provisions of the sanctions regime such as Regulations 16 and 17. These points were interesting, but of no real assistance in construing Regulation 7 which is at the heart of this issue.

169. In relation to the first condition in Regulation 7(2), he relied on the three elements: holding shares, shareholder voting rights and rights of appointment or removal. He submitted that, therefore, Regulation 7(2) on its face was directed at shareholder level, not at the management of a company. In the example he gave of a state-owned energy company, it is the state which owns the shares, not the minister of energy, although he might take important decisions in relation to the company.

170. Schedule 1 contains rules for the interpretation of Regulation 7(2) and Mr Davies KC submitted that it too was concerned with the shareholder level. It would be very strange if it suddenly extended to managerial control. He submitted that paragraph 9, on which the appellants place such reliance, was still using the language of "holding" shares or rights. He submitted that the appellants could only get this provision to work in their favour by saying that Mr Putin or Ms Nabiullina are at the top of a vertical chain and have a majority stake in the next entity down, which in turn has a majority stake in the next entity down, leading to NBT at the bottom. Accordingly one or other of them on this basis has a so-called majority stake in the Russian Central Bank, which is odd, since

its capital and assets are under federal ownership as part of the Russian state. So far as definition of "majority stake" in paragraph 9(3) is concerned, (a) (b) and (c) are in the conventional territory of shareholding. Mr Davies KC submitted that, therefore, viewed in the overall context, (d), on which the appellants rely, must be focusing on control as an economic owner in a personal capacity rather than control through the exercise of an office or a political position.

171. The Court posited the example of the oligarch who sets up a trust or corporate structure and who divests himself of his assets but still controls what is going on and suggested that he was surely intended to be caught. Mr Davies KC's answer was that that example was caught by Regulation 7(4) not 7(2), although he later accepted that, if the oligarch exercised a dominant influence over the top company in the structure, that would be caught by Regulation 7(2). In relation to Regulations 11 and 12, he submitted that, contrary to the appellants' contention, they were simply providing an equivalent to the position of a nominee in relation to rights e.g. to appoint a director.

172. Mr Davies KC accepted that Regulation 7(4) provided for a second condition adding something to 7(2), but submitted that the judge had been right to see this in the context of 7(2), which is directed at ownership and as sweeping up or backstopping cases where the structure may be more complex and not easy to fit in 7(2) as interpreted by Schedule 1. He gave the examples of trust structures, Liechtenstein Anstalts or Jersey foundations. He submitted that 7(4) was looking at P in a personal capacity, cutting out state officials exercising state rights and also directors and managers who are exercising the company's rights as part of their job.

173. He submitted that the appellants' construction of the Regulation would mean that all companies in Russia were subject to the asset freeze even though only 160 were listed as designated at the time of the judgment. Their construction does not require proof of past control, it being enough if P could control if he wanted to. The appellants did not shy away from that consequence. However, Mr Davies KC submitted that it is permissible to test rival constructions of language by reference to their effects in the real world, referring to *Bennion* at section 11.6. He also relied upon Chapter 13 dealing with the construction against absurdity.

174. He submitted that another point which told against the appellants' construction was that, under sections 23 and 38 of SAMLA only a designated person can challenge the application to it of the asset freezing sanctions, not a controlled person. The untold legions of Russian companies controlled by Mr Putin on this hypothesis could only escape the asset freeze if Mr Putin himself made an application under section 38, which was hardly likely.

175. Mr Davies KC drew attention to the civil penalties for breach of sanctions under the section 146 of the Policing and Crime Act 2017 as amended. Sub-section (1A) introduced by the Economic Crime (Transparency and Enforcement) Act 2022 makes it clear that the liability is strict. A fine of £1 million or of 50% of the estimated value of the funds or resources can be imposed even if someone has no guilty state of mind at all. He submitted that, even though this provision post-dated Regulation 7, it went to testing the consequences of the appellants' construction.

176. Mr Davies KC also submitted that the principle against doubtful penalisation was relevant. He submitted that the question of what "controlled person" means is part of

the scope of the offence as the wider the scope of control, the wider the offence and the net of criminal liability. Popplewell LJ asked him what the position would be if there was one meaning which was wide and certain and a narrower meaning which was uncertain and how the principle would support the narrower uncertain meaning. Mr Davies KC referred to what was said by Sales J (as he then was) in *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB) at [47]-[48]:

> "47. The principle that penal legislation is to be construed strictly is a long-standing one of recognised constitutional importance…The rationale for this principle is that it is presumed within our constitutional system that the legislator intends that a person subject to a penal regime should have been given fair warning of the risks he might face of being made subject to a penalty.
>
> 48. But it is not an absolute principle. The overarching requirement is that a court should give effect to the intention of the legislator, as objectively determined having regard to all relevant indicators and aids to construction. The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight."

177. He submitted that all the claimants were saying about the principle was that it is a relevant consideration. He accepted in answer to Newey LJ that the judge's construction might well lead to less certainty so the principle could count against the judge's construction. The claimants did not advocate the judge's construction. Their argument was that control applied to personal assets, not assets controlled in a capacity as a state official or an employee or director.

Discussion

178. The right of access to the court is a fundamental common law right. It comprises not only the right to open the court door by commencing proceedings, since if the right ended there, it would be a hollow one. It encompasses the right in the case of a civil claim such as in the present case, to have the claim adjudicated upon by the court, in other words, where the cause of action is a valid one, to obtain a judgment in one's favour. That the right includes the right to adjudication and thus judgment is clear from all the authorities: from the entirety of the judgment in *ex parte Witham* as a whole, as opposed to the isolated reference to entering the court door, from the judgment of Lord Reed JSC in *UNISON* at [29] quoted at [124] above and the long passage at [66] to [85] headed: "The constitutional right of access to the courts", from the speech of Lord Diplock in *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 309 quoted by Lord Reed at [77] and from all three judgments in the Court of Appeal in *R v R*. The right is not limited to litigants of whom the court approves or who satisfy some

objective moral standard. The court system in England and Wales does not have outlaws or, as they were described in *Taruta,* pariahs.

179. It is common ground that the so-called principle of legality is a principle of statutory construction under which fundamental common law rights such as the right of access to the court can only be curtailed if that is clearly authorised by primary legislation. Although the words in the statute which curtail the right need not be express and can be implicit, they must be clear and unambiguous. Where there are no express words (as it is accepted that there are not in SAMLA) the fundamental right of access to the court will only be curtailed if that is the necessary implication from the express words, as the judge said at [71] of her judgment: "where the implicit proposition was clear because it was inescapable". A recent illustration is the decision of Garnham J in *Youssef.*

180. An important aspect of the principle of legality is the one noted by Lord Reed at [80] of his judgment in *UNISON* and quoted at [125] above, that even if a statute contains a provision authorising intrusion on the right of access to the courts, it will be interpreted as authorising only such intrusion as is reasonably necessary to fulfil the objective of the provision in question, in other words the minimum required interference. It follows that, even if the appellants were right that SAMLA clearly and unambiguously prohibited the entry of a money judgment in favour of a designated person (and for the reasons set out hereafter they are not), that would not preclude both the continued pursuit of the proceedings to trial by the claimants and, if the claim was established at trial, the entry of a declaratory judgment in the claimants' favour or some form of conditional judgment.

181. In my judgment, none of the reasons which Mr Rabinowitz KC gave for the principle of legality being inapplicable in this case was sustainable. His principal point was that any stay of proceedings would only be temporary and so would not infringe the right of access to the courts. However, as Popplewell LJ pointed out in argument and Mr Rabinowitz KC accepted, the stay might well be for an indefinite period, because no-one could say how long the sanctions against the claimants will last. One of the oddities of the submissions made by Mr Rabinowitz KC in reply is that he said that it had never been his case that SAMLA mandates a stay of proceedings, rather that it makes the entry of judgment unlawful. However, the application which the appellants made to the judge, as reflected in the third recital to her Order of 27 January 2023, was for a stay of the proceedings and the discharge of the undertakings given in place of the freezing injunction on the return date. It was those applications which she dismissed in [1] of her Order.

182. It is quite clear that an indefinite stay of proceedings, which is what the appellants' application was seeking, would amount to an intrusion on the right of access to the courts. Mr Rabinowitz KC sought to counter this by arguing that, if this were right, the court could not exercise its inherent jurisdiction to grant a stay, for example where a mediation was contemplated or where the court determined that other proceedings should be concluded before the present proceedings. The fallacy in this argument is that the court is exercising that inherent jurisdiction not to frustrate the resolution of the litigation (as the stay the appellants seek would) but to facilitate it, for example by settlement through mediation or by having issues in other proceedings determined first, which will shorten or simplify the proceedings in which the stay is granted. In any event, part of the relief sought by the appellants is the discharge of their undertakings, which, as the judge pointed out, would have a permanent effect and would leave the

claim unsecured, clearly an impediment to the right to access to have an effective judicial remedy.

183. The second reason Mr Rabinowitz KC gave for the principle of legality being inapplicable derived from the decision of the Supreme Court in *Belhaj*. His submission was that SAMLA clearly did restrict the fundamental common law right to peaceful enjoyment of property. The prohibition on the entry of a money judgment on a valid cause of action was a restriction on a designated person dealing with his property. However, in my judgment, that argument conflates two distinct fundamental common law rights: the fact that SAMLA restricts the right of peaceful enjoyment of property tells one nothing about whether it also restricts the right of access to the courts.

184. Similarly, the fact that section 38 of SAMLA restricts the right of access to the court in respect of any judicial review of a decision to designate a person has nothing to do with the right of a designated person to pursue a civil claim to judgment in the court and there is no suggestion in the judgment of Garnham J in *Youssef* that he considered that section 38 would restrict the right of access in respect of a civil claim. There is no equivalent provision in SAMLA to section 38 limiting that right of access to litigate and have adjudicated a civil claim and I agree with Mr Pillow KC that this is a clear indication that Parliament did not intend to restrict the right of access to the court other than in that narrow respect in relation to judicial review of a decision to designate.

185. Mr Rabinowitz KC's third reason why the principle of legality was not engaged is that the words and phrases in section 60 of SAMLA derive from the international sanctions regime and should be given the same meaning as under that regime and the 2014 EU Regulation without regard to the principle of legality. Like the judge at [98] of her judgment, I have no hesitation in rejecting this submission for which no authority was cited. As the judge said, whatever the origin of the provisions, they are contained in UK legislation which has been adapted extensively to reflect the appropriate way to give effect to the sanctions regime in this jurisdiction and there is no reason why the usual principles of statutory construction, including the principle of legality, should not apply. In any event, on analysis, the argument is one which hinders rather than helps the appellants. On the basis that the words and phrases in section 60 mean the same as in the 2014 EU Regulation, that Regulation was clearly never intended to preclude a designated person from obtaining a judgment in respect of a civil claim, for the reasons developed below. It follows that the words and phrases in section 60 should have the same effect.

186. The fourth reason why it was contended that the principle of legality was not engaged was that it does not apply unless Parliament can be said to have been on notice when SAMLA was enacted that the common law right being infringed existed. Mr Rabinowitz KC accepted that Parliament must be taken to have known about the fundamental right of access to the courts, but said that they could not be taken to know that it included entry of judgment. This argument essentially depended on his narrow interpretation of the judgment of Laws J in *ex parte Witham*, that the right of access was to enter the court door. However, this is misconceived. As I have said, reading the judgment as a whole, it is clear that Laws J considered that the right of access to the courts included the right to have a civil claim adjudicated. One passage from his judgment will serve to demonstrate the point. At p 585F Laws J said:

> "I cannot think that the right of access to justice is in some way a lesser right than that of free expression; the circumstances in which free speech might justifiably be curtailed in my view run wider than any in which the citizen might properly be prevented by the state from seeking redress from the Queen's courts. Indeed, the right to a fair trial, which of necessity imports the right of access to the court, is as near to an absolute right as any which I can envisage."

187. It follows that, contrary to Mr Rabinowitz KC's submissions the principle of legality is engaged in this case and needs to be considered as one of the principles of construction in construing the meaning of SAMLA. Of course, unless SAMLA can be said to have clearly and unambiguously authorised a restriction of the right of a designated person to obtain a money judgment from the court in respect of its civil claim, the fact that the Regulations might purport to do so will not suffice. As Laws J said in *ex parte Witham* at p 581E: "the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate." As already noted and, as his judgment recognises, the specific provision may be express or arise by necessary implication.

188. Given the conclusion I have reached about the applicability in this case of the principle of legality, like the judge I do not consider it necessary to address in any detail the claimants' alternative case based on Article 6 of the ECHR. In my judgment, the claimants are right that it is not a proportionate objective in aid of the sanctions regime to cut down the right of access to the court if that means, not just that the claimants cannot get a money judgment, but that the claim is stayed indefinitely before it even gets to the stage of trial and judgment. The Article requires any intrusion into the right of access to justice to be the minimum necessary to achieve the objective and, on any view, the appellants' case goes way beyond that minimum necessary.

189. Before considering the issue of the construction of the provisions with which we are concerned, I will deal with the question of continuity between the 2014 EU Regulation and the UK post-Brexit sanctions regime. It is clear from the background materials to SAMLA to which we were referred, specifically the Explanatory Notes to SAMLA, the impact assessment and the passage from Hansard, all cited at [131] to [133] above, that SAMLA and the Regulations made under it were intended by Parliament and the Government to continue the EU sanctions regime without any substantive change. The Regulations as enacted do not simply replicate the EU regime but differ from it in terms of their wording and complexity. However, given the clear intention to be gleaned from the background, I consider that the differences are to be explained as putting the same thing differently, possibly because for political reasons post-Brexit, Parliament and the Government did not want to follow slavishly the wording of an EU Regulation, rather than (as on occasions the appellants sought to suggest) Parliament having deliberately made changes, so that what was enacted had a different meaning in important respects from the EU regime.

190. Turning to the 2014 EU Regulation itself, I agree with Mr Pillow KC that Recital (6), quoted at [134] above, makes it clear that the Regulation is not intended to impinge on the right of access to the court for an effective remedy and a fair trial of a civil claim. I also consider that conclusion is borne out by Article 7(2) on its correct construction. Article 7(2)(b) permits payment to a designated person of sums due under a contract or

pursuant to another obligation provided that the contract or obligation was concluded or arose before designation and that the money is paid into a frozen account. As Mr Pillow KC said, it would be very odd if EU law did not permit a designated person to commence and pursue proceedings with a view to achieving the same result and it is difficult to see any sanctions-based purpose for such an odd distinction. That the pursuit of proceedings is permitted is really borne out by Article 7(2)(c), since that permits payments to a designated person under a judicial or arbitral decision, again provided that the money is paid into a frozen account. There is no temporal restriction as to when the judgment or award has been obtained, so that on its face the provision permits payment pursuant to a judgment entered post-designation. Again, as Mr Pillow KC submitted, in my judgment correctly, if it is not a breach of the EU sanctions regime to satisfy a judgment entered post-designation, how can it possibly be a breach of sanctions to pursue proceedings post-designation and obtain the judgment in the first place.

191. Mr Rabinowitz KC's argument that, if Article 7(2)(c) permitted payments under judgments in respect of obligations arising post-designation (which it would appear to, on its unlimited wording), that would undermine Article 7(2)(b) which only permits voluntary payments in respect of obligations arising pre-designation, is misconceived. One can see why the EU legislature might consider that permission for a voluntary payment to a designated person should be limited to pre-designation obligations, to avoid any abuse, whereas if what is being paid is under the compulsion of a judgment or award, there is no need for that temporal restriction to avoid abuse. His argument in his skeleton that Article 7 is only a derogation from Article 2(2) not Article 2(1) was wisely not pursued orally. The answer to it is in the proviso to Article 7(2): "provided that any such interest, other earnings and payments are frozen in accordance with Article 2(1)" which makes it unarguable that the payment could be a breach of Article 2(1), so that the appellants' argument is entirely circular.

192. The other provision in the 2014 EU Regulation on which the claimants rely is Article 11. That prevents claims being brought by a designated person at any stage where the performance of the contract or transaction in question has been affected by sanctions. Section 44 of SAMLA addresses the same mischief, ensuring that those who have been prevented or hindered in performing obligations because of sanctions do not come under a liability. Article 11 does not deal expressly with claims brought by a designated person whilst subject to sanctions, but Article 11(2) contemplates that a designated person who proves that the non-performance of the obligation was not affected by sanctions may enforce the claim. There is no temporal restriction either as regards when an obligation arose or as regards when the claim can be brought.

193. The appellants sought to make much of the fact that, even if Article 7(2)(c) has the effect that a designated person can obtain a judgment post-designation, so that there is nothing in the 2014 EU Regulation which precludes the designated person from pursuing proceedings to obtain that judgment, that provision has not been transposed into UK law in SAMLA or the Regulations. The appellants sought to characterise this as a deliberate omission by Parliament. Like the judge, I would find that a more convincing argument if that were the only change between the 2014 EU Regulation and the Regulations, but as already noted, there are a number of respects in which the wording differs. Although there are those differences in wording, I agree with Mr Pillow KC that SAMLA and the Regulations were not intended to depart from the pre-

Brexit sanctions position. Given that the clear intention was that the post-Brexit UK sanctions regime should maintain continuity with the 2014 EU Regulation and should not effect any substantive change, it would be surprising, to say the least, if the omission of an equivalent to Article 7(2)(c) meant that SAMLA rendered the obtaining by a designated person of a judgment post-designation unlawful.

194. It clearly was not intended that SAMLA and the Regulations should introduce such a radical change in the scope of the sanctions regime. Quite apart from the general statements made in the background material, the OFSI Guidance issued before SAMLA was passed (quoted at [144] above) expressly states that it would not be a breach of sanctions for a designated person to bring a claim and a judgment could be enforced by a designated person, albeit a licence would be required. It must surely follow that the intention was that civil proceedings could be pursued and a judgment could be obtained without a breach of sanctions.

195. As to why an equivalent to Article 7(2)(c) was not included in SAMLA or the Regulations, the judge may well be right that it may have been thought that its inclusion would be redundant and unnecessary because, as she said in [90] of her judgment, a judgment reflects an obligation, by which she obviously meant a pre-existing obligation in respect of which the judgment is obtained. The judge considered that Regulation 58(5) covered the situation where a party transferred funds to a frozen account pursuant to a money judgment in respect of a pre-designation obligation because such a transfer would be in discharge of that obligation.

196. Mr Rabinowitz KC was critical of that analysis, submitting that the judgment created a new obligation in the form of the judgment debt which post-dated designation and was not within the Regulation 58(5) exception. However, I agree with Mr Pillow KC that this would lead to the distinctly odd situation that the designated person would be worse off through having a judgment than it was before the judgment was entered when it had a valid cause of action in respect of the pre-designation obligation and worse off than if the other party had voluntarily discharged that obligation by payment, which on any view is permitted under Regulation 58(5). I consider that that Regulation should be construed as permitting payment into a frozen account of the amount of a money judgment in respect of a pre-designation obligation. There is nothing in Mr Rabinowitz KC's suggestion that such a payment would be in satisfaction of the judgment and would go beyond even the claimants' submissions. This overlooks the fact that, under that Regulation, any payment has to be made into a frozen account and, as Mr Pillow KC pointed out, any further dealing with the funds so paid in would be prohibited under Regulation 11.

197. The first question of construction in relation to Regulations 11 and 12 is whether the judge was correct that a claim or cause of action is not a "fund" within the meaning of section 60(1) of SAMLA. It is important to note that the right to litigate a cause of action is not just in respect of valid causes of action which succeed at trial, but arguable causes of action which may or may not ultimately succeed. Whether they do so is uncertain. In my judgment, that uncertainty demonstrates why a claim or a cause of action is not a "fund". The definition of "financial assets and benefits of every kind" in (1)(a) to (h) is not intended to be exhaustive, but one thing they all have in common is that they are all valid, with an intrinsic financial value, usually as Mr Pillow KC said for a liquidated sum. The only "claim" referred to is "claims on money" which will be for a definite sum rather than damages. Claims for damages are not included, the only

possible exception being a guarantee, but as Newey LJ pointed out in argument, although a claim under a guarantee is one for damages, usually a sum of money is claimed reflective of the principal's liability. Whilst, as I have said, the list is not intended to be exhaustive, if it had been intended that a cause of action in respect of a civil claim was within the definition of fund, section 60(1) would surely have identified it as such.

198. If a claim or cause of action were a fund as the appellants contend, then since Regulation 11(3) makes it clear that use of the fund or change in character of the fund amounts to dealing with it, which is prohibited, the issue of a claim form or the pursuit of proceedings would amount to a prohibited use of the fund. Equally, if the designated person made an interlocutory application in the proceedings in which the judge expressed a provisional view about the merits, that would arguably change the character of the cause of action, by increasing or decreasing its value, which is prohibited. The appellants eschewed any suggestion that commencing or pursuing proceedings, right up to closing submissions at trial, would be a breach of sanctions, but the logical consequence of their case is that commencing and pursuing proceedings must be prohibited and they were unable to provide any coherent explanation as to why, on this hypothesis, asking the court to enter judgment on the cause of action was a prohibited use of a fund whereas pursuing the proceedings on the cause of action was not. Given that, in various places (specifically Regulation 58(5) which I dealt with above and Schedule 5 paragraph 3 dealing with a licence for legal fees), the Regulations contemplate that a designated person may pursue civil proceedings to judgment, this inability to distinguish between pursuit of proceedings and obtaining a judgment is a strong indication that the appellants are simply wrong in their argument that a claim or cause of action is a fund.

199. In my judgment the judge was correct in her conclusion that a claim or cause of action is not a fund but is an economic resource, on which basis the pursuit of the proceedings was not a breach of Regulation 11(5), as Mr Rabinowitz KC accepted.

200. The next question in relation to this entry of judgment issue is whether, as the appellants contend, the entry of judgment is prohibited under Regulations 11 or 12. Mr Rabinowitz KC's primary case was that it is prohibited under Regulation 12. He submitted that, when judgment is entered, pursuant to the doctrine of merger, the cause of action ceases to exist and is replaced by a judgment debt, which it was accepted by the claimants was capable of falling within the definition of "fund". He submitted that entry of judgment was the "making available" of funds in breach of Regulation 12.

201. In my judgment, there are two answers to that argument. First, the "fund" does not come into existence until the judgment is entered, which creates the judgment debt. Accordingly the entry of judgment cannot be making available funds. The wording of the provision contemplates that the person covered by the Regulation is making available a fund which pre-exists whatever act is said to make available the fund. In the context of a judgment debt, the obvious example of making it available is if a person assigned an existing judgment debt to a designated person. In contrast, entering the judgment and simultaneously creating the judgment debt which constitutes a fund cannot be aptly described as making the fund available to a designated person. The words "making funds available" might well be apt to describe an order enforcing a judgment, but not entering the judgment. Support for that analysis can be found in [26] of the judgment of Arden LJ in *R v R* as the judge concluded, albeit that that was

considering Article 11 of the 2014 EU Regulation and the 2014 Regulations and a factual situation of a judgment or court order against a designated person.

202. Second, the words "make funds available" are simply not apt to describe the exercise by the court on one of its prime judicial functions in administering justice, of entering judgment on a valid cause of action. I agree with Mr Pillow KC that, on any ordinary use of words, the exercise of that judicial function is not making funds available. Furthermore, the Regulations have to be construed as a whole not individual Regulations construed in isolation. As set out above, Regulation 58(5) should be construed as permitting payment into a frozen account of the amount of a money judgment in respect of a pre-designation obligation, from which it necessarily follows that the entry of such a judgment is not prohibited and Regulation 12 should be construed accordingly as not prohibiting the entry of a money judgment by the court.

203. I have reached that conclusion irrespective of the application of the principle of legality. When that principle is applied, the suggestion that entering judgment is making funds available becomes unarguable. The words "making funds available" are capable of more than one meaning for the reasons I have given, so that the words of section 3(1)(d) of SAMLA are not a clear and unambiguous prohibition on the court entering a money judgment on a valid cause of action. On that basis, the words have to be given a meaning which is consistent with the court being entitled to exercise its judicial functions in administering justice, one of which is giving judgment on a valid cause of action.

204. In my judgment, the judgments of the Court of Appeal in *R v R* are compelling support for that analysis, albeit that the factual situation there was judgment against a designated person rather than in his favour and that the Court was construing the 2014 EU Regulation and the 2014 Regulations. Arden LJ deals with the fundamental right of access to the court in [28] in the passage cited at [139] above, in particular when she says:

> "It would be contrary to the wife's fundamental right of access to court to prevent her from obtaining the valid and effective decision of the court in a member state as to the maintenance to which she was entitled, unless that right was clearly taken away by the EU Regulation."

Similar statements of principle in the judgments of Ryder LJ and Briggs LJ are quoted at [140] and [141] above, demonstrating that none of the members of this Court considered that either set of Regulations precluded the court from the exercise of its judicial functions, including the entry of judgment. It is to be noted that Article 2(2) of the 2014 EU Regulation uses the same words: "Made available" prohibiting the making available of funds to a sanctioned person. Given that analysis of the EU sanctions regime and the expressed intention of maintaining continuity with that regime post Brexit, it would be surprising, to say the least, if SAMLA and the Regulations had made such a radical change as to now preclude the entry of judgment. For the reasons I have given, I am clear that no such radical change was made.

205. Mr Rabinowitz KC's alternative case was that, if the entry of judgment was not prohibited by Regulation 12 it was prohibited by Regulation 11. As is apparent from [82] to [84] above, most of his argument on that Regulation was predicated upon a

cause of action being a fund. Since, for the reasons set out above a cause of action is not a fund but an economic resource, that argument must fail, as he essentially accepted.

206. His fall-back position, set out at [84] above was that, if the cause of action is an economic resource, then in obtaining judgment, the claimants would have used the cause of action in exchange for funds, namely the judgment debt, in breach of Regulation 11(5)(b) and section 60(4) of SAMLA. In my judgment, Mr Pillow KC is right that neither head of Regulation 11(5) is applicable here. Exchange of an economic resource for funds under 11(5)(a) contemplates handing over one asset in return for another and use in exchange in (b) equally contemplates the retention of the asset but its use in some way, for example as Mr Pillow KC submitted, by way of pledge. On the basis of the doctrine of merger on which the appellants placed much emphasis, the cause of action ceases to exist and is replaced by the judgment, so there is no exchange within the meaning of the Regulation.

207. There is also a problem with the appellants' analysis, given their acceptance that the claimants would not be using the cause of action in breach of the Regulations in commencing and pursuing the proceedings, up to and including closing submissions. It is the Court which enters judgment. The successful claimants merely ask the court to enter judgment, which is something the claimant would do in their submissions at trial, even though the making of those submissions is not, as Mr Rabinowitz KC accepted, a breach of the Regulations. The artificiality and illogicality of the appellants' submissions is thus exposed. Any suggestion that the claimants would be entitled to make their closing submissions, but could not ask the court to enter judgment, is nonsensical.

208. Any suggestion that the court would be in breach of Regulation 11(5) by entering judgment in favour of a designated person is even less convincing. The court would not receive anything in exchange for the cause of action. Furthermore, the words "dealing with" are simply not apt to describe the exercise by the court of its judicial function of entering judgment on a valid cause of action. As with "making available", on any ordinary use of words, the court cannot be said to be dealing with a cause of action when it enters judgment. The contrary suggestion is an artificial construct and ignores the wording of the Regulations as a whole, specifically Regulation 58(5). Since, on its correct construction that Regulation permits the entry of a judgment in respect of a pre-existing obligation, it follows that Regulation 11 cannot be construed as prohibiting the entry of such a judgment.

209. As with "making available", I have reached that conclusion irrespective of the application of the principle of legality. When that principle is applied, the suggestion that entering judgment is dealing with an economic resource is unarguable. The words "dealing with" are capable of more than one meaning for the reasons I have given. Whilst sections 1(5)(a) and 3(1)(a) of SAMLA together contemplate the making of Regulations for the freezing of funds (which in the event is Regulation 11) SAMLA does not address or define "dealing with" so there are no grounds for saying that SAMLA as the primary legislation contains a clear and unambiguous prohibition on the court entering a money judgment. Even if the appellants were right about their construction of "dealing with", any prohibition on the entry of judgment is only in the statutory instrument and so the fundamental right of access to the court is not curtailed and the principle of legality applies. As with "making available" the judgments in this

Court in *R v R* support the analysis that the legislation does not and is not intended to prohibit the court from exercising its core function of entering judgment.

210. In my judgment, none of the other provisions of SAMLA contains any clear and unambiguous curtailment on the right of access to the courts, including entry of judgment. On the contrary, I agree with the judge that section 44 of SAMLA is predicated on the designated person being able to pursue civil proceedings to judgment since otherwise the statutory defence under that section would be unnecessary. Accordingly, the primary legislation in this case does not curtail that right or prohibit the entry of a money judgment in favour of the designated person. As set out above, I have determined, without reference to the principle of legality, that on their proper construction Regulations 11 and 12 do not prohibit the entry of a money judgment, but that if it were necessary to have resort to the principle of legality, the words of those Regulations should be read down and construed so as not to curtail the right of access to the court including to have a claim adjudicated upon and if successful, to obtain a money judgment.

211. Given that conclusion, it is not necessary to determine whether other ways in which the claimants put their case, that the court is not a person or that, as an emanation of the Crown it is not bound by the Regulations, are correct. It would seem more sensible to leave determination of those issues to another case where they are necessary for the decision.

212. It is also not necessary to decide whether, even if the appellants were right that entry of a money judgment was prohibited by SAMLA and the Regulations, one or other of the alternatives (described by Mr Rabinowitz KC as workarounds) such as a declaratory judgment or judgment on liability with quantum deferred until sanctions were lifted, would not be prohibited. However, I am firmly of the view that, if the appellants were correct that entry of a money judgment was prohibited, it would not be appropriate to grant a stay of the proceedings either now or at any stage up to and including the trial. Given that the principle of legality requires, as Lord Reed JSC said in *UNISON* at [80], that the relevant provision is interpreted as authorising only such intrusion as is reasonably necessary to fulfil the objective of the provision in question, I consider that Mr Pillow KC is correct that the court could enter either a declaratory judgment or judgment on liability with quantum deferred. Such a judgment would not be either making funds available to the designated person or dealing with either a fund or an economic resource.

213. There is nothing in Mr Rabinowitz KC's suggestion that such a "workaround" would be contrary to the prohibition in Regulation 19 on circumvention of Regulations 11 or 12. On analysis, the entry of a declaratory judgment or judgment on liability would be a lawful way of vindicating the fundamental right of access to the court even though the entry of a money judgment would be unlawful. That is not circumvention, for the reason explained by Briggs LJ in *R v R* at [57]:

> "The starting point must be to ask whether the common objective sought to be achieved by the so-called normal and abnormal routes is itself one which the relevant regulatory regime seeks to prohibit or control. If it is, then the conclusion that the abnormal route is a circumvention may easily follow. If it is not, then the so-called abnormal route is (if, as here, not itself a breach of the

> regulatory regime) merely a lawful route to a lawful objective which circumvents nothing. It is merely the result of a sensible choice between a lawful and unlawful route to a common lawful objective. One may and should take care to avoid breaking the law, but that does not mean that avoidance is a circumvention of it."

214. In relation to the second issue on the appeal, the licensing issue, the relevant grounds are set out at [19] above. Contrary to the appellants' submissions, there is no question of these grounds being exceptions to sanctions to be construed narrowly. They are grounds for the grant of licences to be construed in the ordinary way. Where they apply, if OFSI grants a licence, the designated person is permitted to use or receive funds for the particular purpose.

215. The first sub-issue concerns adverse costs orders made by the court in favour of the other party against a designated person. In complex commercial litigation such as this case, there are likely to be a number of interlocutory applications, which may be decided either way by the court, for or against the designated person. The court may sometimes order costs in the case but if the application is a discrete one, may make an order for costs against the designated person. Such orders are a normal feature of complex commercial litigation. It would be surprising if OFSI could not licence the payment by a designated person of such adverse costs orders, particularly given that, even on the appellants' case, the pursuit of the proceedings to trial is not unlawful. If adverse costs orders could not be licensed, then the designated person would not be able to pay them and, if there were enough instances of non-payment of such orders, might find itself in a situation where the other party sought and obtained a stay of the proceedings until the orders were paid. That would frustrate the right of access to the court, through no fault of the designated person's own.

216. However, in my judgment the wording of paragraph 3 of Schedule 5: "to enable the payment of…reasonable professional fees for the provision of legal services" is neutral as to whether the legal services are being provided to the designated person or to another party and are wide enough to encompass both. As Mr Pillow KC submitted, this neutral wording is in stark contrast to the subsequently enacted paragraph 9M, which expressly limits a licence to the designated person's own legal fees in respect of correspondent bank relationships. If it had been intended that paragraph 3 should be similarly limited, it would either have said so at the outset or been amended when paragraph 9M was introduced.

217. None of Mr Rabinowitz KC's contrary arguments had any force. His submission that payment of an adverse costs order was not payment of the other party's legal fees takes too narrow and formalistic an approach. If one were considering a designated person's own legal fees, the provision clearly allows licensing of a voluntary payment of the fees, but it would be nonsensical if it did not also cover the situation where there is a dispute about the fees and the lawyers have obtained a court order, in relation to compliance with which the designated person seeks a licence. In each case, it is the professional fees which are being paid. The position should be no different in relation to adverse costs. On the basis that the wording of the provision is wide enough to cover an opposing party's fees, the provision would clearly entitle OFSI to issue a licence for voluntary payment by the designated person of the opposing party's fees. The

designated person should be no worse off because the opposing party has obtained an order from the court.

218. The suggestion that, if the claimants were right that a licence could be obtained for adverse costs orders, that would enable satisfaction of a post-designation judicial decision, since a costs order is a judicial decision, in circumstances where paragraph 6 only permits licences for satisfaction of pre-designation judicial decisions, is misconceived. As Mr Pillow KC submitted, the various licensing grounds are separate and cumulative. Furthermore, if this argument were right it would lead to the very odd result in relation to payment of a designated person's own fees to which I referred at [104] above: whilst the designated person could obtain a licence to pay its lawyers' fees voluntarily, if there had been a dispute and the lawyers had obtained a court order against the designated person, on this hypothesis, it could not obtain a licence. This would defeat the object of licensing in relation to legal fees, which must be, inter alia, to enable a designated person to conduct civil litigation.

219. Equally the suggestion that on the claimants' case the licensing regime would be open to abuse as the claimants could obtain a licence to pay unrelated legal fees such as those of a cleaner or chauffeur is fanciful. Regulation 64 enables the Treasury and thus OFSI to grant a licence on one of these grounds, but does not require it to do so. Whether to grant a licence is in OFSI's discretion and it would obviously not do so if the application was abusive or the designated person could not satisfy OFSI that it was under an obligation to make the relevant payment of fees.

220. There is also nothing in the point made by Mr Rabinowitz KC that the use of the word "reasonable" in paragraph 3 only made sense if the paragraph was limited to the designated person's own fees. As Mr Pillow KC pointed out, any order the court made that the designated person should pay the opposing party's costs would only be in respect of reasonable fees. Those would be likely to have been the subject of summary assessment by the court or the subject of an interim payment pending a detailed assessment.

221. Mr Rabinowitz KC sought to derive support for his narrow construction of paragraph 3 from the equivalent provision in the 2014 EU Regulation which provides: "reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services". He submitted that the reference to reimbursement suggests that the provision was intended to be limited to the designated party's own lawyers and given the claimants' emphasis on continuity, it would be odd if paragraph 3 were wider. I agree with Mr Pillow KC that reimbursement is only in the second part of the provision and does not limit: "reasonable professional fees" in the first part which is wide enough to cover both the designated person's fees and an opposing party's fees. Furthermore, as he submitted the word "reimbursement" is apt to cover the situation where an opposing party has already paid its fees and wants them reimbursed. The fact that the provision contemplates that any interested person, not just a sanctioned person can apply for a licence also supports giving it a broad interpretation rather than the narrow one which the appellants' argument would involve.

222. Given the conclusion that paragraph 3 covers adverse costs orders, it must also cover security for costs, as was common ground. In relation to paragraph 3, that leaves favourable costs orders. Mr Pillow KC pointed out that OFSI had issued a licence to enable the claimants to pay their lawyers' fees. To the extent that there were costs orders

in their favour ordering the appellants to pay them those fees, I agree that OFSI should be able to issue a licence enabling the appellants to comply with those orders and pay or reimburse the claimants in respect of those fees. As he said, there is no question of any payment pursuant to the licence representing a net gain to the claimants' funds and if OFSI could not grant such a licence to ensure a favourable costs order was enforced, an opposing party could take every unmeritorious point with impunity safe from any costs liability, which obviously cannot have been the intention of Parliament in passing the Regulations.

223. In relation to damages on the cross-undertaking for damages, as Mr Pillow KC pointed out, the claimants provided US$2 million security which was paid into their solicitors' client account. The appellants failed to persuade the court to increase the amount of security, from which it follows that this Court should proceed on the basis that they are adequately secured. This issue only arises if, probably in several years' time, the claimants lose the litigation and the court determines: (i) that the freezing injunction should never have been granted so that the undertaking in lieu given by the appellants should be discharged; (ii) that the appellants have suffered loss and damage as a consequence of the injunction and undertaking and (iii) that the damages recoverable exceed the US$2 million currently secured. In addition, the issue only arises if the sanctions are still in place. It is entirely speculative whether any of that ever happens. In my judgment, if it ever did, then, as the judge concluded, OFSI would be entitled to issue a licence to the claimants under Schedule 5 paragraph 5 on the basis that any liability for such damages in excess of the security would be an extraordinary expense of the claimants. Mr Rabinowitz KC sought to contend, by reference to the FCO Policy Note cited at [109] above, that an expense was not extraordinary unless it was unanticipated and out of the ordinary, which he submitted that a claim for damages on the cross-undertaking is not. However, the cases in which the court awards damages on a cross-undertaking are pretty few and far between and the particular circumstances in which the need for a licence might arise, as set out above, would be out of the ordinary and, effectively, unanticipated.

224. In any event, even if the appellants were right in contending that, in that remote eventuality, OFSI could not grant a licence to pay the additional damages, the contingency in question is as I have said, speculative and in all probability distant in point of time. In those circumstances, there is no basis whatsoever for an immediate stay of the proceedings let alone the discharge of the undertaking merely because that might happen in the future, especially given that, as matters stand, the appellants are fully secured.

225. In relation to the third, control issue, given my conclusions in favour of the claimants on the first two issues, the control issue does not arise, since, even if the first claimant, NBT, is a controlled person and therefore to be regarded as designated, both claimants are entitled to pursue the proceedings on which, if the claim is successful, the court will be able lawfully to enter a money judgment and the claimants are both entitled to the licences to which the second issue relates. Nonetheless, the control issue having been fully argued, and being of some general significance, I will address it, albeit briefly. For the reasons elaborated below, I have concluded that the first claimant is controlled within the meaning of Regulation 7 by Mr Putin and/or Ms Nabiullina. The judge's contrary conclusion, at which she arrived essentially by treating the second condition in Regulation 7(4) as an adjunct or backstop to the first condition in Regulation 7(2)

and concluding that there was a carve-out from the concept of control for political office, is not borne out by the clear and plain language of the Regulation. The judge evidently put an impermissible gloss on the language of the Regulation because of a concern on her part that, if the appellants were correct about the construction of the Regulation, the consequence might well be that every company in Russia was "controlled" by Mr Putin and hence subject to sanctions. If, as may well be the case, that is a consequence of giving Regulation 7 its correct meaning, then the remedy is not for the judge to put a gloss on the language to avoid that consequence, but for the executive and Parliament to amend the wording of the Regulations to avoid such a consequence.

226. In relation to the first condition in Regulation 7(2) the claimants argued that the use of "holds" in all three situations contemplated by that provision was directed at the shareholder level, effectively at ownership. Mr Davies KC submitted that Schedule 1, which contains rules for the interpretation of Regulation 7(2), is also concerned with the shareholder level and that paragraph 9 on which the appellants rely still uses the language of "holding" shares or rights. This is correct, but paragraph 9(3)(d) provides that A holds a majority stake in B if: "A has the right to exercise, or actually exercises, dominant influence or control over B." That wording is not concerned with ownership, but with influence or control. Mr Davies KC accepted what the wording of the rule provides but submitted that, given the overall context, (d) must be focusing on control as an economic owner in a personal capacity, not control through the exercise of an office or political position. The problem with this argument is that it involves reading into the rule words which are simply not there.

227. In my judgment, Mr Rabinowitz KC was correct that the wording of paragraph 9(3)(d) is apt to cover the case of a designated person who, for whatever reason, is able to exercise control over another company irrespective of whether the designated person has an ownership interest in the other company, economic or otherwise. This concept of control not dependent on ownership, is borne out by paragraphs 11 and 12 (quoted at [112] above). I agree with Mr Rabinowitz KC that these rules are apt to catch a designated person who, without being an owner, has sufficient influence or power, possibly through a contract under paragraph 12, to control the exercise of a right held by another. There is nothing in the wording of either paragraph to support the contention by Mr Davies KC that these two paragraphs are simply providing an equivalent to the position of a nominee (dealt with separately under paragraph 10) in relation to rights to appoint or remove a director.

228. Thus, although the first condition is primarily concerned with ownership, it also deals, as those paragraphs make clear, with holding a right through control rather than or irrespective of ownership. This is scarcely surprising since the whole Regulation is concerned with the meaning of "owned or controlled directly or indirectly" and Regulation 7(1) makes clear that a company is owned or controlled directly or indirectly by another if either of the two conditions is met. In other words both conditions relate to ownership or control, and it is not the case that the first condition is concerned with ownership and the second with control.

229. The second condition is in wide terms and, as Mr Rabinowitz KC correctly submitted, the use of the words: "in all the circumstances" and "by whatever means" makes it clear that the provision does not have any limit as to the means or mechanism by which a designated person is able to achieve the result of control, that the affairs of the company

are conducted in accordance with his wishes". Mr Rabinowitz KC's description of Regulation 7(4) as applying when the designated person "calls the shots" is an apt one.

230. There is simply nothing in the wide wording of Regulation 7(4) to justify the judge's conclusion at [237] of her judgment that Regulation 7(4) is somehow ancillary to Regulation 7(2), backstopping the latter provision as she put it or as the claimants submitted "plugging the gap" where the designated person has effective personal control. This was a submission which Mr Davies KC repeated before this Court, contending that Regulation 7(4) dealt with cases of more complex structures, not easy to fit into Regulation 7(2) such as discretionary trusts, Liechtenstein Anstalts or Jersey foundations. He also submitted that Regulation 7(4) was concerned with the designated person acting in a personal capacity not covering state officials or directors and managers, which is essentially the point about "effective personal control". However, as Mr Rabinowitz KC pointed out there is nothing in the wide wording of Regulation 7(4) to limit it to cases of some form of personal control. The claimants' limitation to personal control is an impermissible rewriting of Regulation 7(4). Furthermore, the example of a discretionary trust given by judge at [237] of her judgment referred to at [80] above is one which accepts that the designated person has control without any ownership interest. As Mr Rabinowitz KC said, at that point the concept of "effective personal control" becomes meaningless because one form of non-ownership control is no more or less personal than another.

231. The judge concluded at [246] and [247] that, in effect, there was a carve-out from Regulation 7(4) for control through political office, though she rejected the claimants' wider proposed carve-out to exclude control through corporate office. However, I agree with Mr Rabinowitz KC that there is no justification for any such political carve-out and still less for a corporate carve-out in the wording of the Regulation, which does not distinguish between different forms of non-ownership control or calling the shots. I also agree with him that given the potential uncertainty as to what would count as political office, if such a political carve-out had been intended by the legislature, it would have been carefully and expressly addressed in the legislation. The judge also rightly rejected the corporate carve-out on the basis that it increased the scope for circumvention of the Regulation. In my judgment, she should have rejected the political carve-out for the same reason.

232. Mr Davies KC's attempt to avoid the clear and wide meaning of Regulation 7 by reference to the presumption against doubtful penalisation was misconceived, for the reasons given by Mr Rabinowitz KC as summarised at [120] above. There is no uncertainty as to elements of any offence and no genuine ambiguity as to the meaning of Regulation 7. Its wording is clear and supports the appellants' case and the fact that the claimants disagree does not create ambiguity. Furthermore, the claimants' construction of Regulation 7 would lead to greater uncertainty rather than resolving uncertainty. Popplewell LJ put this point to Mr Davies KC in argument, but his response of referring the Court to *Bogdanic* did not really answer the point and he was reduced to saying that the presumption was no more than a relevant consideration. Even if that watered down point were correct, it cannot overcome the clear wording of the Regulation which catches the designated person who calls the shots, as Mr Rabinowitz KC put it.

233. Mr Davies KC also relied upon passages in *Bennion* about avoiding a construction which leads to absurd consequences. However, it seems to me that the answer to that

point is the one which Mr Rabinowitz KC gave, that the absurd consequences arise not from giving the Regulation its clear and wide meaning but from the subsequent designation by the Government of Mr Putin, without having thought through the consequences that, as he put it, Mr Putin is at the apex of a command economy. In those circumstances, consistently with the concession I mentioned in [63], in a very real sense (and certainly in the sense of Regulation 7(4)), Mr Putin could be deemed to control everything in Russia. I consider this the one aspect of the case where Mr Rabinowitz KC was right in saying that the judge and the claimants were not applying the *Duport Steels* principle set out at [90] above and were not distinguishing between interpretation of legislation and its application.

Conclusion

234. For all the above reasons, although I would have found for the appellants on the third issue, since they have lost on the first two issues, the appeal must be dismissed.

Lord Justice Popplewell

235. I agree.

Lord Justice Newey

236. I also agree.