Neutral Citation Number: [2024] EWCA Civ 1168

Case No: CA-2023-002531

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Swift & Mr Justice Bright
[2023] EWHC 2969 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2024

Before:

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal (Civil Division))
LORD JUSTICE SINGH
and
LORD JUSTICE MALES

- -

Between:

THE KING **on the application of** **(1) ELLIOTT ASSOCIATES L.P.** **(2) ELLIOTT INTERNATIONAL L.P.**	**Appellants/ Claimants**
- and -	
(1) THE LONDON METAL EXCHANGE **(2) LME CLEAR LIMITED**	**Respondents/ Defendants**

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Monica Carss-Frisk KC and Jason Pobjoy (instructed by **Akin Gump LLP)** for the **Appellants**
Jonathan Crow KC, James McClelland KC, Rebecca Loveridge and Alastair Richardson (instructed by **Hogan Lovells International LLP)** for the **Respondents**

Hearing dates: 9, 10 & 11 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

Introduction

1. In the early hours of 8th March 2022 there was a dramatic and unprecedented spike in the price of 3M nickel (i.e. nickel due for delivery in three months' time) traded on the London Metal Exchange ('the LME'). At one point the price rose to over US $100,000 per tonne, which compared with a closing price for the previous day's trading of US $48,078, itself a substantial increase from that day's opening price of just under US $30,000. As a result, the LME decided that the market had become disorderly, and that nickel trading should be suspended. This decision was announced to the market at 08:15 on the morning of 8th March in LME Notice 22/052.

2. That left two matters to be considered.[1] The first was: what was the price against which LME Clear, the clearing house of the LME, should set the intra-day margin requirements for a call on members to be made later that day? This was a decision for LME Clear, and in particular its CEO, Mr Adrian Farnham. The second was: what should be done about the trades which had been concluded during the period before the suspension of trading? This was a decision for the LME, and in particular its CEO, Mr Matthew Chamberlain. The two matters were interrelated because Mr Farnham made it clear that the setting of margin would depend on whether those trades stood. If they stood, margin would have to be called by reference to the prices of those trades. If that happened, it was calculated that a total of some US $19**.**75 billion would have to be provided at short notice by LME members, in which case there were concerns that there would be multiple defaults.

3. In these circumstances Mr Chamberlain decided, pursuant to a provision contained in the LME Rules, that all trades concluded since midnight at the beginning of 8th March should be cancelled. This decision was announced to the market at 12:05 in LME Notice 22/053.

4. The claimants/appellants (together 'Elliott') say that this cancellation caused them to lose net profits totalling about US $456 million which would have been made on the nickel trades agreed by them between midnight on 8th March and the suspension of trading at 08:15. They say that the decisions of the LME and LME Clear (together 'the defendants') were unlawful as a matter of domestic public law and constituted a breach of their Convention rights under the Human Rights Act 1998, specifically their rights under Article 1 of the First Protocol ('A1P1').

5. Because section 291 of the Financial Services and Markets Act 2000 ('FSMA 2000') excludes the defendants' liability in damages for anything done in the discharge of their regulatory functions unless (1) the act in question was in bad faith (which is not alleged here) or (2) the act was unlawful as a result of section 6(1) of the Human Rights Act, any claim for damages will depend upon Elliott succeeding on its claim for breach of A1P1. However, the domestic law issues remain important, not only in themselves, but also because any interference with Elliott's possessions will be unlawful under A1P1 if it was not in accordance with law.

[1] In fact there were three, but we are not concerned with the third matter.

6. A hearing before Mr Justice Swift and Mr Justice Bright sitting as a Divisional Court dealt with Elliott's claim for judicial review and with liability issues in respect of their claim for damages under A1P1, leaving issues of remedy to be determined later if necessary. The Divisional Court held that the defendants had acted lawfully and that the claim under A1P1 failed. Elliott now appeals to this court. A similar claim was made by another claimant, Jane Street Global Trading LLC ('Jane Street'), which was also dismissed by the Divisional Court, and in respect of which there has been no appeal.

7. In brief outline, Elliott contends on this appeal that:

   (1) The Divisional Court wrongly attached significance to the contractual context in which the power to cancel was exercised, thereby diluting the protection provided by the applicable public law principles.

   (2) The LME did not have the power to cancel the trades.

   (3) The LME's decision to cancel the trades was tainted by procedural unfairness because it took no steps to give Elliott an opportunity to make representations.

   (4) The decision to cancel was irrational and made for an improper purpose.

   (5) The decision to cancel was unlawful because Mr Chamberlain irrationally failed (a) to investigate the cause of the price movements, (b) to appreciate that the LME's own Trading Operation Team ('TOT') had suspended the 'price bands' for nickel earlier that morning, and (c) to determine the point in time at which the market had become 'disorderly'.

   (6) The Divisional Court was wrong to decide that Elliott's contractual rights arising from the trades which it had concluded did not qualify as 'possessions' for the purpose of A1P1.

   (7) The Divisional Court ought to have concluded that the cancellation involved an interference with Elliott's peaceful enjoyment of its possessions under A1P1, and that such interference was unlawful or otherwise unjustified.

Background

8. I can take the background substantially from the judgment of the Divisional Court.

The claimants

9. Elliott is an experienced commodity trader, with substantial expertise in derivative contracts including nickel futures. In the third quarter of 2021, it formed the view that the price of nickel was likely to increase in 2022. Accordingly it entered into a series of call options entitling it to buy nickel at predetermined strike prices between US $23,000 and US $27,000 per tonne. As a result, when the price rose substantially on 7th March 2022, and even more dramatically in the early hours of 8th March, it was in a position to sell at a handsome profit.

The defendants

10. The LME describes itself as the world's leading trading venue for industrial metals, including nickel. It is a 'recognised investment exchange' or 'RIE' for the purposes of Part XVIII of FSMA 2000. As an RIE, it has the regulatory functions set out in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges, Clearing Houses and Central Securities Depositories) Regulations 2001 (SI 2001/995) ('the Recognition Requirements Regulations').

11. Trading on the LME is governed by the LME Rules and Regulations ('LME Rules'), which include the Trading Regulations ('TRs') set out in Part 3 of the Rules. One of the key objectives identified in the Recognition Requirements Regulations, and acknowledged in the LME Rules, is to maintain a fair and orderly market.

12. LME Clear is a 'recognised central counterparty' for the purposes of Part XVIII of FSMA 2000 and an authorised 'central counterparty' or 'CCP' under the UK European Market Infrastructure Regulation ('UK EMIR', the assimilated EU Law[2] version of Regulation (EU) 648/2012). LME Clear's operations are governed by the LME Clear Limited Rules and Procedures ('LME Clear Rules').

13. As a recognised clearing house and CCP, LME Clear is at the centre of every transaction concluded on the LME. It is the seller to every buyer and the buyer to every seller. It is therefore the effective guarantor of every contract concluded on the LME, eliminating the counterparty risk which would otherwise exist (and which does exist for contracts concluded between traders on the 'over the counter' market). In the event of a default, LME Clear will step in and manage the defaulting party's outstanding risk positions.

14. Each of the defendants is ultimately owned by Hong Kong Exchanges and Clearing Limited. They have public law obligations as regulators and their decisions are amenable to judicial review. They are 'public authorities' for the purpose of the Human Rights Act.

15. The LME and LME Clear have separate boards of directors, although some individuals are on both boards. Each board has delegated its responsibility for overseeing all day-to-day business to its CEO. The LME and LME Clear each has an Executive Committee ('ExCom') to assist the CEO in decision-making, as well as various other committees with specified responsibilities.

16. Although LME and LME Clear have a common ownership and overlapping boards of directors and senior managers, they are separate entities with distinct responsibilities.

The contractual structure for trading on the LME

17. Only LME Members can trade directly on the LME. Members have to satisfy the requirements for membership and submit to being bound by the LME Rules. This means (among other things) that Members submit to their trades being regulated by the LME, in accordance with the LME Rules.

18. There are several categories of Members. One such category consists of Clearing Members, who are members of both the LME and LME Clear and are entitled to contract with LME Clear as principals. Clearing Members submit to be bound not only

[2] Strictly, 'retained EU law' until 31st December 2023 and 'assimilated EU law' thereafter.

by the LME Rules but also by the LME Clear Rules, and thus submit to having their clearing activities regulated by LME Clear.

19. Traders who are not Members can only trade on the LME indirectly, by dealing with LME Members as their 'Clients' (this being the term used in the LME Rules and LME Clear Rules). Elliott was not a Member. In order to participate in transactions on the LME, it had to agree the commercial terms of a trade (commodity, price, volume) either with its designated Clearing Member or with another Member who would then 'give up' the trade to Elliott's designated Clearing Member. All Members and Clearing Members are obliged under the LME Rules (specifically, TR 2.6) to ensure that their contracts with non-Member clients such as Elliott incorporate and are subject to the LME Rules.

20. In effect, therefore, non-Members such as Elliott who trade on the LME agree to be bound by the LME Rules, and by decisions made by the LME in accordance with those Rules, even though they are not Members and have no direct contractual nexus with the LME.

21. The transactions that have given rise to these proceedings were predominantly sales. However, because all LME transactions have to proceed via LME Clear as the CCP, and because non-Members cannot deal with LME Clear, a more complex contractual structure was required. This is relevant to the claim under A1P1 which depends upon Elliott having been deprived of a 'possession' by the cancellation decision. The structure was as follows:

    (1) Elliott would first agree the commercial terms of the trade with its ultimate buyer. In the language of the LME Rules, this would be an 'Agreed Trade' or a 'Contingent Agreement to Trade': both terms are used in the Rules but for present purposes there is no distinction between them.

    (2) Elliott would then conclude an agreement to sell the nickel on these commercial terms to its designated Clearing Member (or with another Member who would 'give up' the contract to the designated Clearing Member).

    (3) The Clearing Member would then conclude a back to back contract to sell the nickel to LME Clear, by entering the commercial terms into the LME's system. This contract would be concluded when administrative checks were completed and the terms were 'matched' with the equivalent contract entered into the LME system by Elliott's counterparty (if the counterparty was a Clearing Member) or its designated Clearing Member (if it was not).

22. Only at this stage would binding contracts of sale come into being. In the terminology of the LME Rules, these would be a 'Cleared Contract' between LME Clear and the Clearing Member, and a back to back 'Client Contract' between the Clearing Member and Elliott. Until this happened, Elliott had only an 'Agreed Trade' or a 'Contingent Agreement to Trade'. Such an agreement is a legally binding contract, enforceable by arbitration, but it is not a contract of sale. It is a contract imposing mutual obligations to submit the particulars of the Agreed Trade into the LME Clear matching system so that a Cleared Contract and a Client Contract, which are contracts of sale, will come into being. This is explained in TR 2.10, which provides as follows:

> ‘2.10 **Contingent Agreement to Trade**
>
> 2.10.1 The terms of a Contingent Agreement to Trade shall be as set out below: …
>
> (b) where only one party to the Contingent Agreement to Trade is a Member, the Member shall:
>
> (i) be responsible for submitting the particulars of the Agreed Trade into the Matching System …
>
> (ii) ensure that its terms of business with the other party (being a Client)… specify that any Contingent Agreement to Trade shall come into effect pursuant to such terms of business, and shall incorporate and be subject to, these Rules…”
>
> 2.10.3 In the event that a Member that is party to a Contingent Agreement to Trade fails to fulfil its obligations to submit the particulars of the Agreed Trade into the Matching System within the timescales specified in Regulation 3.5: …
>
> (b) the Member shall be in breach of the Contingent Agreement to Trade and the Member acknowledges that it shall be liable to the other party to the Contingent Agreement to Trade for any loss suffered by such party as a consequence of such breach …
>
> 2.10.4 Any dispute between the parties to a Contingent Agreement to Trade shall, unless resolved between the parties, be referred by either party to arbitration in accordance with the Arbitration Regulations.
>
> 2.10.5 For the avoidance of doubt, a Contingent Agreement to Trade shall not itself be a derivative contract for the purpose of EMIR or MiFID II, although the Cleared Contracts and any Client Contracts that arise pursuant to the Execution of the Agreed Trade to which the Contingent Agreement to Trade relates may be derivative contracts for such purposes.’

23. Thus, although TR 2.2.3 provides that ‘An Agreed Trade shall not itself constitute a binding contractual agreement between the parties to the Agreed Trade (whether as a Cleared Contract or otherwise) unless and to the extent otherwise specified in these Rules’, TR 2.10 does specify otherwise, so that an Agreed Trade or Contingent Agreement to Trade does constitute a binding contractual agreement to the extent specified in TR 2.10.

24. Precisely how the process of converting a Contingent Agreement to Trade into a Client Contract takes place, and how rapidly, depends on which LME venue has been used. Some trades are concluded by open outcry on a physical trading floor (‘the Ring’); some on the LME electronic trading system, LMEselect, in which case the process is

extremely rapid; and some occur in the inter-office market and are entered on the LMEsmart system. Elliott's trades in the early hours of 8th March 2022 were concluded in the inter-office market. By the time when the contracts were cancelled, all relevant details had been entered into the LMEsmart system, but the matching process had not been completed. Accordingly the Members with whom Elliott had concluded Contingent Agreements to Trade had performed all of their obligations under those agreements, but Elliott did not yet have any Client Contracts.

The LME Trading Operations Team and price bands

25. The LME operates various pre-trade controls and volatility controls, including 'price bands' which are monitored and adjusted by the TOT. If a Member seeks to book a trade outside the bands, it will not be accepted by the relevant trading platform, but will automatically be rejected. This is subject to those involved indicating that the trade reflects their actual intention. They do this by simply contacting the TOT to confirm that the trade is genuine and not a mistake, and the trade is then booked as normal. Accordingly the price bands do not prevent trading outside the prices set by the bands, but merely ensures that such trades are only permitted where they are genuine and not a mistake.

Margin

26. LME Clear's role as a CCP means that it is exposed to the risk of default on both sides of the trade. Under the LME Clear Rules, on every trade the Clearing Member must deposit funds or provide equivalent collateral (known as 'margin') to cover some (but not all) of LME Clear's estimated liabilities in the event of default. The extent of those liabilities will depend on the market price, as damages for default are likely to be based on the difference between the contract price and the market price at the date of default. Accordingly, the amount of any margin call will be calculated by reference to the most up-to-date market price available.

27. 'Initial Margin' is required when a Clearing Member enters into a futures contract and is adjusted daily; 'Variation Margin' is required (sometimes intra-day) if price movements mean that LME Clear is no longer sufficiently protected. There is also an assessment at the end of each business day, when LME Clear uses closing prices to calculate further margin requirements, which are due for payment by 09:00 the next day. Intra-day margin calls must be paid within one hour (apart from the first intra-day margin call, which must be paid before 09:00). These calls reflect price movements and can affect all Clearing Members who have open positions in a given metal, not just those who have entered into trades that day.

28. These margin assessments are not performed only on nickel trades. Each Member, and certainly each Clearing Member, trades on a regular basis in many other metals. The assessment of margin therefore takes account of all the trading that has been done, by all Clearing Members, on all metals.

29. As a CCP, LME Clear has a regulatory obligation to collect sufficient margin to cover its potential exposures. Article 40 of UK EMIR requires it to measure and assess its liquidity and credit exposures 'on a near to real-time basis':

'*Article 40*

Exposure management

> A CCP shall measure and assess its liquidity and credit exposures to each clearing member and, where relevant, to another CCP with which it has concluded an interoperability arrangement, on a near to real-time basis. A CCP shall have access in a timely manner and on a non-discriminatory basis to the relevant pricing sources to effectively measure its exposures. This shall be done on a reasonable cost basis.'

30. More specifically, Article 41 deals with margin requirements:

> '*Article 41*
>
> **Margin requirements**
>
> (1) A CCP shall impose, call and collect margins to limit its credit exposures from its clearing members and, where relevant, from CCPs with which it has interoperability arrangements. Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant positions. They shall also be sufficient to cover losses that result from at least 99% of the exposures movements over an appropriate time horizon and they shall ensure that a CCP fully collateralises its exposures with all its clearing members, and, where relevant, with CCPs with which it has interoperability arrangements, at least on a daily basis. A CCP shall regularly monitor and, if necessary, revise the level of its margins to reflect current market conditions taking into account any potentially procyclical effects of such revisions.
>
> (2) A CCP shall adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared and take into account the interval between margin collections, market liquidity and the possibility of changes over the duration of the transaction. The models and parameters shall be validated by the competent authority.
>
> (3) A CCP shall call and collect margins on an intraday basis, at least when predefined thresholds are exceeded. …'

31. I draw attention to the fact that it is for the CCP, as an expert body, to make an estimate of the margin needed to cover its potential exposures ('Such margin shall be sufficient to cover potential exposures *that the CCP estimates* will occur until the liquidation of the relevant positions'). Moreover, the reference in Article 40 to 'a near to real-time basis' underlines the need for margin calls to be made promptly, as does the requirement to collect margins 'on an intraday basis' in order to avoid a situation where the CCP is exposed to counterparty risk even for a short time.

The LME's power to cancel trades

LME Rules, TR 22

32. When Mr Chamberlain decided, first to suspend trading, and then that trades concluded after midnight on 8th March 2022 should be cancelled, he was acting in reliance on TR 22 of the LME Rules. This provides:

> '22. ORDER CANCELLATION AND CONTROLS
>
> 22.1 Notwithstanding, and without prejudice to, the general power set out at Trading Regulation 1.3, the Exchange may temporarily halt or constrain trading in accordance with the relevant procedures established by Notice if there is a significant price movement during a short period in a financial instrument on the Exchange or a related trading venue (as such term is defined in Article 4(1)(24) of the MiFID II Directive). Where the Exchange considers it appropriate, the Exchange may cancel, vary or correct any Agreed Trade or Contract.'

33. This Regulation is binding on those who trade on the LME as a matter of contract, but the power to cancel is one which the LME is obliged to have by legislation which can be traced back to Directive 2014/65/EU of 15th May 2014 on Markets in Financial Instruments ('MiFID II'). It forms part of the LME's armoury designed to ensure that trading on the LME is conducted in an orderly manner.

MiFID II

34. The requirement for orderly trading derives from Article 47 of MiFID II, which provides:

> '*Article 47*
>
> **Organisational requirements**
>
> 1. Member States shall require the regulated market:
>
> …
>
> (d) to have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders; …
>
> (f) to have available, at the time of authorisation and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.'

35. This requirement is further developed in Article 48:

> '*Article 48*

> **Systems resilience, circuit breakers and electronic trading**
>
> 1. Member States shall require a regulated market to have in place effective systems, procedures and arrangements to ensure its trading systems are resilient, have sufficient capacity to deal with peak order and message volumes, are able to ensure orderly trading under conditions of severe market stress, are fully tested to ensure such conditions are met and are subject to effective business continuity arrangements to ensure continuity of its services if there is any failure in its trading systems.
>
> …
>
> 5. Member States shall require a regulated market to be able to temporarily halt or constrain trading if there is a significant price movement in a financial instrument on that market or a related market during a short period and, in exceptional cases, to be able to cancel, vary or correct any transaction. Member States shall require a regulated market to ensure that the parameters for halting trading are appropriately calibrated in a way which takes into account the liquidity of different asset classes and sub-classes, the nature of the market model and types of users and is sufficient to avoid significant disruptions to the orderliness of trading. …'

36. MiFID II was implemented in the UK by the Recognition Requirements Regulations. Paragraph 3 of Schedule 1 (headed 'Systems and controls') requires an RIE to ensure that it has adequate, effective and appropriate systems and controls to ensure (among other things) 'orderly trading under conditions of severe market stress', and paragraph 3A (headed 'Market making agreements') in effect requires the RIE to ensure that its Members conduct business on the exchange in accordance with its Rules.

37. Paragraph 3B deals with halting trading and cancellation of transactions:

> 'Halting trading
>
> 3B—
>
> (1) The exchange must be able to—
>
> (a) temporarily halt or constrain trading on any trading venue operated by it if there is a significant price movement in a financial instrument on such a trading venue or a related trading venue during a short period; and
>
> (b) in exceptional cases cancel, vary, or correct, any transaction.
>
> (2) For the purposes of sub-paragraph (1) the exchange must ensure that the parameters for halting trading are calibrated in a way which takes into account —

> (a) the liquidity of different asset classes and sub-classes;
>
> (b) the nature of the trading venue market model; and
>
> (c) the types of users, to ensure the parameters avoid significant disruptions to the orderliness of trading.'

38. It was common ground that although TR 22 refers to trades being cancelled 'where the Exchange considers it appropriate', that provision must be read as including the requirement of 'exceptional circumstances' contained in Article 48(5) of MiFID II and paragraph 3B of the Recognition Requirements Regulations from which it is derived.

39. The importance of orderly trading is also emphasised in other provisions of the Recognition Requirements Regulations. For example, paragraph 4 provides that:

> 'Safeguards for investors
>
> 4—
>
> (1) The exchange must ensure that business conducted by means of its facilities is conducted in an orderly manner and so as to afford proper protection to investors.
>
> (2) Without prejudice to the generality of sub-paragraph (1), the exchange must ensure that—
>
> (a) access to the exchange's facilities is subject to criteria designed to protect the orderly functioning of the market and the interests of investors …;
>
> (aa) it has transparent rules and procedures—
>
> (i) to provide for fair and orderly trading, and
>
> (ii) to establish objective criteria for the efficient execution of orders; …'

40. Paragraph 9ZB(1) provides that:

> 'Specific requirements for regulated markets: admission of financial instruments to trading
>
> 9ZB—
>
> (1) The rules of the exchange must ensure that all—
>
> (a) financial instruments admitted to trading on a regulated market operated by it are capable of being traded in a fair, orderly and efficient manner;
>
> (b) transferable securities admitted to trading on a regulated market operated by it are freely negotiable; and

> (c) contracts for derivatives admitted to trading on a regulated market operated by it are designed so as to allow for their orderly pricing as well as for the existence of effective settlement conditions.'

41. The legislation contains no definition of what is meant by 'orderly trading', although guidance has been produced by the International Organisation of Security Commissions ('IOSCO') as follows:

> 'With respect to derivatives markets, an orderly market may be characterized by, among other things, parameters such as a rational relationship between consecutive prices, a strong correlation between price changes and the volume of trades, accurate relationships between the price of a derivative and the underlying commodity and reasonable spreads between near and far dated contracts. Numerous conditions can negatively affect trading and the characteristics of an orderly market, ranging from technical errors in the trading system, "fat finger" mistakes, overreactions to major news or rumors such as embargoes or natural disasters that might affect supplies of commodities, or an unmanaged imbalance between long and short positions resulting from large concentrated positions.'

42. A definition of a 'disorderly market' has also been produced by the National Association of Securities Dealers Automatic Quotation System ('NASDAQ'), a US-based exchange:

> 'A characterization of market conditions whereby there is excessive volatility at a time when there is no news. The volatility is often caused by order imbalances. In some markets, shorts trying to cover can cause disorderly conditions. If disorderly conditions arise, sometimes trading is halted.'

43. These do not purport to be exhaustive definitions of what constitutes disorderly trading. However, it is apparent from the provisions which I have set out that the obvious circumstance in which it is contemplated that disorderly trading may occur such that it may be necessary to suspend trading pursuant to TR 22.1 will be when there is a 'significant price movement … during a short period', and that cancellation of transactions which have been concluded during this period may be appropriate when such a price movement has occurred to an exceptional degree. The fact that these provisions form part of the LME's controls to ensure 'orderly trading under conditions of severe market stress' (paragraph 3 of Schedule 1 of the Recognition Requirements Regulations) is also relevant. While the legislation does not say that a significant price movement during a short period is the only circumstance in which a market may become disorderly, or cancellation of transactions may be appropriate, this can fairly be regarded as the paradigm case so far as the legislation is concerned. Similarly, the existence of 'an unmanaged imbalance between long and short positions resulting from large concentrated positions' (IOSCO) and 'shorts trying to cover' (NASDAQ) can be regarded as examples which may create disorderly market conditions.

44. It is apparent also, from the fact that an RIE is obliged to ensure that it has the power to suspend trading and even to cancel transactions lawfully entered into, that the exercise of these powers is intended to protect the market and those who trade in it, as well as those in the wider economy who would be adversely affected if the market ceased to function properly. It is common ground that the power to cancel trades must be exercised in accordance with public law principles.

The events of 7th and 8th March 2022

45. It is necessary to set out the events of 7th and 8th March 2022 in some detail in order to show quite how unprecedented, urgent and potentially catastrophic the circumstances were in which Mr Chamberlain had to decide whether the trades concluded in the early morning of 8th March should be cancelled. Again, I take this account largely from the judgment of the Divisional Court.

The increase in the nickel price

46. In the days leading up to 7th March, 3M nickel traded at prices between about US $27,000 and US $29,000 per tonne. The first notable price rise in a single day occurred on Friday 4th March, when the market opened at US $27,080 per tonne and closed at US $28,919, an increase of 6.8%. This was itself a significant increase by historical standards. However, Mr Chamberlain and the LME viewed it as explicable in the geopolitical circumstances resulting from the Russian invasion of Ukraine on 24th February. As a result of this price rise, LME Clear made what was then an unprecedented intra-day margin call of about US $2.6 billion in total. This was 40% higher than the previous record.

47. Prices then rose steeply on 7th March, to slightly below US $50,000 per tonne. To put this in context, this one-day price rise of 69% was nearly five times greater than the next biggest move in nickel prices which had occurred in the previous 20 years. Despite this, it remained Mr Chamberlain's view that the market was still orderly, as he considered that the price rise was due to rational factors associated with the situation in Ukraine and the market's fear of supply constraints arising from sanctions. Although Mr Chamberlain did not articulate the point in quite this way, this is another way of saying that the increase in the 3M futures price was explicable in the light of the likely future increase in the price of physical nickel as a result of potential supply shortages, so that there remained a rational relationship between the physical and futures prices.

48. During 7th March LME Clear imposed several margin calls as the price rose. These totalled about US $7.05 billion, almost three times the previous trading day's figure, which had itself been a record. The first of these calls was due to be paid at 09:00 on 7th March. Three Clearing Members failed to pay on time. One of these remained in default until the end of the day and was sent a Notice of Default Event letter.

49. The spike that followed within the first few hours of 8th March 2022 was considerably greater still, from slightly below US $50,000 to a peak of US $101,365 (at 06:08), a rise of over 100% in about 5 hours.

50. At around 04:49, at which time the price had risen to about US $60,000, the LME's TOT suspended the price bands as it had become clear that trades were being concluded

at prices in excess of the upper limit of the bands, and that these were genuine trades and not mistakes.

51. By 06:00 the price had risen above US $100,000. It peaked at 06:08, at US $101,365, and then fell back, but the price was consistently above US $80,000 from 07:00 until the suspension of trading at 08:15.

The claimants' trades

52. Elliott agreed various trades between 04:23 and 08:07, with several Members. They were executed on the inter-office market. The trades were not fully cleared and did not result in Client Contracts between Elliott and any Clearing Member.

The decision to suspend trading

53. Mr Chamberlain woke up at about 05:30. He checked the market, noted that the price of nickel had risen since the opening and watched it continue to rise. He did not know the precise cause of the price movements on 8th March but could not identify any relevant macroeconomic or geopolitical factors that would explain them. On this basis, by about 05:50, he concluded that the market had become disorderly. He made an approximate calculation of the likely increase in the intra-day margin requirement, estimating that it would be more than US $10 billion. He was concerned that some market participants would be unable to pay. From about 06:00 he started receiving calls and messages from several Members expressing concern about their likely margin calls.

54. Mr Chamberlain was then in contact with other senior people within the LME and LME Clear. His view by this point was that there was a problem in the market which was not connected to the geopolitical or macroeconomic situation. He thought that the price movements could not be explained by rational market forces.

55. At 07:24, Mr Paul Kirkwood, LME Clear's Head of Market Risk, circulated a spreadsheet showing the margin call calculation based on a price as at 07:00 of about US $80,000, Members' current open positions and LME Clear's assessment of Members' creditworthiness ('the First Risk Default Spreadsheet'). This showed that the additional margin required would total US $19.75 billion, to be paid by 09:00. This was much greater than the figure Mr Chamberlain had estimated. On this basis, at least five Members were expected to default and Mr Chamberlain considered that four others, and possibly more, would be at risk of default. He was aware that a number of Members had already struggled to meet the unprecedented margin calls made on 7th March.

56. By 07:30 Mr Chamberlain had formed the view that trading should be suspended and had prepared a draft Notice. At 07:30 he and other executives from the LME and LME Clear held a remote meeting to discuss that view. The meeting lasted for about 25 minutes. The decision to suspend nickel trading was confirmed.

57. At 08:15 the LME issued Notice 22/052, as follows:

> 'Subject: **SUSPENSION OF LME NICKEL MARKET**
>
> **Summary**

1. Following further unprecedented overnight increases in the 3 month nickel price, the LME has made the decision to suspend trading for, at minimum, the remainder of today (Tuesday 8 March 2022).

Background

2. The LME, in close discussion with the Special Committee, has been monitoring the LME market and the effect of the evolving situation in Russia and Ukraine. It is evident that this has affected the nickel market in particular, and given price moves in Asian hours this morning the LME has taken this decision on orderly market grounds.

3. …

Actions

4. Trading of the LME Nickel contract on all venues of the LME market will be suspended as of 0815 (London time) on 8 March 2022.

5. Trading will be disabled in LMEselect, and nickel trading will not be permitted on the Ring. Additionally, inter-office trades should not be booked for nickel after this time.

6. Margin on the LME Nickel contract will, for the present time, be calculated on the basis of Closing Prices on 7 March 2022. LME Clear will consider what additional measures, if any, should be taken from a risk management perspective.

7. The LME's other contracts will continue to trade as normal, but will be closely monitored.

Next steps

8. The LME will actively plan for the reopening of the nickel market, and will announce the mechanics of this to the market as soon as possible. The LME will give consideration to a possible multi-day closure, given the geopolitical situation which underlies recent price moves. In this context, the LME will also make arrangements to deal with upcoming deliveries.

9. The Exchange will further consider whether trades booked prior to 0815 today should be subject to reversal or adjustment, and will again update the market as soon as possible.

Questions

> 10. Members who have questions regarding this process should contact their Relationship Manager.'

58. Although Elliott was not an LME Member, it learned of the contents of this Notice within minutes.

The decision to cancel trades

59. This Notice identified two matters in particular as requiring further consideration. The first was what further margin calls needed to be made, a provisional decision having been made that margin would for the time being be calculated on the basis of the 7th March closing price (para 6). The second was whether trades booked before the suspension of trading at 08:15 should be reversed or adjusted (para 9).

60. Decisions about these matters needed to be made urgently. Until a margin call had been made and appropriate margin had been collected, LME Clear was exposed to the risk of default by Members and was potentially under-collateralised, and therefore in breach of its regulatory requirements. Traders needed to know where they stood with trades which had been entered into before the suspension of trading. Further, because market participants often trade across a number of metals on the LME, and only trading in nickel had been suspended, Members who were potentially at risk of default depending on what decisions were made might continue to trade in other metals, potentially increasing their overall risk positions. The longer a decision was deferred, the greater the risk would be that any defaults would have an impact beyond the nickel market. I agree, therefore, with the view of the Divisional Court:

> '132. The reality was that everyone in the market, as well as the LME and LME Clear themselves, needed clarity as to whether the 8 March 2022 trades were to stand and, if so, at what prices. Postponement would have meant uncertainty, which in itself would have risked destabilising the market.'

61. At 09:00 there was another remote meeting, held to discuss these matters, which was attended by Mr Chamberlain and at least 24 other executives from the LME and LME Clear, including Mr Farnham. The meeting lasted for 52 minutes. Several options were discussed:

(1) *Option 1A*: Allow the trades to stand and calculate margin requirements by reference to the pricing of those trades.

(2) *Option 1B*: Allow the trades to stand and calculate margin requirements by reference to the 7th March closing price.

(3) *Option 2*: Allow the trades to stand but adjust their prices.

(4) *Option 3*: Cancel the trades.

62. Any decision whether the trades should stand or be cancelled was for the LME to make, the decision maker being Mr Chamberlain as CEO. Any decision as to how margin requirements should be calculated was for LME Clear to make, the decision maker being Mr Farnham. However, these issues were so interlinked that it would be

impracticable to make a decision on one without a decision simultaneously being made on the other.

63. Options 1A and 1B were discussed together. Option 1A was considered unacceptable by everyone who spoke, because those trades reflected a disorderly market and so were not meaningful. Mr Chamberlain and Mr Farnham also had in mind, in light of the First Risk Default Spreadsheet, that Option 1A entailed the risk of multiple defaults by Members, a situation which had never previously occurred. Thus**,** Option 1A would not restore order to the market. On the contrary, it risked potentially catastrophic consequences. Mr Chamberlain described his thinking in his witness statement as follows:

> '205. … (a) If and when the Members defaulted on their margin payments, LME Clear would have to decide whether to put these Members formally into default in accordance with LME Clear's established default management process. … As Mr Farnham explains, this would normally involve LME Clear "stepping into the shoes" of the defaulting Member to close out the Member's positions. A Member going into default is an extremely rare event on the LME's market. Since 2010, I am only aware of there having been one Member ever to go into default, which was as long ago as 2011 and was (insofar as I understand the situation) due to the particular financial circumstances of the defaulting Member concerned and not associated with systemic risks arising from a disorderly market situation. The LME has therefore – at least in modern times and to the best of my knowledge – never had more than one Member go into default at the same time. The prospect of multiple simultaneous defaults was therefore a market event without any remotely comparable precedent on the LME's market.
>
> (b) LME Clear stepping into the shoes of even one defaulting Member to close out that Member's positions in the market can itself lead to market instability and upward pressure on prices. This risk is especially present in volatile market conditions and would have been significantly exacerbated if LME Clear had been forced to step into the shoes of multiple Members simultaneously. That would have been likely to be very difficult for LME Clear to resolve using its default management process and would be likely to make a bad situation much worse, by creating a self-perpetuating spiral of price increases (due to the fact that market participants would know that LME Clear would need to close out positions in respect of defaulting Members, thereby driving up the price of nickel in the market) and market participant defaults and creating further market disorder. …'

64. Mr Farnham's evidence was to the same effect:

> '121. … Put simply, if a default results in LME Clear taking over large short positions, it then has to purchase nickel contracts in order to close those positions out, and this, in turn will tend to

> drive up the price. The default of any one Clearing Member can therefore have ripple effects on others. In technical language, this is referred to as a "pro-cyclical feedback loop". In less technical language, the consequences of multiple simultaneous Clearing Member defaults could be described as a "death spiral", in which the actions LME Clear would be required to take to address the defaults would exacerbate the underlying causes, leading to further defaults and so on. …'

65. Of course, although this does not seem to have been part of their thinking at the time, until the market re-opened there would be no possibility of LME Clear closing out the trading positions of defaulting Members. Accordingly, if Members did default on margin calls, LME Clear would remain exposed and under-collateralised, contrary to the regulatory requirements described at [29] and [30] above. However, when the market did re-open, the consequences described by Mr Chamberlain and Mr Farnham would have to be faced.

66. In relation to Option 1B, Mr Farnham said that it would not be acceptable to LME Clear for the trades to stand but margin to be calculated by reference to the 7th March closing price. He was concerned that this would leave LME Clear under-collateralised. Others present expressed the view that it would be inconsistent to allow the trades to stand at their agreed prices while not using those prices for margin calculations on the basis that those prices were not meaningful. Mr Farnham also considered that Option 1B would still risk defaults by Members.

67. Option 2 was rejected because it would not be fair to adjust prices when the parties concerned might well not have traded at the adjusted prices. To allow the trades to stand but at adjusted prices would therefore impose on the parties to those trades a contract which they had not agreed. Elliott has not challenged this aspect of the LME's thinking or suggested that Option 2 ought to have been pursued further, perhaps because for the LME to have adjusted the prices of Elliott's trades would also have deprived it of some or all of the profits which it would have made. I need therefore say nothing further about Option 2.

68. This left the option of cancelling. There was some discussion as to which trades should be cancelled. No-one who spoke considered that it was possible to identify a point in time on 8th March when trading changed from being orderly to disorderly. Mr Chamberlain concluded that the last known good state had been the close of trading on 7th March. On this basis he decided that trades up to that point should stand, and all trades from midnight at the beginning of 8th March should be cancelled. He was aware that this meant that traders who had made profits by trading at the high prices prevailing up to the close of trading would be disadvantaged but considered that cancellation of these trades was necessary.

69. At 09:47 (i.e., shortly before the 09:00 meeting ended), Mr Kirkwood circulated a further spreadsheet (the 'Second Default Risk Spreadsheet'). This was similar to the First Default Risk Spreadsheet, but it was prepared on the basis that the 8th March trades would stand, with LME Clear calculating margin requirements on the basis of the 7th March closing price. It showed that the additional margin required would total US $570 million. Mr Farnham considered that even this, coming as it would after the very heavy margin calls already made, still involved a risk that Members would default.

70. At 12:05 on 8th March 2022, the LME published Notice 22/053, as follows:

"Subject: **NICKEL SUSPENSION –**

FURTHER INFORMATION: DELIVERY DEFERRAL AND TRADE CANCELLATION

Summary

1. The LME has been monitoring the impact on the LME market of the situation in Russia and the Ukraine, as well as the recent low-stock environment and high pricing volatility environment observed in various LME base metals and in particular Nickel. With immediate effect, and following the suspension of the LME Nickel market announced in Notice 22/052, the LME (acting where required through the Special Committee) has determined that it is appropriate in the circumstances to take the following actions in respect of physically settled Nickel Contracts: (i) cancel all trades executed on or after 00:00 UK time on 8 March 2022 in the inter-office market and on LMEselect until further notice (**Affected Contracts**); and (ii) defer delivery of all physically settled Nickel Contracts due for delivery on 9 March 2022 and any subsequent Prompt Date in relation to which delivery is not practicable (as determined by the LME and notified to the market) owing to a trading suspension in line with the process in this Notice.

Background

2. The current events are unprecedented. The LME is committed to working with market participants to ensure the continued orderly functioning of the market. The suspension of the Nickel market has created a number of issues for market participants which need to be addressed. This Notice is intended to address the most pressing of those issues. Further communications will be issued during the course of today, including regarding the process for reopening the market.

Cancellation of Affected Contracts

3. The LME hereby exercises its powers to cancel all Affected Contracts. Members with Affected Contracts will be contacted by the LME with instructions to cancel or reverse these Affected Contracts. LME Post-Trade Operations will create files containing all the details of the trades that Members will need to book to effect these cancellations / reversals. These files will be emailed to Members.

> 4. Any Member so instructed must cancel or reverse all relevant Affected Contracts as soon as practicable during the Business Day in which the instructions are issued.
>
> 5. In the event that a Member does not comply with these instructions, we reserve our right to cancel the relevant Affected Contracts in accordance with the Exchange's powers under the LME Rules.
>
> 6. All cancellations will be reflected by corresponding cancellations of the Contracts under the LMEC Rules, once the cancellations have been actioned by the Member. …'

The cause of the price spike

71. Although the cause of the price spike was not known at the time when these decisions were made, later investigation suggested that it was due to the fact that large short positions had been built up by a number of market participants. One of these, but not the only one, was a Chinese industrial user of nickel called Tsingshan, which had built up a short position on the over the counter market. Market rumours about this had been reported in the financial press in the days leading up to 8th March 2022 and were therefore known about in the market, although the details were not known. A price divergence between nickel and other metals began to develop from 4th March as traders began to cover their short positions, causing what is known as a short squeeze. I described this phenomenon in admittedly somewhat lurid terms in the course of the hearing, but in my view it captures the essence of the investigation's findings:

> 'Have I got this wrong? My understanding of the short squeeze is that the market gets a whiff of the fact that somebody is short and therefore needs to buy to cover their commitments because otherwise they're going to default and effectively are desperate to buy at almost any price to avoid that default, and people are therefore driving the price up, exploiting that vulnerability, and trading happens not because of any underlying market forces, supply and demand, not because of conventional hedging or anything like that, but because the vultures are circling round a wounded beast.'

The market re-opens

72. The nickel market remained closed until 08:00 on 16th March 2022, by which time a package of measures had been put in place to ensure support for Tsingshan from its banks and Mr Chamberlain judged that orderly trading could resume. During the period when the market remained closed, LME Clear continued to calculate margin in respect of nickel by reference to the closing price on 7th March. In practice, as the intra-day margin call calculated by reference to this price on 8th March was met without defaults, this meant that further calls were not needed during the period of closure of the market.

The five decisions

73. Now that I have set out the events which led to the decision to cancel the 8th March trades, it is convenient to identify the various decisions made by one or other of the defendants in the course of 8th March, in order to see the broad scope of Elliott's challenge:

(1) The first was a decision by the TOT at about 04:49 to suspend the price bands. Elliott does not suggest that this was unlawful but does say that it was a matter which Mr Chamberlain ought to have taken into account when deciding whether the market had become disorderly.

(2) The second was Mr Chamberlain's decision that the market had become disorderly, a view first formed at about 05:50. This decision is challenged on the basis that it was irrational to form this view without carrying out further investigation.

(3) The third decision, announced at 08:15, was to suspend trading. Elliott does not challenge this decision as such, save to the extent that it follows on from the irrational decision that the market had become disorderly.

(4) Fourth was the decision that if the trades concluded on 8th March were allowed to stand, margin would be called by reference to the prices of those trades. This decision, made by Mr Farnham of LME Clear, was in a sense contingent, because it was part of the discussion of what to do about margin and the 8th March trades and in the event those trades were cancelled. It is challenged by Elliott as irrational because Option 1B was the appropriate alternative course. However, Elliott does not suggest that the rejection of Option 1A, the option which, in Mr Farnham's words, would have led to the 'death spiral', was irrational.

(5) Finally came the decision to cancel the 8th March trades, announced at 12:05. Elliott challenges this decision as *ultra vires*, procedurally unfair, irrational and contrary to A1P1.

The judgment of the Divisional Court

74. The Divisional Court began by identifying what it described as contextual features of the case. These included the fact that Elliott and Jane Street had agreed to contract on terms which included the LME's power to cancel which, as well resourced, experienced and knowledgeable traders, they must have understood and accepted. They did not have to contract on terms which included the LME Rules but could have conducted their nickel trades elsewhere (for example on the over the counter market) or abstained from trading altogether. The Divisional Court described this choice to contract on the terms of the LME Rules as 'highly significant':

> '133. Finally, it seems to us highly significant that the reason why TR 22 arises at all in relation to these Claimants is that they had agreed to contract on terms including TR 22, along with the other LME Rules.'

75. Having identified this contextual feature among others, the Divisional Court dealt with the challenges to the LME's decision to cancel the trades. In brief outline, and so far as relevant to this appeal, it held as follows:

Ultra vires and proper purpose

(1) The power to cancel contained in TR 22 was not subject to, or constrained by, other terms of the LME or LME Clear Rules or by other provisions of the regulatory regime on which the claimants relied. (To the extent that such provisions are still relied on, I will deal with them further below). The LME had not acted for an improper purpose (i.e. to favour one cohort of market participants over another) but in the interest of the market as a whole. The submission that the LME had no power to cancel the trades or that, if it did, the power had been exercised for an improper purpose was therefore rejected.

Procedural unfairness

(2) The LME had not consulted those such as Elliott who would be adversely affected by the cancellation of the trades; nor had it consulted the market generally. However, the LME had 'a wide margin of discretion' in deciding whether, whom and how to consult, and it was significant that Elliott had consented to TR 22 and must be taken to have appreciated that its terms do not require prior consultation. Accordingly, in view of the urgent need to make a prompt decision, the absence of consultation did not render the decision to cancel procedurally unfair. In any event, consultation would have made no difference, so on this issue section 31(2A) of the Senior Courts Act 1981 would have applied.

The Tameside duty to investigate

(3) In order to determine that the market had become disorderly as a result of the price movements during the early hours of 8th March 2022, Mr Chamberlain did not need to know the causes of these price movements, the precise time at which the market had become disorderly, or the fact that the TOT had suspended the price bands at about 04:49 that morning. Accordingly, the decision to cancel the trades was not flawed by Mr Chamberlain's failure to investigate these matters.

Rationality

(4) Mr Chamberlain was entitled to conclude that the market had become disorderly, and therefore to suspend trading. It was then for LME Clear to decide what margin call to make in those circumstances. In view of LME Clear's obligation to ensure that it had sufficient resources, having regard to the risks to which it was exposed, it was rational for Mr Farnham to take the position that, if the trades concluded on 8th March before the suspension of trading were allowed to stand, margin would be called by reference to the prices of those trades, thus ruling out Option 1B. Once Option 1B was ruled out in this way, the decision to cancel the trades was rational.

A1P1

(5) The Elliott trades had not resulted in contracts of sale (i.e. 'Client Contracts' in the terminology of the LME Rules) and therefore did not amount to possessions within the meaning of A1P1. Further, although a 'legitimate expectation' of being able to acquire a property right may be capable in some circumstances of qualifying as a 'possession', that will only be so when the expectation in question has a basis in law sufficient to constitute some sort of proprietary interest. Elliott's Contingent

Agreements to Trade did not satisfy this test: their counterparties made no promise that Elliott would acquire a Client Contract, but only that they would take the steps incumbent on them to enable this to happen, a commitment which they duly performed. Accordingly, Elliott had no 'possession' within the meaning of A1P1.

(6) In this respect the position of Elliott was to be contrasted with that of Jane Street, where the Agreed Trades had matured into Client Contracts. However, in the case of Jane Street, the claim under A1P1 failed. That was either because there was no interference with Jane Street's rights, which were subject from the outset to the LME's power to cancel under TR 22.1; or because the exercise of the power to cancel was lawful in circumstances where all the public law challenges to its exercise had been rejected.

Ground 1 – the contractual context

Submissions

76. On behalf of Elliott, Ms Monica Carss-Frisk KC submitted that the Divisional Court erred in principle by attaching significance to the 'contractual context', in particular to the fact that Elliott had agreed to TR 22, and thus had agreed that the LME would have the power to cancel contracts which it had concluded. She submitted that the Divisional Court had thereby diluted the protection provided by the applicable public law principles. It was apparent that the Divisional Court had applied a less rigorous standard of review to the LME's decision-making (which Ms Carss-Frisk characterised as 'public law light') than it would otherwise have done. This had occurred at a number of points in its analysis, for example in relation to procedural fairness, the *Tameside* duty to investigate and rationality.

77. Rather, the LME and LME Clear were public authorities when acting in their capacity as regulators and their decision-making was subject to the usual principles of public law. There was no basis for diluting those principles merely because the power to cancel arose as a matter of contract, not least in circumstances where that position had been brought about specifically to implement a regulatory requirement derived from assimilated EU law (Article 48 of MiFID II) and domestic implementing legislation (paragraph 3B of Schedule 1 of the Recognition Requirements Regulations). The only inference that could legitimately be drawn was that, when agreeing to contract on terms which included TR 22, Elliott consented to the LME's exercise of the power to cancel in accordance with ordinary and undiluted principles of public law and consistently with its rights under the Human Rights Act.

78. Ms Carss-Frisk relied on the approach to review of the disciplinary decision of a domestic body exercising powers as a matter of contract which was explained by Mr Justice Richards in *Bradley v Jockey Club* [2004] EWHC 2164 (QB) and endorsed by the Court of Appeal [2005] EWCA Civ 1056 at [17]:

> '37. That brings me to the nature of the court's supervisory jurisdiction over such a decision. The most important point, as it seems to me, is that it is supervisory. The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review.

> Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision maker, and so forth.
>
> …
>
> 40. The supervisory role of the court should not involve any higher or more intensive standard of review when dealing with a non-contractual than a contractual claim …'

Decision

79. In general, I would accept that 'the contractual context' does not justify a dilution of the applicable public law principles when reviewing the lawfulness of the LME's decision to cancel the 8th March trades. It is true that Elliott agreed to contract on terms which incorporated the power to cancel contained in TR 22. But that does not mean that it agreed to the power being exercised otherwise than in accordance with the ordinary protections provided by public law.

80. Leaving aside for the moment the arguments under A1P1, Mr Jonathan Crow KC for the defendants did not suggest otherwise. His submission was that it is necessary to analyse each of the challenged decisions in order to see whether, or to what extent, the reasoning of the Divisional Court was actually affected by the 'contractual context' to which they referred, and that on analysis this context played a much less significant role in the Divisional Court's thinking than some paragraphs of the judgment appear to suggest. I accept that submission.

81. For example, the first critical decision made by the defendants was that the market had become disorderly on 8th March. But it formed no part of Mr Chamberlain's thinking in determining that the market had become disorderly that those trading on LME terms had agreed to the LME having the power to suspend trading and to cancel trades. To the extent that the Divisional Court relied on this factor in concluding that Mr Chamberlain was entitled to determine that the market had become disorderly, it is apparent that it formed a minor part of the Court's reasoning. Rather, the Divisional Court reached its conclusion essentially on the basis that there was no prescribed test of what amounted to disorderly trading; that it was rational to take account of the extreme price spike which could not be explained by macroeconomic or geopolitical factors, the relevance of those factors being broadly in line with the IOSCO and NASDAQ guidance; that the LME was a specialised and expert body; and that the situation was urgent. That reasoning can be seen in the following parts of the judgment:

> '121. Rather than falling back ourselves on the "elephant test", our approach is as follows. In circumstances where neither the legislation nor the LME Rules attempts a definition of "orderly"

or "orderliness", there may be a number of different definitions or tests that a reasonable RIE could adopt. These include, but may not be limited to, the IOSCO guidance and the NASDAQ definition.

122. It was consistent with the IOSCO guidance and the NASDAQ definition for Mr Chamberlain to make his assessment on the basis that he explained – i.e. in essence, whether there was a disconnect between the 3M nickel price and the value of physical nickel, which could not be explained by any relevant macroeconomic, geopolitical or other factors relevant to the market for the underlying commodity. The fact that Mr Chamberlain's understanding and approach was consistent with that of IOSCO and of NASDAQ must mean that it was reasonable and therefore, an approach that is legally permissible. It may be that some reasonable RIEs would prefer Mr Dodsworth's definition, but we do not have to decide this.'

…

'126. The LME and LME Clear have specialist knowledge, experience and expertise in relation to complex and technical economic issues, arising in a niche area of commercial activity, that are beyond the knowledge, experience and expertise of this Court. This being so, it behoves a court to be cautious when reviewing any decisions made by the LME and LME Clear on grounds such as rationality or any Tameside type failure to make proper inquiry, ask the correct question, or properly assess relevant considerations. The Court's approach to review must permit sensible latitude to decision-makers with specialist knowledge insofar as the decisions reviewed either rested on or were informed by such knowledge.'

…

'127. Once again, most of the authorities here relate to rational decision-making and the margin of discretion to be allowed. However, urgency is also relevant to the ultra vires arguments, because the evidence and submissions that we have received suggest to us that decisions about the suspension and cancellation of trades, and about margin calls, are of their nature likely to be made in urgent situations and under conditions of great pressure. This must be borne in mind when interpreting the legislation and the LME Rules.

…

132. The reality was that everyone in the market, as well as the LME and LME Clear themselves, needed clarity as to whether the 8 March 2022 trades were to stand and, if so, at what prices.

> Postponement would have meant uncertainty, which in itself would have risked destabilising the market.'

82. Subject only to Ms Carss-Frisk's submission that it was unlawful to conclude that the market had become disorderly without undertaking further investigation (the *Tameside* point, ground 5 below), this conclusion is unimpeachable. Indeed, if the extreme and unprecedented market movements experienced on 8th March leading to the risk of multiple defaults did not amount to a disorderly market, it is difficult to see what would: the events of 8th March represented what I have described as the paradigm case in which exercise of the LME's powers under TR 22 would need to be considered.

83. It is true that the Divisional Court goes on to say that the 'contractual context' is 'highly significant', but the only point then made to explain how this could be significant to the determination whether a market had become disorderly, referring to traders such as Elliott, is that:

> '137. They must be taken to have understood their rights and obligations, and the limits on those rights and obligations. They must also have understood properly the powers the LME Rules and LME Clear Rules granted to the LME and to LME Clear, and the limits on those powers. Furthermore, they must have formed the considered and informed view that the LME and LME Clear were suitable bodies to be trusted with those powers.'

84. If this is to be read as suggesting that the 'contractual context' justified a less rigorous approach to review of the LME's determination that the market had become disorderly than would result from the application of ordinary public law principles, I would respectfully disagree. But in any event, the point is at most a makeweight in the Divisional Court's reasoning and the Court's conclusion was not only justified by, but was almost inevitable as a result of, the considerations already identified.

85. Similar considerations apply to the decision by LME Clear that if the 8th March trades were allowed to stand, margin would have to be called by reference to the prices of those trades (i.e. the rejection of Option 1B). Once again, it was no part of Mr Farnham's thinking that traders had agreed to the incorporation of the LME Rules in their contracts. Rather, the decision was made because of Mr Farnham's concern that, if the 8th March trades stood, LME Clear would be exposed to counterparty risk in the event of defaults for which it would not have sufficient collateral in the form of margin, and that it would as a result be in breach of its regulatory requirements. I consider below the rationality challenge to that decision (ground 4), but it had nothing to do with the 'contractual context'.

86. Accordingly, I propose to consider the 'contractual context' issue by reference to the specific grounds of appeal rather than as a stand-alone point.

Ground 2 – *Ultra vires*

Submissions

87. Ms Carss-Frisk submitted that the power to suspend trading and the power to cancel trades which had been concluded were distinct. Trades could not be cancelled merely because trading had been suspended, even in the case of a significant price movement during a short period. In particular, and despite the wide terms of TR 22, the LME did not have the power to cancel Elliott's trades because that power was circumscribed by assimilated EU delegated legislation implementing Article 48 of MiFID II. I have already shown how the power to cancel in TR 22 is derived from Article 48(5) of MiFID II. Article 48(12) goes on to provide that:

> 'ESMA [the European Securities and Market Authority] shall develop draft regulatory technical standards further specifying: …
>
> (g) the requirements to ensure appropriate testing of algorithms so as to ensure that algorithmic trading systems including high-frequency algorithmic trading systems cannot create or contribute to disorderly trading conditions on the market. …'

88. One such Regulatory Technical Standard, contained in Commission Delegated Regulation (EU) 2017/584 of 14th July 2016, was known as 'RTS 7'. Article 18 of RTS 7 dealt with prevention of disorderly trading conditions. It required trading venues to be able to cancel or revoke transactions in case of malfunction of the trading venue's mechanisms/functions and also required them to have a published cancellation policy:

> '*Article 18*
>
> **Prevention of disorderly trading conditions (Article 48(4), (5) and (6) of Directive 2014/65/EU)**
>
> 1. Trading venues shall have at least the following arrangements in place to prevent disorderly trading and breaches of capacity limits:
>
> (a) limits per member of the number of orders sent per second,
>
> (b) mechanisms to manage volatility;
>
> (c) pre-trade controls.
>
> 2. For the purposes of paragraph 1, trading venues shall be able to: …
>
> (d) cancel or revoke transactions in case of malfunction of the trading venue's mechanisms to manage volatility or of the operational functions of the trading system; …
>
> 3. Trading venues shall set out policies and arrangements in respect of: …

> (f) cancellation policy in relation to orders and transactions including:
>
> (i) timing;
>
> (ii) procedures;
>
> (iii) reporting and transparency obligations;
>
> (iv) dispute resolution procedures;
>
> (v) measures to minimise erroneous trades; …
>
> 4. Trading venues shall make public their policies and arrangements set out in paragraphs 2 and 3. That obligation shall not apply with regard to the specific number of orders per second on pre-defined time intervals and the specific parameters of their mechanisms to manage volatility. …'

89. Ms Carss-Frisk submitted that RTS 7 sets out exhaustively the circumstances in which trades may be cancelled, i.e. only where it was necessary due to malfunction of the trading venue's mechanisms to manage volatility or of the operational functions of the trading system. As there was no such malfunction on the morning of 8th March 2022, the power to cancel did not arise.

90. She submitted further that the power to cancel could only be exercised in accordance with a published policy as required by Article 18(3)(f) and (4), and that as the cancellation of Elliott's trades had not been effected in accordance with any such policy, it was *ultra vires* for that reason also. On this point, she relied also on TR 13 of the LME Rules, which provides that:

> '13. **TRADE INVALIDATION AND CANCELLATION**
>
> 13.1 The Exchange may, in certain circumstances, invalidate transactions in accordance with the relevant procedures established by Notice.
>
> 13.2 Where an LME Select Participant has made an error in the execution of a transaction undertaken on LME Select, such LME Select Participant may request that the Exchange contact the counterparty(ies) to determine whether such counterparty(ies) would agree to the transaction being cancelled. In the event that the counterparty(ies) do not agree to the request, then the transaction will not be cancelled.
>
> 13.3 Notwithstanding Trading Regulation 13.2, the Exchange may in its absolute discretion review any transaction undertaken on LME Select and invalidate or adjust the price of any trade in accordance with any policy that the Exchange issues from time to time on erroneous trades.'

91. Here too, Ms Carss-Frisk submitted that the power to cancel (or invalidate) transactions in the absence of agreement must be exercised in accordance with a published policy.

92. As to the consequences of the absence of a published policy, Ms Carss-Frisk relied on the approach of the Divisional Court in *McGrath v Camden London Borough Council* [2020] EWHC 369 (Admin), [2020] Bus LR 643 at [52], submitting that the legislature's intention in this case was that the power to cancel could not be validly exercised unless the requisite published policy was in place, as the requirement for such a policy would otherwise become a dead letter. In *McGrath* Mr Justice Holgate said:

> '52. Where legislation requires a procedural step or action to be taken, it may not specify the legal consequences of a failure to comply with that requirement, for example, whether any other step or document must be treated as invalid or non-compliant with the legislation. In such circumstances the court must firstly construe the instrument in order to determine whether the legislature intended "total invalidity" to follow (*R v Soneji* [2006] 1 AC 340, paras 15, 23 and 78; *Bennion on Statutory Interpretation*, 7th ed (2017), section 7.3). If the answer to that question is "yes" then no further issue arises. But if the answer is "no", then the second question is whether the circumstances of the instant case indicate that invalidity should be the consequence. The answer to that question may be affected by whether there has been substantial compliance with the requirement, or whether any non-compliance has caused significant prejudice relevant to the purposes of the legislation (see e.g. *SM (Rwanda) v Secretary of State for the Home Department* [2019] Imm AR 714).'

Decision

93. The power to cancel contained in TR 22 is a regulatory requirement intended to protect the market in circumstances of exceptionally disorderly trading. It is notable that although TR 22 deals with the suspension of trading and the cancellation of trades in separate sentences, Article 48(5) of MiFID II from which TR 22 is derived deals with both matters in a single sentence:

> 'Member States shall require a regulated market to be able to temporarily halt or constrain trading if there is a significant price movement in a financial instrument on that market or a related market during a short period and, in exceptional cases, to be able to cancel, vary or correct any transaction.'

94. This is not to say that the power to cancel can be exercised whenever there is a significant price movement during a short period or whenever the power to suspend trading is exercised. The two issues, whether trading should be suspended and whether trades should be cancelled, must be considered separately. The defendants have never suggested otherwise. However, the term 'significant price movement … during a short period' is a flexible term which is capable of encompassing a variety of situations. It is a matter of judgment for the LME (in this case, Mr Chamberlain) as an expert body to determine whether any given movement in price is within the scope of TR 22 and, if

so, what action needs to be taken. In particular, the power to cancel only arises if the circumstances are exceptional. There is no further constraint within TR 22 itself, or in the legislation from which it is derived, beyond that the power to cancel arises in exceptional cases. In my judgment, in the light of the narrative which I have set out, the circumstances prevailing on the morning of 8th March 2022 were indeed exceptional but, on any view, it was rational for Mr Chamberlain to reach this conclusion.

95. It would be surprising if a power expressed to be available in exceptional circumstances, and necessary for the orderly functioning of the market, was tightly constrained by subordinate legislation such as RTS 7 with the effect that, even in a situation where the market was facing potential catastrophe, the LME as the regulator would be unable to take the necessary action to prevent that catastrophe unless it could bring itself within the terms of RTS 7. That is the effect of Ms Carss-Frisk's submission. If LME Clear was entitled to take the view that if the 8th March trades stood, margin would have to be called by reference to the pricing of those trades, a point which I consider under ground 4 (irrationality) below, so that Option 1B was effectively ruled out, to hold that the cancellation of those trades was *ultra vires* would effectively condemn the LME to the catastrophic situation represented by Option 1A.

96. Examination of RTS 7 makes clear that it does not limit the circumstances in which the power to cancel can be exercised. Rather, it is concerned only with one subset of trading on the LME, that is to say algorithmic trading on LMEselect. That is apparent from the recitals to and terms of RTS 7. For example, the heading to RTS 7 is 'General Organisational Requirements for Trading Venues Enabling or Allowing Algorithmic Trading', while the first recital makes clear that its intended scope is to deal with algorithmic trading:

> 'It is important to ensure that trading venues that enable algorithmic trading have sufficient systems and controls …'

97. This is further confirmed by Article 1:

> 'This Regulation lays down detailed rules for the organisational requirements of the systems of the trading venues allowing or enabling algorithmic trading …'

98. 'Algorithmic trading' is defined by Regulation 2 of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 as:

> 'trading in financial instruments where a computer algorithm automatically determines individual parameters of orders such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited or no human intervention, and does not include any system that is only used for the purpose of routing orders to one or more trading venues or for the processing of orders involving no determination of any trading parameters or for the confirmation of orders or the post-trade processing of executed transactions.'

99. LMEselect is the LME venue which allows algorithmic trading, but the Elliott trades with which we are concerned were not carried out algorithmically or on LMEselect.

100. It is therefore clear that RTS 7 does not purport to be an exhaustive statement of the circumstances in which trades may be cancelled pursuant to TR 22. The need to cancel may arise in circumstances much wider than malfunction of an electronic trading venue's operational functions.

101. It follows from this that the provisions of Article 18 of RTS 7 which deal with the need for a published policy are limited to a policy dealing with the cancellation of trades due to the kind of malfunctions covered by RTS 7. They are not concerned with any need to define the circumstances in which the power to cancel under TR 22 may be exercised.

102. Similarly, TR 13 is concerned with trades concluded as a result of error, whether as a result of a 'fat finger' or otherwise. Regulation 13.2 enables the parties to agree that a trade concluded in error should be cancelled, while Regulation 13.3 allows the LME to invalidate such a transaction, but only in accordance with a published policy on erroneous trades. But that is an entirely separate matter from suspending trading or cancelling trades pursuant to TR 22 in circumstances where the market has become disorderly as a result of extreme price volatility. The powers to cancel contained in TR 13.3 and TR 22 deal with different situations. TR 13.3 does not purport to define the circumstances in which the power under TR 22 can be exercised.

103. In my judgment there is no further requirement for a published policy setting out the circumstances in which the power to cancel under TR 22 can be exercised. That is not surprising. The Regulation itself refers to a significant price movement during a short period, which identifies the circumstances in which the exercise of the power will generally need to be considered, and in the nature of things it is difficult to define the circumstances which may properly be regarded as exceptional. It may even be undesirable to attempt to do so.

104. In any event, as *McGrath* makes clear, even when there is a requirement for a published policy as to the circumstances in which a public body will exercise its powers, it does not necessarily follow that the absence of such a policy will invalidate an exercise of the power. In my judgment the absence of a published policy in the present case would not invalidate the otherwise lawful exercise of a power to cancel trades in order to protect the market in conditions of extreme market stress.

105. For all these reasons I would reject the submission that the power to cancel Elliott's trades was exercised *ultra vires*.

Ground 3: procedural fairness

Submissions

106. Ms Carss-Frisk submitted that basic fairness required that before taking an unprecedented decision which would cost market participants very considerable sums of money, in Elliott's case running to hundreds of millions of dollars, those affected should be given an opportunity to make representations. She distinguished between a public body's duty in some circumstances to consult on a proposed decision affecting the public in general and the requirement of procedural fairness in the context of a

decision to extinguish the legally protected interests of a defined cohort, a distinction drawn by Lord Justice Singh in *R (Kebbell Developments Ltd) v Leeds City Council* [2018] EWCA Civ 450, [2018] 1 WLR 4625 (see below).

107. Ms Carss-Frisk relied on the summary by Lord Neuberger in *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 14, [2014] AC 700 urging close scrutiny of any argument that it would be impossible, impractical or pointless to allow a person adversely affected by a decision the opportunity of making representations before the decision was made.

108. Ms Carss-Frisk submitted also that the Divisional Court was wrong to state at [165] that the LME and LME Clear had 'a wide margin of discretion' in deciding whether, whom and how to consult: a decision was either procedurally fair or it was not; it was for the court to decide what procedural fairness required (*Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115 at [65]); and a decision maker has no power to make a procedurally unfair decision. She submitted also that the Divisional Court was wrong at [159] to treat as significant the fact that Elliott had agreed to the terms of TR 22.1, with knowledge that its terms do not require prior consultation: this was a further example of 'public law light'.

109. Rather, once the immediate problem was resolved by the decision to suspend trading, there was time for further investigation and an opportunity to make representations, which need not have taken long. As to this, her initial submission was that the consultation could have been completed without delaying the decision at all. All that was required was to issue a Notice inviting those who wished to make representations to a remote meeting. Subsequently Ms Carss-Frisk submitted that this process could have been completed during 8th March. Her final position was that, if necessary, a further day could have been allowed.

110. Moreover, it was unfair not to give Elliott and others in a similar position the opportunity to make representations when other traders, concerned about the possibility of further margin calls, had telephoned Mr Chamberlain to express their concerns which included, in at least one case, urging that the trades on 8th March should be cancelled.

111. Despite Mr Chamberlain's claim in his evidence that representations would have made no difference, the relevant test is whether they could have made a difference (*R (Timson) v Secretary of State for Work & Pensions* [2022] EWHC 2392 (Admin), [2023] PTSR 85 at [219]) and that test was met on the facts of this case.

Decision

112. As explained by Lord Justice Singh in *Kebbell Developments*, different considerations may apply to a duty to consult on a proposed decision affecting the public or a section of the public in general and the requirement to adopt a fair procedure before making a decision to extinguish the legally protected interests of a defined cohort:

> '62. In my respectful view, it is important to be careful to distinguish between different senses of the word "consultation" which can sometimes be found in the authorities on this subject. First, there may be cases in which there is no dispute about the existence of an obligation to consult which is imposed upon a

> public authority. Very often the source of that obligation will be legislation, so there will be a statutory duty of consultation. In such cases the context will usually be not an individual decision which affects a particular person or persons but rather the formulation of general policy or draft legislation.
>
> 63. The issue which may then arise is what the exact *content* of that duty of consultation requires. That was considered in the well known case of *R v Brent LBC, ex p. Gunning* (1985) 84 LGR 168, at 189, where Hodgson J cited with approval the following submissions of counsel, Mr Stephen Sedley QC (as he then was):
>
> > "Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

113. After pointing out that these requirements had been endorsed by the Supreme Court, Lord Justice Singh continued:

> '66. The word "consultation" may be used in a second sense, where, I would respectfully suggest, it may be preferable to speak of "procedural fairness." This is because what is under consideration is not consultation of the general public or a section of the public; but rather whether the duty to act fairly arises in relation to a particular person who is affected by a public authority's decision.
>
> 67. That is, as I understand it, the burden of what was said by Lord Reed JSC in the *Stirling* case, paras 34-38. The broad distinction between the two concepts was expressed as follows by Lord Reed, at para. 38:
>
> > "Such wide-ranging consultation, in respect of the exercise of a local authority's exercise of a general power in relation to finance, is far removed in context and scope from the situations in which the common law has recognised a duty of procedural fairness. The purpose of public consultation in that context is in my opinion not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. The purpose of this particular statutory duty to consult must, in my opinion, be to ensure public participation in the local authority's decision-making process."

> 68. In my view, that passage sets out an important distinction, between (i) procedural fairness in the treatment of persons whose legally protected interests may be adversely affected and (ii) public participation in a public authority's decision-making process. It seems to me that, although the word "consultation" is often and understandably used in the former context, it would be preferable to reserve it for use in the latter context, to the extent that the word is said to have legal significance.
>
> 69. Procedural fairness in the former context is really the modern term for what used to be called "natural justice", in particular the limb of it which used to be called *audi alteram partem* ("hear the other side"). Public law no longer talks of "judicial" or "quasi-judicial" disputes and so even the notion of a "hearing" seems inapt now but the fundamental requirement of procedural fairness is to give an opportunity to a person whose legally protected interests may be affected by a public authority's decision to make representations to that authority before (or at least usually before) the decision is taken. To refer to "consultation" in that context is not wrong as a matter of language but I think it would be better to avoid using it in that context, so as to avoid confusion with the sense in which it is used in the context of public participation in a public authority's processes for making policy or perhaps some form of legislation such as rules.'

114. In the present case we are concerned with this second context, where the decision to cancel the 8th March trades would adversely affect a specific cohort, namely traders such as Elliott who had entered into trades to sell nickel at the high prices prevailing during the early hours of 8th March.

115. I accept that it is for the court to determine in such circumstances whether a fair procedure was followed, as explained by Lord Reed in *Osborn v Parole Board*:

> '65. The first matter concerns the role of the court when considering whether a fair procedure was followed by a decision-making body such as the board. In the case of the appellant Osborn, Langstaff J refused the application for judicial review on the ground that "the reasons given for refusal [to hold an oral hearing] are not irrational, unlawful nor wholly unreasonable" (para 38). In the case of the appellant Reilly, the Court of Appeal in Northern Ireland stated at para 42: "Ultimately the question whether procedural fairness requires their deliberations to include an oral hearing must be a matter of judgment for the Parole Board." These dicta might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on *Wednesbury* grounds. That is not correct. The court must determine for itself whether a fair procedure was followed (*Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; 2006 SC (HL) 71; [2006] 1 WLR 781, para 6

> per Lord Hope of Craighead). Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required.'

116. This may be contrasted with the statement by the Divisional Court in the present case that:

> '165. … It was for the LME and LME Clear to decide whether, whom and how to consult, and they are entitled to a wide margin of discretion.'

117. In the light of *Osborn*, I respectfully disagree, but undoubtedly what fairness requires will vary significantly according to the context and the circumstances.

118. I accept also, as explained in Lord Neuberger's summary of the applicable principles in *Bank Mellat (No. 2)*, that any argument that it was impossible, impractical or pointless to afford those affected an opportunity to make representations before the decision was made should be very closely examined:

> '178. As Lord Sumption JSC says in paras 29-30, where the executive intends to exercise a statutory power to a person's substantial detriment, it is well established that, in the absence of special facts, the common law imposes a duty on the executive to give notice to that person of its intention, and to give that person an opportunity to be heard before the power is so exercised. While this has been described as a "rule of universal application … founded on the plainest principles of justice" (per Willes J in *Cooper v Wandsworth Board of Works* 14 CBNS 180, 190) it has more recently been expressed in somewhat more measured tones. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill said that "fairness" will
>
> > "very often require that a person who may be adversely affected by the decision will have an opportunity to make representations … either before the decision is taken … or after it is taken, with a view to procuring its modification …"
>
> 179. In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute.'

119. The context for considering this issue, as I have already explained at [60] above, is that an urgent decision was needed. If representations were to be made in any meaningful way, it would be necessary to decide what form they should take. The possibility proposed by Ms Carss-Frisk was an invitation to a remote meeting in which anyone affected could participate. But that would have taken some time to set up and, if everyone was to have their say, could itself have gone on for some time. Ultimately, I understood Ms Carss-Frisk to accept that it would have taken much of the day and, if any representations were to be meaningfully considered, might have meant that a decision could not be made until the following day. Moreover, it is at any rate questionable to what extent traders would have been willing to give details of their trading positions in what would effectively have been a public forum, let alone to discuss candidly such matters as the risk of defaults. Meanwhile, LME Clear would remain potentially under-collateralised and trading in other markets would continue with the risks attached to that. Although Ms Carss-Frisk submitted (for the first time in this court) that traders might choose to hold off from trading in other markets so as to alleviate the latter risks, there was no evidence whether this would be practicable (some might need to hedge physical transactions, or to cover long or short positions) and in any event it could not safely be assumed by the LME that no further trading would take place while those other markets remained open. It was not suggested that trading in other markets could or should have been suspended.

120. For these reasons I would accept Mr Crow's submission that an open meeting of this nature would indeed have been impractical.

121. Moreover, it is of some importance that the LME Notice announcing the suspension of trading expressly warned that the LME would be considering 'whether trades booked prior to 0815 today should be subject to reversal or adjustment and will again update the market as soon as possible'. Traders would have understood, therefore, that this question was being urgently considered. The Notice went on to state, in paragraph 10, that 'Members who have questions regarding this process should contact their Relationship Manager'. Although that paragraph was in terms limited to questions from Members, it did provide a route by which concerns could be expressed.

122. In these circumstances, the market was fairly warned that trades prior to the suspension of trading might be cancelled and traders who wished to make representations for or against that course did have some opportunity to do so during the four hours between the Notice of suspension of trading and the Notice cancelling the 8th March trades. Elliott has not identified anything which it might have said during that period which could have made any difference. Its only point during this litigation has been that Option 1B ought to have been adopted, but that option was decisively rejected for good reason (see below) and representations by Elliott could have made no difference.

123. For these reasons, having given the matter the close examination to which Lord Neuberger referred in *Bank Mellat (No. 2)*, I consider that there was no failure of procedural fairness.

Ground 4 – irrationality and improper purpose

Submissions

124. Ms Carss-Frisk submitted that it was irrational to have rejected Option 1B and, to the extent that this rejection was dictated by Mr Farnham making clear on behalf of LME Clear that if the 8th March trades were allowed to stand, margin would be calculated by reference to the pricing of those trades, that was itself an irrational and unlawful decision. She submitted that if the basis for concluding that the market had become disorderly was that the prices of trades on 8th March did not accurately reflect the current market price, LME Clear had the power under its Clearing Procedure A6.10, which it ought to have exercised when calculating Variation Margin, 'to amend any prices that it considers do not accurately reflect the current market price', and that the closing price on 7th March was a readily available alternative price against which to set margin; and that, contrary to Mr Chamberlain's evidence, there was no logical inconsistency in allowing the 8th March trades to stand despite having suspended further trading on the ground that the market had become disorderly. Further, it was irrational to consider that Option 1B would still have entailed the risk that members would default, when the additional margin call on this basis would have been only US $570 million and there was no supporting analysis to this effect.

125. As to improper purpose, Ms Carss-Frisk relied on the principle that a power must only be exercised for the purpose for which it was conferred *(Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997), submitting that it was unlawful for the power to cancel to be used for the purpose of protecting one cohort of the market (LME Members or the LME itself) from the risk of default or to prevent 'knock-on effects' in other metals markets or the wider global financial system at the expense of those who had concluded lawful trades.

Decision

126. The short answer to this ground of appeal is that LME Clear had an obligation under Articles 40 and 41 of UK EMIR to collect sufficient margin to cover its potential exposures and that it was for LME Clear, as an expert body, to make an estimate of the margin needed to cover those exposures. LME Clear did in fact estimate that, if the 8th March trades were allowed to stand, margin would need to be called based on the pricing of those trades in order to cover LME Clear's potential exposures. Unless that estimate was irrational, it was a lawful estimate and one which LME Clear had a regulatory obligation to implement.

127. Mr Farnham's evidence was that Option 1B (that is to say, allowing the 8th March trades to stand while calling margin based on the closing price on 7th March) represented a risk for LME Clear which would leave it under-collateralised. As he explained:

> '… Option 1B would not be consistent with the purpose of LME Clear as a CCP, which is to pool counterparty risk. … CCPs are required by regulation to ensure that they are fully collateralised against their exposures to their members. Standard CCP risk management practice (and the way in which LME Clear's systems operate as a consequence) is to margin against current traded prices because that is generally the best indication of the current market price. However, our conclusion was that there were significant concerns about the trades entered into on 8 March (i.e. the market on the 8 March was disorderly and the price of nickel did not accurately reflect the current market price)

> and the systemic risk of margining against those trades. Option 1B would have allowed those same trades at prices up to US $100,000 per metric tonne to stand, while at the same time not margining against them in the usual way, and instead margining against the Monday Closing Price of approximately US $48,000 per metric tonne. This difference between a trade price of US $100,000 per metric tonne and a settlement price of US $48,000 per metric tonne would have resulted in large losses for a number of Clearing Members at risk of default and more importantly US $100,000 did not accurately reflect the current market price. As CEO of LME Clear, I consider that it would be unacceptable from a risk-management and regulatory compliance perspective to take this approach to margining for the trades executed on 8 March.'

128. In my judgment this view, by the expert body responsible for estimating the margin required, was entirely rational. Indeed, it appears to me to have been correct. Option 1B would have left LME Clear potentially significantly under collateralised – i.e. taking the counterparty risk on trades which had been done at prices up to US $100,000 per tonne in circumstances where there was at least a real risk of defaults and where it would not have margin sufficient to cover defaults at that level.

129. That problem would not be solved by calling for margin at what Ms Carss-Frisk described as the 'correct' price, i.e. the 7th March closing price of US $48,078 per metric tonne. The point of margin is not to satisfy some abstract concept of what is the true market price, but to provide sufficient assurance that, in the event of a default, LME Clear would have the necessary funds. But if the 8th March trades were allowed to stand, LME Clear's liability in damages in the event of defaults might well be assessed by reference to prices of up to US $100,000 per metric tonne.

130. The fact that LME Clear was content to calculate margin requirements by reference to the 7th March closing price during the period of suspension when no trading was taking place is irrelevant. That calculation was made in circumstances where the 8th March trades had in fact been cancelled. It tells us nothing about whether a call for margin based on the 7th March closing price would have provided LME Clear with sufficient collateral in the event that the 8th March trades had been allowed to stand.

131. Clearing Procedure A6.10, which allows LME Clear 'to amend any prices that it considers do not accurately reflect the current market price' when calculating Variation Margin, does not assist. It assumes that there is a 'current market price' which can be used in the calculation, but the position in the early hours of 8th March was that the market was disorderly and there was no current market price available to be used for the purpose of any calculation. It was not LME Clear's function to invent a notional or arbitrary market price and in any case, if it had sought to do so, the risk of under-collateralisation remained.

132. I would therefore reject the argument based on irrationality. Similarly, I would reject the argument that the power to cancel was exercised for an improper purpose. There was no question of favouring one cohort of the market. The decision was plainly taken in the interest of the market as a whole, in order to preserve its proper functioning in a situation of crisis. Indeed, once the rational decision had been made to reject Option

1B, cancellation of the 8th March trades was almost inevitable if the 'death spiral' was to be avoided.

Ground 5 – failure to investigate

Submissions

133. Ms Carss-Frisk submitted that Mr Chamberlain was in breach of the *Tameside* duty to take reasonable steps to acquaint himself with the relevant information in order to enable him to make the relevant decision (*Secretary of State for Education & Science v Tameside Metropolitan Borough Council* [1977] AC 1014, at 1065, per Lord Diplock). He failed to investigate the cause(s) of the price movements on 8th March, failed to appreciate that the TOT had suspended the price bands for nickel at around 04:49 after which the price rose particularly steeply, and failed to determine the point in time at which the market became disorderly; these failures invalidated the decision to cancel the 8th March trades. Ms Carss-Frisk submitted that it was not possible to determine that the market had become disorderly without investigating these matters because, for example, investigation might show that there was a rational cause capable of explaining the price rises that morning; and that if these investigations had been carried out, revealing that the cause of the price spike was a short squeeze, the only sustainable conclusion would have been that the market had not become disorderly, not least as the TOT's own removal of the price bands had caused or materially contributed to the most dramatic increase in prices.

134. Again, Ms Carss-Frisk criticised the statement by the Divisional Court at [177] that the fact of Elliott's consent to the LME's role as decision-maker for the purpose of TR 22.1 was relevant to the margin properly to be allowed for the discretion of the decision-maker in deciding what investigations needed to be conducted.

135. Finally on this ground, Ms Carss-Frisk relied on the LME's 'Kill Switch Procedure'. This was a procedure applicable to LMEselect, the LME's electronic trading system, which enabled the TOT to halt trading by operating a 'Kill Switch' if that was necessary to maintain an orderly market. The procedure envisaged that this could happen 'in the event of circumstances such as, but not limited to' a technical issue in which market participants were unable to access the market or a major trading event or economic factor, or to mitigate systemic risks posed by an LMEselect participant. It set out the procedure for a decision to apply the Kill Switch to be approved. Ms Carss-Frisk submitted that the TOT was the body responsible for determining whether the market had become disorderly, and that as it had not made such a determination, it was irrational for Mr Chamberlain to do so.

Decision

136. The Divisional Court directed itself, correctly, by reference to the principles set out in the decision of this court in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, approving the summary by Mr Justice Haddon-Cave in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662, [2015] 3 All ER 261:

> '70. The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd)*

> *v Secretary of State for Justice* [2015] 3 All ER 261, paras 99—100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge, it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it.'

137. The third and fourth principles, that the court should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision, and that the court should only strike down a decision not to make further enquiries if no reasonable authority could suppose that the enquiries it had made were sufficient, are particularly important in the present case. The information which Mr Chamberlain had consisted, in summary, of the extreme increase in the price of 3M nickel during the early hours of 8th March, together with the absence of any rational explanation for that movement by reference to macroeconomic or geopolitical factors. That information was sufficient to enable him to conclude that the market had become disorderly, or at any rate he was entitled to form that view and the Divisional Court was right to regard that as a rational approach.

138. Mr Chamberlain did not need to investigate further the cause of the price spike or the precise time at which the market had become disorderly in order to determine whether it had done so and, in a situation of considerable urgency, he did not have time to carry out such investigations. The market was in crisis and he needed to act. It is true that Mr Chamberlain did not know that the TOT had suspended the price bands but, even if he had known this, and even if he had formed the view that this had contributed to the speed with which prices had increased, this could not have sensibly affected his decision that the market had in fact become disorderly and action needed to be taken

urgently to deal with the situation. Similarly, if Mr Chamberlain had known more about the short squeeze which was later determined to have been the cause of the price spike, that would only have confirmed the disorderly nature of the market.

139. As I have mentioned, Ms Carss-Frisk criticised the words which I have underlined in the Divisional Court's judgment at [177]:

> '177. *Sixth*, the margin properly to be allowed for the discretion of the decision-maker must, once again, reflect the specialist, technical context, and the fact of the Claimants' express, informed consent to the LME's role as decision-maker.'

140. While that criticism, considered in isolation, may have some force, it follows immediately after the Divisional Court's previous point that:

> '176. *Fifth*, for the reasons already given in Section G, as well as in the light of the point noted in the last paragraph, we accept that it was legitimate for Mr Chamberlain to assess orderliness as he did – by considering whether there was a disconnect between the 3M nickel price and the value of physical nickel, which could not be explained by any relevant macroeconomic, geopolitical or other factor relevant to the market for the underlying commodity.'

141. However, once the Divisional Court had concluded, correctly in my judgment, that it was legitimate for Mr Chamberlain to assess orderliness as he did, the 'contractual context' point made in the second part of [177] adds nothing of substance.

142. None of this is affected by the Kill Switch Procedure, which only applied to one of the LME's trading venues and did not affect Mr Chamberlain's responsibility as the CEO to make an assessment of the orderliness of the market in the light of his understanding and experience of the market behaviour which he observed. There is nothing in the procedure to suggest that such an assessment was exclusively within the province of the TOT. On the contrary, it provided a process by which concerns arising at a more junior level could be escalated to senior management for a decision.

Ground 6 – A1P1/Possessions

143. A1P1 provides that:

> '*Protection of property*
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

Submissions

144. The first issue arising in relation to A1P1 is whether the Contingent Agreements to Trade which Elliott had concluded amounted to possessions for the purposes of A1P1. As already noted, the Divisional Court held that they did not.

145. Ms Carss-Frisk submitted that as a matter of commercial and legal reality, sales between a willing buyer and a willing seller (Elliott) had been agreed in every respect, with the relevant parties committed to the transactions. Contingent Agreements to Trade were binding contracts, breach of which gave rise to a right to claim damages enforceable by arbitration (see TR 2.10), with only the formalities under the LME system remaining to be completed. But for the cancellation under TR 22, Elliott would have obtained Client Contracts; and if Elliott's Clearing Member had refused to submit the Contingent Agreements to Trade for clearing, the damages recoverable by Elliott would have included its loss of profits. The Contingent Agreements to Trade were therefore valuable assets which amounted to possessions for the purposes of A1P1 (see *Depalle v France* (2012) 54 EHRR 17 at [63]). Alternatively, Elliott had a legal right to have the Contingent Agreements to Trade submitted for clearing and for the clearing process to be allowed to proceed in the ordinary way, and therefore had a legitimate expectation that it would obtain Client Contracts (see *Ceni v Italy* (App No. 25376/06 of 4th February 2021) and *Béla Németh v Hungary* (App No. 73303/14 of 17th December 2020)). In substance, Elliott was in the same position as Jane Street, which had traded electronically on LMEselect, and had therefore obtained Client Contracts more quickly. Economically, its position was exactly the same.

146. Mr Crow submitted that the Contingent Agreements to Trade did not qualify as possessions for the purposes of A1P1. Elliott had no right to receive the agreed price, but only to have the agreements submitted for clearing, which had duly happened. Accordingly, it had no existing asset. The fact that the parties were committed to the trades was irrelevant, as these were mere preparatory arrangements which, however far advanced, were not possessions (*Breyer Group Plc v Department of Energy & Climate Change* [2014] EWHC 2257 (QB), [2015] 2 All ER 44 at [60], upheld on appeal [2015] EWCA Civ 408, [2015] 1 WLR 4559 at [49]). Further, it could have no legitimate expectation: an expectation cannot amount to a possession in the absence of some other *existing* asset to which the legitimate expectation relates. *Depalle* and *Ceni* were both cases where the relevant asset was already in existence. But here there was no existing asset to which the expectation could relate, only an expectation that a new asset (i.e. the prospective Client Contracts) would come into existence once the clearing and matching process was completed.

Decision

147. As the Strasbourg Court has often made clear, the concept of 'possessions' in A1P1 has an autonomous meaning. It is not limited to the ownership of material goods and is independent from the way in which possessions are classified in domestic law. It includes also a concept of 'legitimate expectation', although that concept does not entirely correspond with the concept of 'legitimate expectation' in domestic English public law. See for example, the summary given by the Strasbourg Court in *Depalle v France*, repeating to some extent what had previously been said in *Broniowski v Poland* (2005) 40 EHRR 21 at [129]:

> '62. The Court reiterates that the concept of "possessions" referred to in the first part of art. 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by art. 1 of Protocol No. 1.
>
> 63. The concept of "possessions" is not limited to "existing possessions" but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and legitimate expectation of obtaining effective enjoyment of a property right. A legitimate expectation of being able to continue having peaceful enjoyment of a possession must have a "sufficient basis" in national law.'

148. It is well established that contractual rights are capable of constituting possessions for the purposes of A1P1, although not all contractual rights will do so. As held in *M (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 1015 at [49], 'a claim justiciable in domestic law can amount to a possession for the purposes of A1P1 only if it is sufficiently established to be enforceable'. In that case contractual rights which were intangible, not assignable or transmissible, not realisable and with no present economic value were described as having 'none of the indicia of possessions' and could not realistically be described as an asset.

149. On the other hand, the sense in which such rights have to be 'enforceable' was considered in *Breyer v DECC*. Producers of solar power were disadvantaged by a decision that they would only qualify for tariff payments if their eligible installations had been completed by 12th December 2011. Previously the applicable date had been 31st March 2012, which afforded them more time to complete the installations in question. They contended that this decision deprived them of possessions in the form of concluded or imminent contracts, the marketable goodwill of their businesses, and their legitimate expectation of an entitlement to payments under the statutory scheme. Mr Justice Coulson held that contracts which the claimants had actually concluded qualified as possessions for the purpose of A1P1, even if the counterparty had a right to withdraw from them. In that sense, therefore, the contracts were not enforceable. On the other hand, contracts which the claimants expected to conclude, even if they were at an advanced stage of negotiation, did not qualify as possessions. They were nothing more than a hope or aspiration, which could not be regarded as an asset. The future income which would have been earned from such contracts had not yet been earned and the claimants had no effective legal claim which could be made in respect of it. Therefore, it was not a possession. That conclusion could not be avoided by arguing that the claimants had a legitimate expectation of earning future income.

150. Mr Justice Coulson's decision was upheld by this court. However, the case largely turned on the elusive distinction in the Strasbourg authorities between goodwill, which may count as a possession for the purposes of A1P1, and the present day value of a future income stream, which does not. As Lord Dyson MR explained:

> '49. As I have said, the distinction between goodwill and loss of future income is not always easy to apply. But in my view, the judge was right to see a clear line separating (i) possible future contracts and (ii) existing enforceable contracts. Contracts which have been secured may be said to be part of the goodwill of the business because they are the product of its past work. Contracts which a business hopes to secure in the future are no more than that. For this reason, I would uphold the judge's classification.'

151. In the present case no issue arises as to a loss of goodwill and the principle that a hoped-for future income stream does not qualify as a possession for the purposes of A1P1 does not arise.

152. The circumstances in which a legitimate expectation may qualify as a possession were considered in two Strasbourg admissibility decisions cited to us. In *Béla Németh v Hungary*, the claimant submitted a successful bid to purchase a property at a public auction. Under Hungarian law this did not transfer title to him but gave him what was described as 'an asset in expectancy'. The question arose whether this qualified as a possession. After reiterating the principles in *Depalle v France* which I have set out above, the Court said that:

> '24. Although Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not create a right to acquire property (see *Strummer v Austria* [GC], no. 37452/02, § 82, ECHR 2011), in certain circumstances a "legitimate expectation" of obtaining an asset may also enjoy the protection of Article 1 of Protocol No 1 (see, among many authorities, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, ECHR 2007-I). Thus, where a property interest is in the nature of a claim, the person in whom it is vested may be regarded as having a "legitimate expectation" if there is a sufficient basis for that interest in national law – for example, where there is settled case-law of the domestic courts confirming its existence. However, no "legitimate expectation" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law, and the applicant's submissions are subsequently rejected by the national courts (see *Kopecky v. Slovakia* [GC], no. 4491/98, § 50, ECHR 2004-IX).
>
> 25. A "legitimate expectation" must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act, such as a judicial decision. The hope that a long-extinguished property right may be revived cannot be regarded as a "possession"; nor can a conditional claim that has lapsed as a result of a failure to fulfil the condition (see *Gratzinger and Gratzingerova v. the Czech Repblic* (dec) [GC], no. 39794/98, §§ 69 and 73, ECHR 2002-VII).
>
> 26. In cases concerning Article 1 of Protocol No. I the issue that needs to be examined is normally whether the circumstances of the case, considered as a whole, conferred on the applicant title

> to a substantive interest protected by that provision (see the above-cited cases of *Iatridis,* § 54, and *Beyeler,* § 100.)'

153. Applying these principles, the Court said that the claimant had a legitimate expectation that the procedure for transferring and registering title would be carried out. That was sufficient to constitute a possession:

> '29. In the Court's view, these elements demonstrate that the applicant had at least a legitimate expectation of acquiring legal ownership (that is to say recognised under Hungarian law) of the residential property – even if that was barred for a period by subsequent legislation – from the moment that he won the auction. This legitimate expectation therefore constitutes a "possession" for the purposes of Article 1 of Protocol No. 1 (see, *mutatis mutandis, Pine Valley Developments Ltd and Others v. Ireland,* 29 November 1991, § 51, Series A no. 222; *Asito v. Moldova* no. 40663/98, § 61, 8 November 2005. …'

154. In *Ceni v Italy* the claimant signed a preliminary contract to purchase an apartment which, under Italian law, did not transfer ownership, but merely obliged the parties to sign the final contract. At the time of the preliminary contract, the apartment did not exist as it had not yet been built. The claimant paid the price and moved in. However, the seller refused to sign the final contract transferring ownership. When the seller became bankrupt, the liquidator terminated the preliminary contract. Once again, the Court summarised the principles from *Depalle v France*:

> '38. The Court points out that the concept of "property" referred to in the first part of Article 1 of Protocol No 1 to the Convention has an autonomous scope which is not limited to the ownership of tangible property and which is independent of formal qualifications in domestic law: certain other rights and interests constituting assets may also be regarded as "property" for the purposes of that provision. In each case, it is important to examine whether the circumstances, considered as a whole, made the claimant holder of a substantial interest protected by this article … Article 1 of Protocol No 1 of the Convention does not guarantee a right to acquire property …; however, the fact that a property right is revocable under certain conditions does not prevent it from being considered a property within the meaning of this provision at least until its revocation …'

155. Turning to the concept of legitimate expectation, the Court continued (omitting citations):

> '39. The Court also points out that the notion of "properties" may cover both "actual assets" and asset values, including receivables, under which the claimant may claim to have at least a "legitimate expectation" of obtaining the effective enjoyment of a property right … The legitimate expectation of being able to continue to enjoy the property must be based on a "sufficient basis in domestic law", for example when it is confirmed by

> well-established case law of the courts or when it is based on a legislative provision or a legal act concerning the property in question … Once this is acquired, the notion of "legitimate expectation" may come into play …'

156. The Court noted that the claimant never had ownership of the apartment because the preliminary sales contract did not confer ownership but provided 'for a mere commitment to the conclusion of another contract' which would confer ownership in the future. It held that, because under Italian law the claimant could obtain a judgment ordering the seller to transfer ownership once she had paid the price, she 'had the legitimate expectation of becoming the owner of the apartment or, failing that, to obtain the restitution of the sums paid by [her]':

> '44. In conclusion, the Court argues that, in the special circumstances of this case, the claimant's legitimate expectation, linked to property interests such as full payment of the sale price and taking of possession of the apartment, was significant enough to constitute a substantial interest, and therefore "property" within the meaning of Article 1 of Protocol No. 1 to the Convention, which is therefore applicable in this case …'

157. It appears from these citations that the critical questions when considering whether a legitimate expectation qualifies as a possession for the purposes of A1P1 are whether the expectation has a sufficient basis in domestic law and an identifiable (even if not necessarily measurable) economic value. It is true that in *Béla Németh v Hungary* the property which the claimant expected to acquire did already exist, but that does not appear to have been critical. What mattered was that the claimant had a legal right to acquire the property which was more than a mere hope. In *Ceni v Italy*, however, the apartment in question did not even exist at the time when the claimant acquired the right to have title transferred to her, although it did exist and she had moved in by the time she came to enforce her rights under A1P1. But this does not appear to have been an essential element of the Court's reasoning. What mattered was that she had an enforceable right to obtain title to the apartment.

158. In the present case, because the clearing and matching process had not been completed at the time when the power to cancel was exercised, Elliott did not have Client Contracts but only (in the terminology of the LME Rules) Agreed Trades or Contingent Agreements to Trade. These were not contracts of sale pursuant to which Elliott had the right to receive the agreed price. As I have explained, they were legally binding contracts, enforceable by arbitration, for which damages would be recoverable in the event of breach, but the only obligation which could be enforced was the Clearing Member's obligation to submit the contracts to LME Clear for clearing and matching. That obligation had been performed and there was nothing left to enforce.

159. Accordingly, Elliott did not have an existing contractual right to be paid the price at which it had agreed to sell the nickel. Its ability to obtain the price depended on LME Clear completing the clearing and matching process. However, this was a routine administrative process which (so long as the Contingent Agreements to Trade subsisted) LME Clear could not have refused to undertake. It had no discretion in the matter. If it had refused, it would have been in breach of its obligations as a CCP, which Elliott could have enforced (or could have required the Clearing Member to enforce).

From a practical and legal viewpoint, therefore, all parties were committed to the trades. There was nothing left to be agreed and none of the parties concerned (including LME Clear) had a right to withdraw from or to refuse to proceed with the transactions.

160. In these circumstances I consider that Elliott's rights (subject always to the possibility of lawful cancellation under TR 22) had a clear economic value, and that for practical and economic purposes Elliott was in the same position as Jane Street. If it had not been for the cancellation of the trades, Elliott would undoubtedly have obtained Client Contracts and, if for some reason LME Clear had refused to undertake the clearing and matching process, it would have had a legal remedy. It therefore had (subject to what I shall say in relation to ground 7 below) a legitimate expectation that it would obtain such contracts. I would therefore hold, if necessary, that Elliott did have possessions for the purposes of A1P1. That would give effect to the general principle, applied in the context of A1P1 in *Broniowski v Poland* at [151], that the Convention is intended to operate in a 'practical and effective' way. However, because of what I shall say in relation to ground 7, it is nevertheless clear that the claim under A1P1 must fail.

Ground 7 – A1P1/Interference and justification

161. Finally, the questions arise whether the cancellation of Elliott's trades was an interference with its possessions and, if so, whether that interference was justified. Because the Divisional Court held that Elliott's rights did not constitute possessions for the purpose of A1P1, it did not need to address these questions in Elliott's case, but it did address them when dealing with the case of Jane Street (where the clearing and matching process had been completed so that Jane Street did have concluded Client Contracts, and therefore possessions for the purpose of A1P1) and indicated that the same reasoning would have applied to Elliott if its A1P1 claim had not failed at an earlier stage.

162. Here as elsewhere the Divisional Court considered that the 'contractual context' was significant. It reasoned that, because of this, either there was no interference**,** or any interference was justified in the public interest and proportionate:

> '246. Here, the power to cancel trades not only has its origin in MiFID II (which directly reflects the public policy concerns associated with the maintenance of orderly trading), but, ultimately, is effective as against these Claimants because they have agreed to be bound by the LME Rules and LME Clear Rules, as a condition of trading on the LME. TR 22.1 therefore only applies to Jane Street with its informed and willing consent. This has a significance that seems to us to transcend the distinction suggested by Lord Hope in *Wilson v First Country Trust Ltd (No. 2)*. It might be said that Jane Street's rights cannot be said to have been interfered with, because they were subject from the outset to the LME having the power to cancel under TR 22.1. It could also be said that Jane Street's informed and willing consent means that it does not lie in Jane Street's mouth to object on the basis that TR 22.1 was not justified by the general or public interest, or that it was not sufficiently precise, or that its effect was disproportionate in the sense of *Bank Mellat*.

> 247. This consent to TR 22.1 was subject to the implicit limitation that the LME would exercise its powers lawfully, rather than unlawfully and irrationally. If, therefore, we had been in Jane Street's favour on the judicial review of the Cancellation Decision and/or the 8 March Margin Decision, Jane Street would no doubt have had a claim under A1P1. We understood this to be accepted by Mr Crow KC. However, in circumstances where we have dismissed the Claimants' case that those decisions were unlawful, we do not see how a claim for damages under A1P1 can run. We emphasise that this is because of the unusual features of this case, in particular the contractual context, arising as it does in a commercial field in which these Claimants are well-resourced and knowledgeable, and where the Defendants are specialist decision-makers whose exchange the Claimants chose to use.'

Submissions

163. Ms Carss-Frisk submitted that the cancellation was clearly an interference. It resulted in the extinguishment of rights with a value of hundreds of millions of dollars and was therefore required to be justified by reference to considerations of proportionality. The Divisional Court had been wrong to invoke the 'contractual context'.

164. Ms Carss-Frisk submitted that the decision to cancel was not in accordance with law, even assuming that the judicial review challenge failed. A1P1 requires that, to be lawful, an interference must be foreseeable and not arbitrary (*R (Justice for Health Ltd) v Secretary of State for Health* [2016] EWHC 2338 (Admin) at [141]): without a published policy as to the circumstances in which trades could be cancelled the requirement of foreseeability could not be satisfied.

165. Further, the decision to cancel could not be justified. It was no part of the LME's role to protect Members from the risk of defaults or to protect one cohort of market participants at the expense of another. Even if this was the LME's objective, it was not appropriate to serve that aim by cancelling trades freely and lawfully entered into. The decision to cancel the trades did not strike the requisite fair balance between Elliott's rights and the interests of the general community, which had already been protected by the suspension of trading. If further action was required, Option 1B was readily available as a less intrusive alternative.

Decision

166. On this issue, I agree with the Divisional Court that the fact that the power to cancel was contained in the LME Rules was significant, not necessarily because those Rules took effect as contractual terms, but because whatever contractual rights Elliott obtained were always qualified by the risk that the power to cancel would be lawfully exercised. Thus even if Elliott, like Jane Street, had reached the stage of having concluded a Client Contract, its contractual rights (and in particular its right to receive the agreed price) were never unconditional, but were subject to the lawful exercise of the LME's power to cancel trades in exceptional circumstances pursuant to TR 22. As was common ground, the position would be different if the exercise of the power to cancel was unlawful on any of the domestic law grounds which I have so far considered.

As it is, however, the fact that the LME exercised the power to cancel in the very circumstances for which that power was conferred would not have amounted to an interference with Elliott's rights. It would only mean that those rights proved to be less valuable than Elliott had hoped.

167. In this respect the position is similar to that in *Sims v Dacorum Borough Council* [2014] UKSC 63, [2015] AC 1336. The claimant and his wife were joint periodic secured tenants of a house owned by the defendant local authority. Their tenancy agreement provided that if either of them wished to terminate their interest in the tenancy, they had to terminate the full tenancy. The council would then decide whether the other joint tenant could remain in the property or would be offered accommodation elsewhere. When the claimant's marriage broke down, his wife gave notice to quit. The claimant contended that his subsequent eviction was an infringement of his possessions under A1P1. The Supreme Court held that he had been deprived of his property in circumstances and in a way which was specifically provided for in the tenancy agreement, so that the loss of the property was the result of a bargain which he himself had made:

> '15. The property which Mr Sims owned and of which he complains to have been wrongly deprived, whether one characterises it as the tenancy or an interest in the tenancy, was acquired by him on terms that (i) it would be lost if a notice to quit was served by Mrs Sims (clause 100), and (ii) if that occurred, Dacorum could decide to permit him to stay in the house or find other accommodation for him (clause 101). The property was lost as a result of Mrs Sims serving a notice to quit, and Dacorum did consider whether to let Mr Sims remain, as he requested, and decided not to let him do so. Given that Mr Sims was deprived of his property in circumstances, and in a way, which was specifically provided for in the agreement which created it, his A1P1 claim is plainly very hard to sustain. The point was well put in the written case of Mr Chamberlain QC on behalf of the Secretary of State: "the loss of [Mr Sims's] property right is the result of a bargain that he himself made". I believe that that conclusion is reinforced by the admissibility decision in *Di Palma v United Kingdom* (1986) 10 EHRR 149, which concerned the implementation of a forfeiture proviso in a lease against a tenant in rather harsh circumstances.'

168. If that would have been the position if Elliott had concluded a Client Contract, it can be in no better position having only a Contingent Agreement to Trade. Indeed, to the extent that its rights under a Contingent Agreement to Trade qualify as a 'possession' for the purpose of A1P1 because Elliott had a legitimate expectation that it would obtain a Client Contract, that expectation was itself subject to the possibility of a lawful exercise of the power to cancel under TR 22. Put another way, Elliott's legitimate expectation could only have been that it would obtain a Client Contract once the clearing and matching process had been completed, and that it would then go on to receive the agreed price under the contract, *provided* that in the meanwhile the power to cancel under TR 22 was not lawfully exercised by the LME. Moreover, although no doubt Elliott did not give any thought to the possibility of such a cancellation at the time when it concluded

the trades in the early hours of 8th March 2022, if it had applied its mind to the terms of TR 22 it ought to have realised that the extraordinary market conditions then prevailing gave rise to a real risk that the power to cancel would be exercised. Any legitimate expectation, considered objectively, would therefore have to be heavily qualified.

169. For these reasons I agree with the Divisional Court that there was no interference with Jane Street's (and therefore with Elliott's) possessions for the purpose of A1P1.

170. If that is right, the question of justification does not arise. However, if that question does arise, I have no doubt that any interference was lawful, justified and proportionate.

171. As Ms Carss-Frisk pointed out, any interference with possessions must be according to law and, for Convention purposes, this means more than that the interference is lawful under domestic law. Issues of accessibility and foreseeability also arise. There can be no problem with accessibility in the present case. The power to cancel was contained in the LME Rules and would only ever affect sophisticated traders who had agreed to trade on those Rules and could be expected to be familiar with them and with their origin in the MiFID II legislation. I would not accept that the absence of a published policy as to the circumstances in which the power to cancel would be exercised means that those circumstances were unforeseeable. TR 22 itself, when read in the light of the MiFID II legislation from which it was derived, provides a sufficient indication of the circumstances in which the power would be exercised, namely in the event of an exceptionally significant price movement during a short period in a financial instrument traded on the LME market.

172. As to proportionality, the relevant test was explained by Lord Sumption in *Bank Mellat (No. 2)*:

> '20. The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these

> matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with.'

173. The requirements described by Lord Sumption are readily satisfied in the present case. The LME's objective was to prevent a cascade of defaults which could have had a catastrophic impact on the market and very possibly on the wider economy. There was no question of seeking to favour one cohort of traders over another. Rather the decision was taken in the interest of the market as a whole. That objective was undoubtedly sufficiently important to justify the limitation of Elliott's right to enjoy the ownership of its possessions – possessions, I would add, which were acquired in and as a result of conditions of exceptional market disorder. It was precisely for this reason that the legislation insisted that the LME should have the power to cancel trades, notwithstanding that in that event there would always be losers as well as winners. The cancellation of the trades was rationally connected to the LME's objective. Once Option 1B was ruled out, it was probably the only way of achieving that objective. The only less intrusive measure which Ms Carss-Frisk suggested could have been used was Option 1B, but that would have put LME Clear in breach of its own regulatory obligations and therefore was not a viable alternative. Overall, the cancellation struck a fair balance between the rights of Elliott, which (if it had thought about it) should have realised that it was concluding the trades in question in exceptional market conditions where there was a real risk that the power to cancel would be exercised, and the interests of the market as a whole as well as of those in the wider economy who might be affected by a market crash.

Summary and conclusion

174. Although the background is complex, it seems to me that this is ultimately a straightforward case. The LME was legally required to ensure that it had the power to cancel trades in the event of extreme price movement during a short period, which is precisely what occurred on the morning of 8th March 2022. That was a once in a generation event. To have allowed the 8th March trades to stand would have meant a real risk of what has been graphically described as a 'death spiral' in the international metals market. The defendants were entitled to conclude that the only alternative to

cancellation, namely allowing the trades to stand but collecting margin based on the previous day's closing price, would have put LME Clear in breach of its regulatory obligations and accordingly to rule out that alternative. That left the LME with effectively no choice.

175. For the reasons I have explained, the cancellation was lawful as a matter of domestic law. Once that conclusion is reached, there is in practice no real scope for a claim under A1P1. Even on the basis that Elliott's rights qualify as possessions for the purposes of A1P1, there was no interference with rights which were always qualified and, even if there was, any interference was clearly justified.

176. I would dismiss the appeal.

LORD JUSTICE SINGH:

177. I agree.

LORD JUSTICE UNDERHILL:

178. I also agree.